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COMMENTS

WAIVER OF BECK RIGHTS AND RESIGNATION RIGHTS: INFUSING THE UNION-MEMBER RELATIONSHIP WITH INDIVIDUALIZED COMMITMENT*

"[T]he struggle of man against power has been the struggle of memory against forgetting."1

Traditionally, the obligation to pay dues2 has been considered to arise from only two sources: union membership3 and union security agreements.4 Union membership requires the employee to contribute dues in

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1. First Place, John H. Fanning Labor Law Writing Competition, Columbus School of Law, the Catholic University of America, 1992.


3. Unions garner the bulk of their revenue from the payment of dues and assessments by the employees they represent. See Jennifer Friesen, The Costs of "Free Speech"—Restrictions on the Use of Union Dues to Fund New Organizing, 15 HASTINGS CONST. L.Q. 603, 603-04 (1988) (articulating the importance of dues to the continued vitality of the labor movement, particularly in the context of organizing nonunionized workers). Unions generally expend dues on core workplace activities such as contract negotiation, adjustment of employee grievances, staff salaries, and free publications concerning items of importance to represented employees. See id. at 603.

4. Id. A "union security agreement" is an agreement between the employer and the union that directs the employer to require all employees to engage in some specified degree of union support as a condition of employment. ROBERT GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 639 (1976). Union security agreements are authorized by Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 158(a)(3), 8(b)(2) (1988) [hereinafter Taft-Hartley Act, cited by section number]. 2 THE DEVELOPING LABOR LAW 1495 (Charles J. Morris et al. eds., 3d ed. 1992). Section 8(a)(3) of the Act declares that an employer commits an unfair labor practice:
accordance with the provisions of the union constitution or forfeit good

29 U.S.C. § 158(a)(3). Section 8(b)(2) determines that it is an unfair labor practice for a labor organization (union):

[T]o cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

Id. § 158(b)(2). In its 1947 amendments to the NLRA, Congress included Section 14(b), which entitles states to prohibit union security agreements. Id. § 164(b) ("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."). Section 14(b) is an express congressional exemption from the federal preemption generally accorded to the Taft-Hartley Act. See 2 The DEVELOPING LABOR LAW, supra, at 1528. As of 1990, 21 states have outlawed various forms of union security agreements by statute or constitution. Id. at 1528-29 & n.227 (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming). Popularly known as "right-to-work laws" (or dubbed "right-to-work-for-less" laws by union adherents), these measures entitle employees to work without the incumbent obligation of joining any union, including a union chosen as the employees' bargaining representative. Id. at 1529 & n.228.

Union security agreements between the employer and the union compel employees to obtain and maintain membership in a union as a condition of employment. When membership is imposed as a condition of employment, payment of fees and dues is the only aspect of membership that may be exacted from the employee.

6. The term "member in good standing" is defined by Section 402(o) of the Labor-Management Reporting and Disclosure Act (LMRDA):

"Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.


7. THE DEVELOPING LABOR LAW, supra note 4, at 1365. There are several forms of union security devices. "Union shop" clauses mandate that all present and new employees join the union within an explicit period of time and remain in good standing through the duration of the contract or suffer discharge by the employer. "Agency shop" provisions do not make employment expressly conditional upon membership. However, employees must contribute payments equal to the initiation fee and periodic dues paid by union members. FLORIAN BARTOSIC & ROGER C. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 420 (2d ed. 1986). "Maintenance of membership" agreements are a weaker form of union security in that nonmembers are never compelled to join the union. Pursuant to such provisions, all employees who are union members when the contract is executed or at a specified later time, and all employees who subsequently become members, are required to retain membership as a condition of employment. However, the sole requirement of membership is payment of dues. 2 THE DEVELOPING LABOR LAW, supra note 4, at 1390. The overwhelming majority of collective bargaining agreements in the private sector contain some form of union security provision. See BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 1425-21, MAJOR COLLECTIVE BARGAINING AGREEMENTS: UNION SECURITY AND DUES CHECKOFF PROVISIONS 1, 5 (1982) (reporting in the Department’s most recent study that 83 percent of 1327 major private industry collective bargaining agreements include union security provisions, affecting 5.5 million workers); see also Dennis C. Shea, Unions, Union Membership, and Union Security, 11 SETON HALL LEGIS. J., 1, 6-15 & n.19 (1987) (assessing the types and frequency of union security provisions in collective bargaining agreements).

8. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). In General Motors the Court did not expressly declare that unions may not require full membership. Rather, the Court construed Section 8(a)(3) as permitting weaker forms of union security than the union shop:

Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but 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.

Id. (emphasis added). Since the legality of union compulsion of active membership has never been squarely presented, the Supreme Court's reticence on the subject is understandable. BARTOSIC & HARTLEY, supra note 7, at 424. Nevertheless, the Board has consistently leaned towards permitting only exaction of minimal periodic dues and initiation
The National Labor Relations Board’s (NLRB or Board) decision in *Lockheed Space Operations Co.* and subsequent Board opinions indicate that, under certain circumstances, dues checkoff can function as a third, independent source of dues obligation. Pursuant to a dues checkoff.

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11. Dues checkoff authorization is a convenient method for employees to fulfill the financial obligations imposed on them pursuant to a union security agreement. Checkoff further relieves unions of the expensive and burdensome administrative task of individually collecting membership dues. *BARTOSIC & HARTLEY, supra* note 7, at 449. Most major collective bargaining agreements contain checkoff provisions. See Dep’t of Labor, Bull. No. 1425-21, *supra* note 7, at 23 (reporting that 86 percent of 1327 major collective bargaining agreements include checkoff clauses, covering 5.2 million workers).

The Taft-Hartley Act criminalizes unauthorized employer contributions to unions while legalizing dues checkoff agreements. 29 U.S.C. § 186 (1988). Section 302(a) of the Taft-Hartley Act broadly prohibits payments by an employer to his employees’ bargaining representative, subject to exceptions enumerated in Section 302(c). *Id.* § 186(a). Section 302(c)(4) of the Taft-Hartley Act excludes dues checkoff authorization agreements from the general Section 302(a) prohibition against employer donations to unions:

The provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner. . . .

*Id.* § 186(c)(4).

12. The Board in *Lockheed* stated:

Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. If an authorization contains such language, dues may properly continue to be deducted from the employee’s earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization.

*Lockheed, 302 N.L.R.B. at 329; see also National Oil Well, 302 N.L.R.B. at 368 & n.9* (finding that where the employee was not employed under a union security agreement, the post-resignation dues obligation arose from the checkoff authorization); Roger C. Hartley, *Recent Developments Under the National Labor Relations Act, Address Before the Committee on the Development of the Law Under the National Labor Relations Act* (March 1-5, 1992) (analyzing NLRB opinions concerning checkoff and alerting the labor law commu-
Waiver of Beck Rights

off authorization clause of a collective bargaining agreement, the employer directly deducts, or checks off, membership dues from employees' wages and remits them to the union. Even when incorporated in a collective bargaining agreement, checkoff is not mandatory. Section 302(c)(4) of the Taft-Hartley Act requires that each employee execute a dues checkoff authorization form consenting to checkoff. Furthermore, the duration of checkoff is not limitless. Employees must be afforded the opportunity to revoke their dues checkoff authorization at the end of one year, or upon expiration of the collective bargaining agreement, whichever occurs first.

Prior to Lockheed, scholars considered dues checkoff a relatively minor form of union security. Checkoff was touted primarily as a convenient method for expediting employee discharge of financial obligations under a union security agreement. In Lockheed, the Board determined that checkoff may survive membership resignation where the employee's...
waiver of his right to revoke dues checkoff authorization is "clear and unmistakable." Post-resignation survivability indicates that checkoff can function as more than a mere method of dues payment; dues checkoff may compel dues payment. The Board's decision notably elevates a previously underutilized source of dues obligation more than a half-century after the passage of the National Labor Relations Act (NLRA).

19. Lockheed, 302 N.L.R.B 322, 328 (1991) ("We will require clear and unmistakable language waiving the right to refrain from assisting a union, just as we require such evidence of waiver with regard to other statutory rights."). The Board analyzed the wording of the dues checkoff authorization at issue in Lockheed and considered the language insufficiently clear to warrant the conclusion that the employee had waived his right to revoke checkoff authorization. Id. at 330. Consequently, the checkoff authorization did not survive after the employee resigned. Id. However, in National Oil Well, 302 N.L.R.B. 367 (1991), the dues checkoff authorization did survive the employee's resignation because "the language [of the authorization] clearly indicated an agreement to pay dues 'irrespective of my membership in the Union.'" Lockheed, 302 N.L.R.B. at 329 n.28 (citing National Oil Well, 302 N.L.R.B. at 367); see also National Oil Well, 302 N.L.R.B. at 368 ("Because there is explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership, dues were still owing under [the employee's] checkoff authorization after his resignation of membership.").

20. Lockheed, 302 N.L.R.B. at 329. The Lockheed Board emphasized the relationship between clarity of language and waiver of the right to revoke dues checkoff authorization. See supra note 12.

21. National Oil Well, 302 N.L.R.B. at 368 ("Applying the analysis of Lockheed to the facts in this case, we find that the Respondent [union] has shown that the dues-checkoff authorization signed by the Charging Party [resignee] obligated him to pay dues after his effective resignation from membership in Local 4671."); see also 2 THE DEVELOPING LABOR LAW, supra note 4, at 1555 ("An employee's resignation from the union does not necessarily terminate the effectiveness of a dues checkoff authorization or relieve the employer of its obligation to withhold union dues pursuant to the checkoff authorization.").


In Shen-Mar, the employer refused to continue dues checkoff of nine employees who resigned their union memberships and endeavored to revoke their checkoff authorizations during the time frame when their authorizations were still irrevocable. Shen-Mar, 221 N.L.R.B. at 1329. The employer defended its action on the ground that checkoff of resignee dues would be tantamount to approving a union security device for compelling union membership. Id. Since Virginia is a right-to-work state outlawing union security agreements, the employer reasoned that continuation of checkoff would conflict with Section 14(b) of the Taft-Hartley Act, which permits states to enforce prohibition of union security agreements. Id. The Board, concurring with the administrative law judge below, held that dues checkoff authorizations were exclusively within the province of federal law and thus preempted from any state regulation under Section 14(b) of the Taft-Hartley Act. Id. Moreover, the Board reasoned that "the dues checkoff herein does not, in and of itself, impose union membership or support as a condition required for continued employment." Id. at 1330. Consequently, the employer was held to have committed the unfair labor
More significantly, the Board's reasoning in *Lockheed* raises startling questions concerning the waivability of both "*Beck rights*" and the right to resign.24

*Beck rights*, first recognized in *Communication Workers v. Beck*, designate the right of employees not to support certain activities financed by compulsory dues and fees.26 Pursuant to Section 9(a) of the Taft-Hartley Act, once elected by the majority, the union must represent all employees in the bargaining unit, including nonmembers or financial core em-

practices of unlawful interference under Section 8(a)(1) of the Taft-Hartley Act and for abrogating its bargaining duty under Section 8(a)(5). *Id.* at 1329.

23. "*Beck rights*" is the shorthand denomination for the rights of nonunion members employed pursuant to union security agreements to object to certain uses of mandatory periodic payments of dues and initiation fees. *See generally* Friesen, *supra* note 2 (discussing the impact of *Beck* and related cases on the status of dues use in organizing campaigns). Waiver of *Beck* rights would enable unions to streamline financial planning and improve performance of their dual economic and democratic roles. *See discussion infra* notes 182-251 and accompanying text.

24. The *Lockheed* Board expressly declined to opine on the waivability of resignation rights. *Lockheed*, 302 N.L.R.B. at 328 n.25. The Board stated:

Because the authorization is not sufficiently clear to waive either the Sec. 7 right to resign union membership or the right to refrain from assisting a union, we need not, and do not, decide whether or not an employee may, by authorization or other form of contract that he signs as an individual, agree to an enforceable waiver of the right to resign for a limited period.

*Id.*

Nevertheless, it bears noting that "strikes do not seem to cost society a substantial amount of goods and services. For the economy as a whole, the percentage of total working time lost directly to strikes" from around 1960 to 1980 averaged less than 0.2 percent per year. Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, Pub. Interest, Fall 1979, at 69, 81-82; *see infra* notes 252-367 and accompanying text.


26. *Id.* at 762-63. The Court stated: "We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Id.* (quoting Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984)). For a definition of *Beck rights*, *see supra* note 23. For further discussion of the *Beck* decision and waivability of *Beck rights*, *see infra* notes 182-251 and accompanying text.

27. Section 9(a) of the Taft-Hartley Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .


ployees. Union adherents advocate that all represented employees should contribute to the expenses of collective bargaining. Moreover, unions urge, collective bargaining activities extend well beyond the conventional bargaining table to encompass organizing, lobbying, and participation in social, charitable, and political events vital to bolstering the union’s bargaining clout. Financial core employees forcefully counter
determine whether a particular union will represent them, all employees in the bargaining unit are eligible to cast votes. If the union wins a majority of votes, it is empowered and obligated to represent all employees in the bargaining unit, regardless whether the employees are union sympathizers or members. See 29 U.S.C. § 159(a) (1988); Steele v. Louisville & Nash. R.R., 323 U.S. 192, 204 (1944) (holding that a union, as exclusive bargaining representative, must fairly represent all employees in negotiation and enforcement of the contract); see also Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (applying Steele’s construction of the Railway Labor Act to Section 9(a) of the Taft-Hartley Act).

29. This Comment utilizes the terms “financial core employee” and “dues objector” synonymously. The Board defines the term “financial core employee” in its proposed rulemaking for enforcing the Beck decision as “an employee who is not a full member of the Union, but who is required to pay the equivalent of fees and dues to retain his employment under a contractual union security provision.” 57 Fed. Reg. 43,642 (1992) (to be codified at 29 C.F.R § 103) (proposed Sept. 22, 1992). By contrast, “full member” denotes “an employee who has fulfilled the requirements for membership in a labor organization[,] has voluntarily joined the labor organization, and who neither has voluntarily resigned from membership nor has been expelled or suspended from membership.” Id.

30. See Roger C. Hartley, Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases, 41 HASTINGS L.J. 1, 2 n.7 (1989) (“[U]nions argue that the statutory duty to represent the entire bargaining unit obligates each employee who receives the benefit of unionization to pay a fair share of its cost. Only then can the aspiration of industrial stability, secured by a vibrant collective bargaining system, be achieved.”). Professor Hartley has pointed out the larger philosophical issues looming behind the union’s facile anti-free rider argument:

That “majority rule” includes the ability to restrict the minority; that use of compulsory dues for political or ideological purposes is not oppressive to the individual, union-represented dues objector; that a strong trade union movement requires autonomy from the state and, concomitantly, limited governmental interference with internal union affairs; and that dues objectors’ challenges, while clothed in the language of free expressive association and respect for individual autonomy, are financed by corporate funds expended to isolate unions politically and weaken unions’ ability to speak for their members and working people generally. Id. at 4-5 (footnotes omitted).

31. Professor Jennifer Friesen notes that “[u]nions are ... commonly authorized by their membership to spend dues on extra-workplace activities thought to enhance the union’s strength internally and in the community.” Friesen, supra note 2, at 603. Among the plethora of extra-workplace activities unions engage in, Friesen enumerates lobbying for labor and social legislation, union conventions, scholarships, charitable contributions and organizing nonunion employees. Id. For emphasis on the growth and significance of union involvement in the legislative process, see Alan Hyde, Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism, 60 TEX. L. REV. 1, 3-4 (1981) (noting that political advocacy is replacing private sector collective bargaining as parties’ interests become increasingly dependent on economic regulation by the federal government); see also ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 107 (1960) (“It is difficult,
that coerced payment of dues compromises their First Amendment right to freedom of association.32

In *Beck*, the Supreme Court implicitly balanced the union majority’s right to full freedom of association33 with respect to collective bargaining against the financial core employees’ right to refrain from engaging in concerted activity.34 The Supreme Court concluded that financial core employees may be compelled to contribute only that portion of dues ger-

if not impossible, to separate the economic and political functions of labor unions.”). John T. Delaney, professor of industrial relations at the University of Iowa, urges that “[u]nions more and more are being forced to try to defend themselves in the political arena because they have been so unsuccessful in other arenas. . . . Strikes and collective bargaining don’t seem to be working any more.” Richard L. Berke, *Bush Fires a Shot at Union Political Spending*, N.Y. Times, Apr. 19, 1992, at E3. Even the Supreme Court acknowledges that costs “germane to [the union’s] duties as collective bargaining agent” are not limited to the “direct costs of negotiating and administering a collective-bargaining contract” but also include “expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive bargaining representative of the employees in the bargaining unit.” *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447-48 (1984).

32. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (finding that freedom of belief, which includes the right not to be forced to give financial support to an ideological cause, is the “heart of the First Amendment”); Kenneth Cloke, *Mandatory Political Contributions and Union Democracy*, 4 Indus. Rel. L.J. 527, 532 (1981) (explaining how the interplay between the principles of union security and exclusive representation engendered a limited right of minority members not to associate with the union majority); Mark S. Pulliam, *Union Security Clauses in Public Sector Labor Contracts and Abood v. Detroit Board of Education*: A Dissent, 31 Lab. L.J. 539, 545 (1980) (arguing that compelled financial support of a union interferes with the right of free association, even where nonpolitical activities are involved).

Unions dispute on at least two grounds the notion that expenditure of compulsory dues for political or ideological purposes oppresses the union-represented dues objector. First, “majority rule,” the cornerstone of democracy, permits eliciting contribution from dissenters for the collective benefit of the majority. See Cloke, *supra* at 529 (“[T]axation for the common good and majority rule are accepted principles of democracy and common practice in associations.”). Second, compelled financial support is not equivalent to compelled belief. See Steven Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 590-91 (1980) (concluding that compulsory financing of union political endeavors “does not compel [objectors] to believe anything or to express anything, nor does it prohibit them from believing or expressing anything”).

33. Section 1 of the Taft-Hartley Act declares that it is the “policy of the United States” to protect “the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151 (1988).

34. Section 7 of the Taft-Hartley Act ensures that:

Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) . . . .
mane to negotiation of the collective bargaining agreement, contract administration, and grievance procedures.\footnote{Expenditures for any other purpose abrogate the union's duty of fair representation.\footnote{The \textit{Beck} decision evoked immense legal and political controversy.\footnote{Confusion over the type of notice and the extent of financial information that unions must provide to dues objectors prompted the Board to engage in rulemaking for only the second time in its august history.\footnote{De-}}}}

The \textit{Beck} decision evoked immense legal and political controversy. Confusion over the type of notice and the extent of financial information that unions must provide to dues objectors prompted the Board to engage in rulemaking for only the second time in its august history. De-
Waiver of Beck Rights

Despite the proposed rules, the Board anticipates that substantial litigation will ensue to refine categories of rebatable expenditures.\textsuperscript{39} Litigation will tax both unions and dues objectors,\textsuperscript{40} as unions seek to attract new members by exploring novel and questionably fundable ventures, such as advertising.

The financial implications of the \textit{Beck} decision for unions are discernible from the trial court's finding that seventy-nine percent of compulsory dues were allocated to activities unrelated to collective bargaining and contract administration.\textsuperscript{41} Furthermore, because the Supreme Court does not similarly require corporations to accommodate dissenting shareholders,\textsuperscript{42} the union's main adversary in the political arena gains an unfair advantage.

\textsuperscript{39} NLRB Notice of Proposed Rulemaking, \textit{supra} note 37, at D-1.

\textsuperscript{40} Labor scholars predict that the actual number of employees who avail themselves of the opportunity to object to dues payment will be small. \textit{See}, \textit{e.g.}, \textsc{Bernard Taylor \& Francis Whitney}, \textsc{Labor Relations Law} 388 (5th ed. 1987) (extrapolating from data that only .01\% of United Auto Workers' membership participates in a voluntary rebate program for political expenditures that has been in effect for several years); Dau-Schmidt, \textit{supra} note 37, at 33 & n.13. Furthermore, statisticians project that the reduction in fees stemming from rebate will be minimal for most unions. \textit{See} \textsc{Taylor \& Whitney, supra}, at 388-89; Dau-Schmidt, \textit{supra} note 37, at 33 n.14 ("Under the \textit{Ellis} formula made applicable to NLRA unions by \textit{Beck}, the largest expenditures that unions cannot charge dissenting employees are expenditures for organizing and political activities. These expenditures have been estimated at 15\% and 5\% respectively for the average private sector union.").


\textsuperscript{42} \textit{See} Friesen, \textit{supra} note 2, at 611-12 n. 26 ("Free speech and other rules generally permit corporations to subsidize ideological messages out of funds contributed by unconsenting shareholders or ratepayers."); \textit{see also} Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating state law prohibiting monopoly utility from including pro nuclear power missives in billing envelopes); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (finding that despite free speech and associational interests of dissenting shareholders, prohibition of corporate contributions to influence a state ballot proposition is unconstitutional); Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. 1969).
advantage. Speculation is also rampant on the impact of dues rebate on political funding.

Apart from predominately remunerative considerations, the executive branch has manipulated *Beck* rights as a potent political pawn. Deeming *Beck* symbolic of the "renewed spirit of Jeffersonian reform sweeping through this nation today[,]" President Bush issued an Executive Order mandating that federal contractors notify workers of their right to dues refund. President Clinton rescinded the order as "distinctly anti-union" on the grounds that it failed to notify workers of any other rights protected by the NLRA.

The shift in presidential policy illuminates the significance of *Beck* rights as symbolic of union sentiment. Waiver of *Beck* rights would enable unions to expand coffers and streamline accounting; but, above all,
Waiver of Beck Rights

each employee's individual waiver of her Beck rights would constitute a vote of confidence for unionization and a personalized commitment to solidarity.

Whereas Beck rights are most valuable to financial core employees employed under union security contracts, the right to resign is usually exercised by union members during a strike of their employer. In Pattern Makers' League v. NLRB, the Supreme Court held that restrictions in union constitutions on membership resignation are inconsistent with the federal labor policy of voluntary unionism. Subsequent to Pattern Makers', union members can avoid union discipline by resigning before crossing over during a strike.

Although Pattern Makers' arguably supports the concept of voluntary unionism by protecting the employee's right to refrain from engaging in concerted activity, the holding dramatically diminishes the union's effectiveness as a bargaining agent by withdrawing its most effective tool for preserving union solidarity during a strike period: the threat of discipline. Consequently, enforceable waivers of the right to resign would provide an alternative means of replenishing the ultimate weapon labor union shop and checkoff are clearly vital to the planning and administration of a union's financial affairs; checkoff provisions further spare costs of collecting dues from reluctant members. Not surprisingly, employers frequently balk at inclusion of such clauses in the collective bargaining agreement because they are "not going to [give] aid and comfort [to] the union." H.K. Porter Co. v. NLRB, 397 U.S. 99, 101 (1970).

50. See Powell, supra note 37, at 717-20 (discussing the restriction on a union's authority to discipline members).


52. Id. at 107. "Congress in 1947 sought to eliminate completely any requirement that the employee maintain full union membership. Therefore, the Board was justified in concluding that by restricting the right of employees to resign, League Law 13 impairs the policy of voluntary unionism." Id. (footnote omitted).

53. Id. at 106. "By allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union." Id.; see also James G. Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 Tex. L. Rev. 1071, 1125 (1987) ("[I]n Pattern Makers' League v. NLRB, the Supreme Court upheld an NLRB ruling that members could avoid discipline simply by resigning from the union immediately prior to crossing a picket line." (footnotes omitted)).

54. For explanation of the concept of voluntary unionism, see infra notes 86-89 and accompanying text.

55. James H. Clark, Jr., Comment, Pattern Makers v. NLRB: the Supreme Court Removes the Resignation Restriction as a Method to Achieve Union Solidarity, 22 Williamette L. Rev. 503, 505 (1986); see also Mancur Olson, The Logic of Collective Action: Public Good and the Theory of Groups 68 (1971) ("By far the most important single factor enabling large, national unions to survive was that membership in those unions, and support of the strikes they called, was to a great degree compulsory." (emphasis added)).

56. Noel A. Levin, Successful Labor Relations 281 (1978); Clyde Summers, Disciplinary Powers of Unions, 3 INDUS. & LAB. REL. REV. 483, 495 (1950) ("Strikebreaking is
employs in disputes with management: the strike or threat of strike.  

Affording employees the option to commit contractually to remain with the union in times of individual crises builds confidence in unions and incentive to arrive at mutual consensus to benefit the group as a whole.

The Board's decision in Lockheed provides that the waivability of Beck rights and resignation rights is determined by (1) the nature of the right uniformly considered sufficient reason for expulsion whether or not there is an express prohibition, for it undercuts the union's principal weapon and defeats the economic objective for which the union exists.

57. See David Abraham, Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy, 63 N.Y.U. L. Rev. 1268, 1304 (1988) ("It has been a stable assumption in American labor law that a union cannot compel an employer to bargain with it, let alone make any concessions to it, unless it can apply economic pressure and do so effectively."). For both union and employer, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized," NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960), notwithstanding "the most serious effect upon individual workers and productive enterprises." Id.

To offset "weapons," such as the strike, in the union's arsenal of economic pressure, the employer can, depending on the circumstances, operate with permanent replacements, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); initiate a preemptive lockout, American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); subcontract out work, Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963); close down the plant entirely, Darlington Mfg. Co., 165 N.L.R.B. 1074 (1967), enforced, 397 F.2d 760 (4th Cir. 1968), cert. denied, 393 U.S. 1023 (1969); "or simply let[ ] time, financial pressures, and adverse publicity wear down the union's bargaining position," Abraham, supra, at 1304 n.161.

58. Thus the argument of classical liberal theorists who opposed a constitutional right to strike is wielded to enhance the right to strike. The classical liberal argument is epitomized by Professor Corwin's estimation that """"[l]iberty is an individual matter; for as [Edmund] Burke remarks in the Reflections, '[W]hen men act in concert, liberty is power.'"""

Moving toward a middle ground, one can appreciate how this appeal to individualism is a subtle attenuation of the indigenously American concept of democracy that has been incorporated into the brand of "industrial democracy" protected by the labor statutes. The watchwords of American democracy are "liberty and equality." Whereas contemporary French republicanism embraced "fraternité" as well, fraternity is conspicuously absent from the pantheon of American virtues. As one scholar has remarked, "[t]his individualism, which is neither fraternal nor mean, is still the deepest impulse of our democracy. Americans cling to it because their common sense tells them that the expanded sense of brotherliness or sisterliness is highly unreliable ...." Eva T.H. Brann, Democratic Distinction, Key Rep., Summer 1993, at 2, 2. "Even Jefferson, probably the most radical of the major Founders, evidently held that it was safer to rely on the legal protection of a sound constitution than on the hyperbolic sentiments of expanded family feeling." Id.
and (2) the method of waiver.\textsuperscript{59} Although the \textit{Beck} opinion is couched in terms of statutory interpretation,\textsuperscript{60} free association values embedded in the labor statute\textsuperscript{61} strongly influenced the Supreme Court's ruling.\textsuperscript{62} The waivability of \textit{Beck} rights, therefore, hinges on the waivability of the right to withhold financial support, as conferred by Sections 7 and 8(a)(3) of the Taft-Hartley Act, to the extent that the right of freedom of association\textsuperscript{63} is not impinged.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{59} International Bhd. of Elec. Workers, Local 2088, 302 N.L.R.B. 322, 328-29 (1991) (analyzing waivability of the right to revoke dues checkoff authorization by examining the language and legislative history to determine the nature of right and the method of waiver).
\item \textsuperscript{60} See Communications Workers v. Beck, 487 U.S. 735, 762 (1988). The Court stated: We therefore decline to construe the language of § 8(a)(3) [of Taft-Hartley] differently from that of § 2, Eleventh [of the Railway Labor Act] on the theory that our construction of the latter provision was merely constitutionally expedient. Congress enacted the two provisions for the same purpose, eliminating "free riders," and that purpose dictates our construction of § 8(a)(3) no less than it did that of § 2, Eleventh, regardless of whether the negotiation of union-security agreements under the NLRA partakes of governmental action. \textit{Id.}
\item \textsuperscript{61} The national labor policy rests on the principle of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151 (1988). Referring to rights granted by Section 1, \textit{id.}, and Section 7, see supra note 34, of the Taft-Hartley Act, Professor Summers elaborates on how "Congress protected these rights, rooted in the first amendment, against private action, against encroachments by employers exercising private power." Clyde W. Summers, \textit{The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law}, 1986 U. ILL. L. REV. 689, 697.
\item \textsuperscript{62} See Hartley, supra note 30, at 2 ("[T]he threshold task is to demonstrate that although most of the pre-\textit{Beck} dues objector litigation [which the \textit{Beck} Court relied upon] nominally focused on statutory interpretation, constitutional values largely determined the cases' outcomes."); see also Friesen, supra note 2, at 608 ("Although the private sector rule is formally cast as a construction of federal collective bargaining law, the doctrine in both private and public sectors really rests upon the theory that the use of members' money to promote causes with which they disagree offends notions of free speech and association.").
\item \textsuperscript{63} In NAACP v. Alabama, 357 U.S. 449 (1958), the Court clearly articulated the right of association that is derived from the First Amendment protection of freedom of speech and assembly:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. \textit{Id.} at 460-61 (citations omitted).
\item \textsuperscript{64} Lockheed, 302 N.L.R.B. 322, 327 (1991). The Board stated:
In contrast to *Beck* rights, the right to resign is an unenumerated right, presumed to subside in the right to refrain from engaging in concerted activity pursuant to Section 7 of the Taft-Hartley Act. The nature of resignation rights as not purely economic indicates that apart from statutory considerations, their waivability will be influenced by liberty concerns, the doctrine of unconscionability, and the Thirteenth Amendment's prohibition against involuntary servitude. Illustration of

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[I]t can hardly be disputed that Section 7 protects both the right to refrain from belonging to a union and the right to refrain from contributing money to it, except to the extent that the proviso to Section 8(a)(3) of the Act permits an employee to be required to pay dues under a contractual provision as there defined. *Id.*

Section 7 of the Taft-Hartley Act affords employees the right to refrain from joining or assisting a labor organization and from engaging in concerted activities for mutual aid and protection. 29 U.S.C. § 157 (1988). The right to assist or not to join a labor union has been interpreted to include the right to resign. The Supreme Court in *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985), remarked:

The right to join or not to join a labor union includes the right to resign, and § 8(b)(1)(A) forbids unions to interfere with that right except to the extent, if any, that such interference is permitted by the proviso to that section, which preserves the union's right to prescribe its own rules with respect to the acquisition or retention of membership. *Id.* at 116 (White, J., concurring).

The Petitioner union in *Pattern Makers'* argued unsuccessfully that the Taft-Hartley Act's legislative history indicated that Congress made a considered decision not to protect members' right to resign. *Id.* at 110. Section 8(c) of the House Bill included a specific “bill of rights” for labor union members. H.R. 3020, 80th Cong., 1st Sess. § 8(c) (1947). The bill of rights contained a provision rendering it an unfair labor practice to “deny to any [union] member the right to resign from the organization at any time.” *Id.* § 8(c)(4). In comparison, the Senate bill did not list particular employee rights, but expressed in more general terms that it was an unfair labor practice to “restrain or coerce” employees in the exercise of their Section 7 rights. *Id.* § 8(b)(1)(A) (Senate version). The Taft-Hartley Act adopted the more general language of the Senate Bill rather than the specific prohibitions detailed in the House version. See 29 U.S.C. § 158(b)(1)(A). The Petitioners in *Pattern Makers'* reasoned that the omission of the House provision evidenced an express decision by Congress not to protect the “right to resign.” *Pattern Makers*, 473 U.S. at 110. The Supreme Court declined to accept Petitioner's interpretation of the legislative history. *Id.* Instead, the Court determined that “[t]he ‘right to resign’ apparently was included in the original House bill to protect workers unable to resign because of ‘closed shop’ agreements.... Because the closed shop was outlawed by the Taft-Hartley Act, it is not surprising that Congress thought it unnecessary explicitly to preserve the right to resign.” *Id.* at 110-11 (citation omitted).

66. As Professor Summers has criticized, “preoccupation with the economic function of labor law too often causes the constitutional values to be overlooked or not recognized.” Summers, supra note 61, at 701.

67. See *id.* (“The National Labor Relations Act is too often viewed solely as striking a balance between union and employers rather than as a statute primarily protecting the personal freedoms of individual employees and extending democratic procedures to industrial life.”).

68. See discussion infra notes 341-53 and accompanying text.

69. See discussion infra notes 318-40 and accompanying text.
the language and circumstances comprising "clear and unmistakable" waiver, as endorsed by *Lockheed* and later Board opinions, informs the method of waiver of *Beck* rights and resignation rights.\(^7\)

This Comment extends the reasoning of *Lockheed* to conclude that *Beck* rights and resignation rights are waivable, provided conditions of notice, consideration, and, in the case of resignation rights, duration, are satisfied. Part I chronicles the discovery of dues checkoff authorization as an independent source of dues obligation. The intersection of the statutory policy of voluntary unionism with common law contract principles delineates the waivability of the right to revoke dues checkoff authorization and other membership rights.\(^7\) Part II explores the source of *Beck* rights and the circumstances that permit their waiver. Part III examines the elusive nature of the right to resign through the lens of statutory analysis and the prism of Supreme Court and Board precedent. A focus on the Thirteenth Amendment prohibition against involuntary servitude and the doctrine of unconscionability indicates the necessity for durational restraints on waiver. Finally, this Comment concludes that the Board's endorsement of "clear and unmistakable" waiver of the right to revoke dues checkoff authorization greatly expands the capacity of individual contract to affect the union-member relationship. Paradoxically, and perhaps unwittingly, the Board has created a means to decrease its own involvement in the regulation of the union-member relationship.\(^7\)

I. POST-RESIGNATION SURVIVABILITY OF DUES CHECKOFF AUTHORIZATION

A. Rejection of an Erroneous Interpretation of Contract Law

Dues checkoff originally occurred in tandem with union security agreements.\(^7\) Unions and employers considered dues checkoff mutually desir-
able for several reasons. First, unions discovered that absence of checkoff diverted time and resources away from "constructive" contract administration to individual dues collection.\textsuperscript{74} Second, collection activities at the plant site posed enormous potential for impinging on the employer's efficiency and productivity.\textsuperscript{75} Finally, as employees laboring under union security agreements must pay dues or suffer employer discharge, the expediency of dues checkoff as a method of ensuring timely payment helped obviate the pressure of discharging employees.\textsuperscript{76}

Historically, dues checkoff agreements affected payment of an entire panoply of financial obligations to unions: membership dues, initiation fees, fines, and assessments.\textsuperscript{77} Furthermore, checkoff agreements were predominantly automatic and did not require individual employee consent.\textsuperscript{78} Following World War II, collective bargaining agreements incorporating dues checkoff clauses without underlying union security provisions emerged.\textsuperscript{79}

\textsuperscript{74} Hearings on S. 55 \& S.J. Res. 22 Before the Senate Comm. on Labor \& Public Welfare, 80th Cong., 1st Sess. 1151-52 (1947) (statement of Lee Pressman, General Counsel of CIO) [hereinafter Senate Hearings].
\textsuperscript{75} Id.
\textsuperscript{76} Id. In testimony before the Senate Labor Committee, CIO General Counsel Pressman declared that:

\begin{quote}
[M]ost employers . . . prefer the check-off with or without union security to union security without the check-off [as] indicated by the issue which has been posed with some frequency in recent months in collective-bargaining negotiations in which the employer has offered a universal check-off in preference to union security, contending that he [the employer] prefers the relatively easy, automatic, mechanical process of the check-off to being forced to deal with problems relating to discharge of recalcitrant individual employees.
\end{quote}

Id. at 1151.
\textsuperscript{77} Lockheed, 302 N.L.R.B. at 326.
\textsuperscript{78} See H.R. REP. No. 245, 80th Cong., 1st Sess. (1947), reprinted in 1 N.L.R.B. LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 369 [hereinafter 1 LEGISLATIVE HISTORY] (stating that over one-half of the 1,300,000 workers in nonmanufacturing industries participate in automatic dues checkoff; aircraft engines, automobiles, cigarettes and tobacco, hosiery, electrical machinery, leather (except shoes and gloves) and steel (basic) are among the manufacturing industries whose workers are largely covered by automatic checkoff provisions). Automatic consent provisions were not blanketly utilized. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 865, EXTENT OF COLLECTIVE BARGAINING AND UNION RECOGNITION, 1945 (1946) (23 percent of the 39 percent of employees covered by union security agreements are subject to automatic dues checkoff provisions). Rather, collective bargaining agreements usually tailored the consent requirement to the form of union security utilized. For instance, maintenance-of-membership agreements, which grant employees the choice of union membership, similarly tended to include optional dues checkoff provisions. Senate Hearings, supra note 74, at 1151-52 (testimony of William Green, President of the AFL).
\textsuperscript{79} Lockheed, 302 N.L.R.B. at 326; see also Senate Hearings, supra note 74, at 1166 (testimony of Secretary of Labor Schwellenbach) (explaining that checkoff "may be com-
The currently operable law pertaining to dues checkoff authorization was enacted as part of the 1947 Taft-Hartley amendments to Section 302(c)(4) of the NLRA. The principal thrust of Section 302 of the Taft-Hartley Act was to curtail unions’ ability to exact so called “welfare funds” from employers. Congress expressed concern that union leaders had been deploying large sums of employer contributions toward institu-

80. Section 302(c)(4) of the Taft-Hartley Act originated from a floor amendment by Senator Ball to the Senate bill, S. 1126. The Senate report, filed by several senators including Senator Ball and Senator Taft, comments sparingly that the amendment “prevents the check-off of union dues unless authorized in writing by the individual employee. Such authorization may be irrevocable for the period of contract, which is the usual form of check-off today.” S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947) (supplemental views), reprinted in 1 Legislative History, supra note 78, at 458. The final amendment, as passed, also provided for annual revocation of authorization. 29 U.S.C. § 186(c)(4) (1988).

A parallel dues checkoff provision was introduced in the House of Representatives. H.R. 3020 would have outlawed all employer deduction of union fees, dues and assessments, except where deductions were “voluntarily authorized in writing by such employee and such authorization is revocable by the employee at any time upon thirty days' written notice to the employer.” H.R. 3020, 80th Cong., 1st Sess. 21, reprinted in 1 Legislative History, supra note 78, at 51. The House Report on this provision categorized it as “a form of 'union security' that is in effect in many plants, where it has proved popular with employers, employees, and unions, saving time and trouble for all of them.” H.R. Rep. No. 245, 80th Cong., 1st Sess. 29 (1947), reprinted in 1 Legislative History, supra note 78, at 320.


For a cogent analysis of the Taft-Hartley Act from the vantage point of a labor historian, see James R. Green, The World of the Worker: Labor in Twentieth-Century America 198-200 (1980) (outlining how the Taft-Hartley Act eliminated many of the rights and protections unions had gleaned during the New Deal and World War II). One significant impact of the Taft-Hartley Act was the expansion of the NLRB's role in policing labor-management relations. Id. The Act created the position of General Counsel of the Board, vesting the General Counsel with discretion to sue unions for various unfair labor practices. Id. As Green summarizes, “the NLRB, the product of labor's Magna Carta [referring to the NLRA] in 1936, could now be used against unions as well as against employers. Administrative law, like judicial law, reflects the alignment of class forces, and in 1947 the pendulum of forces was swinging against organized workers.” Id. at 198.

81. Lockheed, 302 N.L.R.B. at 325. Congress apparently considered John L. Lewis, eminent former president of the United Mine Workers, the most insidious extorter of “welfare funds,” and therefore the prime target of Section 302(a). The floor debates on Section 302 are riddled with invective leveled against Lewis. See, e.g., 93 Cong. Rec. 3713 (1947), reprinted in 1 Legislative History, supra note 78, at 800 (“Arrogant labor leaders such
tional ends, rather than directly ameliorating employment conditions, as promised.\(^2\) Reflecting congressional intent, the revised structure of Section 302(c)(4) bars direct payments to unions, with certain enumerated exceptions, including dues checkoff authorization.\(^3\) The checkoff provision of the Taft-Hartley Act consists of two stipulations. First, checkoff is no longer automatic; employees are required to execute individual dues checkoff authorizations.\(^4\) Second, the duration of checkoff authorizations are conscribed to a period not to exceed one year, with employees afforded the option of revoking their authorizations at regular intervals.\(^5\)

The Taft-Hartley limitations on checkoff authorization and duration of checkoff can be viewed as a response to the tenor of the era that initiated the concept of "voluntary unionism."\(^6\) Voluntary unionism means that the employee is free to elect whether or not to support a union, except where union security agreements compel contribution.\(^7\) In its 1947 modifications to the NLRA, Congress for the first time gave employees the right to refrain from belonging to a union.\(^8\) The dues checkoff provision of the Taft-Hartley Act similarly facilitates the newfound right to refrain from union association. By affording employees both the option of dues checkoff and regular opportunities to reconsider and rescind checkoff au-

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\(^2\) As John L. Lewis have set themselves up as super-governments contrary to the welfare of the country.

\(^3\) Representative Hugh A. Meade described the purpose of H.R. 3020, the House version of later-enacted Section 302, in his extended remarks:

The bill would forbid an employer to pay royalties, taxes, and other exactions to unions in the guise of welfare funds or otherwise.

This section speaks for itself and was brought about by Mr. Lewis' demand for a 5 cents a ton royalty for a welfare fund for miners. Although that fund now contains several million dollars, not one dime was paid out of it to the widows and children in the recent Centralia coal-mine disaster.

\(^4\) See Pattern Makers' League v. NLRB, 473 U.S. 95, 104-07 (1985) (finding that the 1947 Taft-Hartley amendments incorporated the policy of voluntary unionism into the National Labor Relations Act); see also Lockheed, 302 N.L.R.B. 322, 327 (1991). The Board in Lockheed stated:

In its 1947 modification of Section 7 of the Act, Congress gave employees the right to refrain from engaging in the activities specified in that section. Because those activities include "join[ing], or assist[ing] labor organizations," it can hardly be disputed that Section 7 protects both the right to refrain from belonging to a union and the right to refrain from contributing money to it, except to the extent that the proviso to Section 8(a)(3) of the Act permits an employee to be required to pay dues under a contractual provision as there defined.

\(^5\) Id.

\(^6\) Id.

\(^7\) 29 U.S.C. § 158.

Waiver of Beck Rights

B. Rejection of an Erroneous Interpretation of Contract Law

The Board struggled during ensuing decades to refine and apply the statutory requirements of dues checkoff to individual cases of authorization. Originally, the Board adopted a contract approach to checkoff authorizations, scrutinizing the language of authorizations to discern the relationship between dues checkoff authorization and union membership, as agreed to by the employee. In examining the effect of resignation

89. For text of statute, see supra note 11.

90. See NLRB v. National Truck Drivers Local Union 449, 353 U.S. 87, 96 (1956) ("The function of striking [a] balance [that will] effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board . . . ."); see also Pattern Makers' 473 U.S. at 114. The Pattern Makers' Court stated that "[t]he Board has the primary responsibility for applying "the general provisions of the Act to the complexities of industrial life."" Id. (quoting Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) (quoting NLRB v. Eric Resistor Corp., 373 U.S. 221, 236 (1963))).

91. See, e.g., American Tel. & Tel. Co., 303 N.L.R.B. 944, 945 (1991) (holding that where employee explicitly authorized continuation of dues checkoff even after resignation, neither employer's continued checkoff nor union's continued acceptance of dues were illegal); Cardinal Sys., 259 N.L.R.B. 456, 457 (1981) (holding that employer's solicitation of employees' revocation of checkoff authorizations is illegal); Frito-Lay, Inc., 243 N.L.R.B. 137, 139 (1979) (holding that the union and employer were justified in considering authorizations still valid where employees did not revoke their authorizations during allotted escape periods); Columbia Broadcasting Sys., Inc., 175 N.L.R.B. 873, 874 (1969) (holding that the right of revocation is not automatically created upon election culminating in decertification of the incumbent or certification of the new union; the employer must check off dues until the present contract expires); William Wolf Bakery, Inc., 122 N.L.R.B. 630, 631 (1958) (explaining that as a matter of comity, the Board adopts the Department of Justice interpretation of the term "membership" in Section 302).

92. See e.g., San Diego County Dist. Council of Carpenters (Campbell Indus.), 243 N.L.R.B. 147, 149 (1979); United Steelworkers, Local 7450 (Asarco Inc.), 246 N.L.R.B. 878, 881 (1979); see also Local Lodge 2045, Int'l Ass'n of Machinists & Aerospace Workers (Eagle Signal), 268 N.L.R.B. 635, 637 (1984) ("It is established Board law that a dues-checkoff authorization, or wage assignment as it is called in this case, is a contract between an employee and his employer . . . .").

The Sixth Circuit opinion in NLRB v. United States Postal Service, 833 F.2d 1195 (6th Cir. 1987) [hereinafter Postal Service], identified Campbell Industries as the seminal case containing the Board's reasoning with respect to continuation of checkoff post membership resignation. Id. at 1200. The Sixth Circuit categorized the Board's rational as "essentially an analysis based on contract principles." Id. The Court's opinion further noted that
from union membership on continuance of dues checkoff authorization, the NLRB adhered to the "quid pro quo" analysis of Machinists Local Lodge 2045, International Ass'n of Machinists & Aerospace Workers (Eagle Signal). In Eagle Signal, the Board determined that where the dues checkoff authorization form expressly designated dues payment to be the quid pro quo for union membership, resignation would automatically revoke dues checkoff authorization. The quid pro quo approach focused on the express language of the dues authorization agreement. If the agreement indicated that dues were "in consideration of the benefits received and to be received by me as a result of . . . membership in the union," then the payment of dues was deemed to be a quid pro quo for union membership. Where the payment of dues was considered a quid pro quo for union membership, the dues checkoff authorization would expire upon the employee's resignation. The authorization would terminate, regardless of when the employee gave notice of her revocation of dues authorization.

The Eagle Signal approach gradually came under disfavor, beginning with opinions by the federal courts of appeals. The United States Courts of Appeals for the Sixth and Ninth Circuits denounced the Eagle

_"Campbell Industries_ laid great stress on the express language of the dues authorization agreement, which included a recitation that the dues were 'in consideration of the benefits received and to be received by me as a result of my membership in the Union.' _Id._ (quoting _Campbell Industries_, 243 N.L.R.B. at 149).

93. 268 N.L.R.B. 635 (1984). Although Eagle Signal loaned its name to the so-called "Eagle Signal doctrine," two previous Board decisions, _Campbell Industries_ and _Frito-Lay_, actually provided the generative source for the quid pro quo approach. _See_ NLRB v. United States Postal Serv., 827 F.2d 548, 553 (9th Cir. 1987) [hereinafter _Dalton_] (stating that the Eagle Signal doctrine originated in _Campbell Industries_ and _Frito-Lay_; see also _Lockheed_, 302 N.L.R.B. 322, 324 (1991). _But cf._ _Postal Service_, 833 F.2d at 1200 (citing _Asarco Inc._ and _Campbell Industries_ as the cases relied upon by Eagle Signal in deriving the Eagle Signal mode of analysis).

94. _Eagle Signal_, 268 N.L.R.B. at 637. The Board opined:

> It is established Board law . . . that a resignation of union membership ordinarily does not revoke a checkoff authorization. However, a resignation will, by operation of law, revoke a checkoff authorization, even absent a revocation request, where the authorization itself makes payment of dues a quid pro quo for union membership.

_Id._ (footnotes omitted).

95. _See Postal Service_, 833 F.2d at 1200.

96. _Campbell Industries_, 243 N.L.R.B. at 149.

97. _Postal Service_, 833 F.2d at 1200.

98. _Eagle Signal_, 268 N.L.R.B. at 637.

99. _Id._ Under the quid pro quo approach, resignation terminated dues checkoff regardless of whether (1) the employee executed a formal revocation request; and (2) the request was timely, i.e., within the time frame set forth in the authorization form. _Id._

100. _See Dalton_, 827 F.2d 548 (9th Cir. 1987); _Postal Service_, 833 F.2d at 1195.
Waiver of Beck Rights

Signal doctrine as an unacceptable construction of contract principles. The criticism of Eagle Signal and its predecessors centered on confusion over the link between consideration and the obligation to perform.

101. Postal Service, 833 F.2d at 1200 (citing Dalton, 827 F.2d at 554-55 ("It is because the Board based its decision entirely 'on an erroneous view of the requirements of contract law' that the Ninth Circuit majority held that 'the Board has not given a reasoned basis for its rule, nor does it represent a correct application of the law.").); Dalton, 827 F.2d at 554.

The courts of appeals further faulted the Board for its improper statutory construction. Postal Service, 833 F.2d at 1197-1200; Dalton, 827 F.2d at 551-53. Since the employees in both cases were employed by the Postal Service, the applicable checkoff provision was Section 1205 of the Postal Reorganization Act (PRA), rather than Section 302(c)(4) of the Taft-Hartley Act. Id. In reaching its decisions, however, the Board had applied its interpretation of the checkoff provision of the Taft-Hartley Act to the PRA, "brush[ing] aside contentions that the differing language of the two laws was of any significance, and that the legislative history indicated any Congressional intention contrary to the Board's view." Postal Service, 833 F.2d at 1198. The United States Court of Appeals for the Sixth Circuit stressed the difference between the two statutes in general and the two checkoff provisions in particular. Id. at 1198-1200. In its comparison of the PRA and Taft-Hartley, the court singled out the fact that union security agreements are not permitted under the PRA. Id. at 1199. The checkoff provision of the PRA thus provides the only means for the union to predict future revenue and expenses. Id. The court considered of paramount importance the fact that the PRA "explicitly permits the deduction of dues in situations that would unquestionably be illegal under the NLRA," including continuation of checkoff agreements with non-exclusive bargaining representatives. Id. at 1199-1200 (citing United States Postal Serv., 248 N.L.R.B. 5 (1980)).

The court further explained how, despite apparent similarity in the language of the two provisions, they are "crucially different":

Section 302(c)(4) of the NLRA provides that an authorization "shall not be irrevocable for a period of more than one year." The provision allows, but does not require, an authorization to be irrevocable, and it places a maximum on the length of permissible irrevocability. The PRA, in contrast, provides that the Postal Service will deduct dues from the pay of employees who have made "a written assignment which shall be irrevocable for a period of more than one year." On its face, section 1205 requires that any assignment made must be irrevocable for a period up to a year.

Id. at 1199 (citations omitted).

102. The United States Court of Appeals for the Ninth Circuit described the fundamental flaw in the Eagle Signal approach as exemplified in the reasoning of Campbell Industries:

The Board in Campbell apparently concluded that the employee's duty to assign his wages to pay membership dues was conditioned on union membership. Although the contract did not explicitly state that the employee's authorization was conditioned on the employer's performance or tendering of performance, such "constructive conditions of exchange" are freely implied.

But even this implied condition would not lead to the Board's result. Under the contract, the employer promised to tender "the benefits received and to be received" as a result of union membership. Because of the implied condition, if the employer did not tender these benefits, the employee would no longer have a duty to perform his end of the bargain; thus, the employee could revoke the authorization. But the employer in Campbell did not fail to provide these benefits. Instead, the employee unilaterally declined to accept them—he resigned. A party's duty to perform even a wholly executory contract is not excused merely
Under *Eagle Signal*, manipulation of the wording of the authorization agreement alone could enable the employee to escape the contractual agreement. The employee could terminate checkoff upon resignation outside the window period simply because the employee no longer desired the consideration offered by the union, i.e., the benefits of union membership. Such interpretation rendered the employee's consideration illusory. The employee incurred no legal detriment, but simply promised to continue checkoff as long as she wanted to partake of the consideration of union membership. The Sixth Circuit excoriated the *Eagle Signal* Board for derogating a basic precept of contract law: a party to a contract may not relieve herself from the obligation to perform merely because she no longer desires the other party's performance; as long as the other party remains ready to perform, both sides are bound. Consequently, where a member voluntarily resigned from the union, and the union remained ready to tender the resignee the benefits of union membership, contract law mandated that the resignee should be bound to the authorization she signed even post-resignation. The existence of an implied or express condition that the authorization is in consideration for the benefits of union membership should be irrelevant to the survival of authorization where the member involuntarily relinquishes membership. Only where membership is beyond the control of the employee could the employee condition her performance on continuation of membership and still be bound contractually.

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103. *Id.* at 554; see also *Postal Service*, 833 F.2d at 1200.
104. *Postal Service*, 833 F.2d at 1199-1200.
105. An "illusory promise" as consideration occurs where two parties exchange promises and one promise facially appears to impose absolutely no obligation whatsoever on the promisor. The giver of illusory consideration merely promises "I will if I want to." E. ALLEN FARNSWORTH, *CONTRACTS* § 2.13, at 75 (2d ed. 1982). A promise, however, may constitute valid consideration despite conditioning on the possible occurrence of a definite event. *Id.*
106. *Dalton*, 827 F.2d at 554.
107. *Postal Service*, 833 F.2d at 1200 ("A party to a contract may not relieve himself of the obligation to perform by indicating that he no longer desires the other party's performance. So long as the other party remains ready to perform, both sides are bound."). *See generally* ARTHUR L. CORBIN, 3A *CORBIN ON CONTRACTS* § 654, at 136, § 656, at 144-45 (1951); RESTATEMENT (SECOND) OF CONTRACTS § 75, Cmt. a (1981).
109. *Id.*
110. *Id.*
The courts of appeals, while critical of the *Eagle Signal* doctrine, neglected to offer a coherent alternative analysis for determining waivability of the employee's right to revoke dues checkoff authorization. In *Lockheed*, however, the Board expressly overruled the *Eagle Signal* quid pro quo approach. The *Lockheed* Board declared the *Eagle Signal* doctrine a misapplication of basic tenets of contract law. Although in *Lockheed* the particular checkoff authorization at issue did not survive resignation and the union's post-resignation enforcement of checkoff was held to violate Section 8(b)(1)(A), the Board set forth a new test for determining whether an employee, after membership resignation, may be found to have agreed to continue paying dues pursuant to a previously executed checkoff authorization. The *Lockheed* test focused on the dual statutory policies of "voluntary unionism," and clear and unmistakable waiver of statutory rights along with "relevant principles of contract law" to determine the conditions for waiver of the right to revoke checkoff authorization. The underlying rationale for the test indicates that the significance of the *Lockheed* decision extends beyond the narrow field of dues checkoff authorization and may be applied to surmise when, if ever, other statutory rights may be abandoned voluntarily. Comprehension of the far-reaching implications of *Lockheed* requires closer analysis of the opinion itself.

111. *Lockheed*, 302 N.L.R.B. 322, 324 (1991). The Board stated that "although we reach the same result in this case, and although both the 'membership dues' language of the authorization and principles of contract law are part of our analysis, we no longer adhere to the 'quid pro quo' doctrine of *Eagle Signal*." Id.

112. Id. at 327. "Although we adhere to the characterization of a dues-checkoff authorization as a contract, reconsideration of this issue persuades us that the *Eagle Signal* analysis did not adequately take into account pertinent principles of contract law." Id.

113. Id. at 330. The Board concluded:

By receiving, accepting, and retaining membership dues withheld from the pay of David D. May after his resignation from membership in the Respondent and by doing so solely on the authority of a checkoff authorization that did not clearly and explicitly provide for a postresignation dues obligations, the Respondent Union has restrained and coerced employees in their exercise of Section 7 rights and violated Section 8(b)(1)(A) of the Act.

Id.

114. The Board explained that its new test is fashioned to promote the dual goals of predictability and employee awareness of assumed obligations. Defending against putative assertions that its test fails to yield a "bright line rule," the Board pointed out that numerous legal standards promulgated by the Board exhibit similar ambiguity. Indeed, where checkoff is concerned, such ambiguity permits influx of flexibility in determining which considerations influence the outcome of a specific case. Id. at 329.

115. Id. at 327.

116. See Hartley, supra note 12, at 25 ("In short, while these cases [including *Lockheed*] seem to be about checkoff, and they are, they are much more about waiver.").
C. Emergence of the Clear and Unmistakable Waiver Test

On January 8, 1988, a Lockheed union employee not employed under a union security agreement resigned from the union and notified the union of his request to terminate a previously executed checkoff authorization. That checkoff authorization directed the employer to deduct from his wages the "regular membership dues" he owed the union. On the date of the employee's resignation, the terms of the checkoff authorization indicated that the requested revocation was untimely. The union refused to acknowledge the notification as effective and continued to receive and retain the membership dues the company deducted from the employee's wages. On review of the situation, the General Counsel of the Board contended that the employee's resignation was effective when tendered and, pursuant to Eagle Signal, his resignation terminated the authorization as a matter of law because the authorization provided for the checkoff of "regular membership dues." The General

117. Lockheed, 302 N.L.R.B. at 322. The resignee mailed a note to the union which included the following statement: "I, David Dwayne May, employee #TO756, am requesting that I be dropped from your union membership. I have sent a notice to Lockheed payroll, stopping my union dues." Id.

118. Id. at 322 n.2.

119. The union refused to accept the letter as a valid resignation on the grounds that "the letter [was] ineffective to revoke May's dues obligation because it was sent during the period when the authorization was irrevocable." Id. at 323 n.4.

The checkoff authorization stipulated that it was "irrevocable for a period of one year from the date hereof or until the expiration of the present collective bargaining agreement between the Company and the Union, whichever is the shorter of the two periods." Id. at 322.

The wording of this provision tracks the language of the proviso to Section 302(c)(4), which limits the duration of dues checkoff authorization's irrevocable status to the lesser of one year or the expiration of the collective bargaining agreement. 29 U.S.C. § 186(c)(4) (1988). Nevertheless, it must be emphasized that the checkoff authorization need not automatically expire at the statutory expiration date. An authorization may provide for automatic renewal if not revoked during a specified period of time prior to the expiration of the contract or the year's end. C. Solari & Sons, Inc., 264 N.L.R.B. 282 (1982); see also Monroe Lodge, Int'l Ass'n of Machinists & Aerospace Workers v. Litton Business Sys., 334 F. Supp. 310, 314-15 (W.D. Va. 1971), aff'd, 80 L.R.R.M. (BNA) 2379 (4th Cir.), cert. denied, 409 U.S. 879 (1972). If the employee repeatedly fails to give effective notice during the allotted window period, the checkoff authorization will continue indefinitely or until the employee is no longer employed by the employer. See, e.g., NLRB v. Brotherhood of Ry. Clerks, 498 F.2d 1105, 1109 (5th Cir. 1974) (finding employment severed and renewal of authorization not automatic upon rehire).

120. Lockheed, 302 N.L.R.B. at 322-23.

121. The General Counsel of the NLRB is vested with the discretion to prosecute unions and/or employers for perceived commissions of unfair labor practices. 29 U.S.C. § 153(d).

122. For this line of reasoning, the General Counsel stressed that the same result should obtain in the instant case as in Eagle Signal because of the similarity between the language of the dues checkoff provisions in Eagle Signal and in Lockheed. The authorization provi-
Counsel further asserted that the union's retention of post-resignation dues constituted an illegal restriction on an employee's right to resign union membership. Such restriction, he insisted, "impairs the [Act's] policy of voluntary unionism," as explicated by the Supreme Court in Pattern Makers. Arguing in the alternative, the General Counsel reasoned that even if membership resignation did not automatically revoke checkoff authorization, resignation still effectively reduced the amount of union dues the employee owed to nothing.

The Board concurred with the General Counsel that the Union violated Section 8(b)(1)(A) of the Taft-Hartley Act by refusing to accept the resignation and by continuing to retain checked-off membership dues. Nevertheless, the Board rejected the General Counsel's arguments and relied on its own analysis of the implications of Board precedent, statutory language, and policies. The Board initiated its discussion of Board precedent by framing the issue in terms of whether a union may seek continuation of dues checkoff when a member resigns prior to the revocation period in cases where the underlying contract does not contain a union security provision. The Board proceeded to discuss the case of Shen-Mar Food Products, which similarly involved untimely revocation of checkoff in a non-union security context. In Shen-Mar, the employer argued that compelling continuation of checkoff of dues for employees who had resigned union membership was equivalent to enforcing a union-security device. The case arose in Virginia, a right-to-work state, where union-security clauses are deemed illegal, as permitted by Section 14(b) of the Taft-Hartley Act. The employer reasoned that continued checkoff of the resignee's dues conflicted with Section 14(b)'s allowance

123. Id. (citing International Ass'n of Machinists & Aerospace Workers, Local 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. 1330 (1984)).
124. Id.
125. Id. at 323 & n.5.
126. Id. at 330.
127. Id. at 323-27.
128. Id. at 323. The Board framed the issue:

This case presents the question whether a union, without reliance on any valid union-security clause, may seek to require the continued checkoff of union "membership dues" from the wages of an employee who signed a dues-checkoff authorization that is irrevocable for 1 year or the expiration of the current collective-bargaining agreement, whichever is sooner, but who resigned from membership before the end of that period of irrevocability.

Id.

129. Shen-Mar Food Prods., Inc., 221 N.L.R.B. 1329, 1329-34 (1976), enforced as modified, 557 F.2d 396 (4th Cir. 1977).
of Virginia's prohibition of union-security clauses. The Board held that dues checkoff authorizations were exclusively a matter of federal law and, by virtue of federal preemption, not within the purview of Section 14(b). Furthermore, the Board explained that such authorizations could not properly be viewed as union security devices because they did not “impose union membership or support as a condition required for continued employment.”

The Lockheed Board then examined the cases that provided the genesis of Eagle Signal's quid pro quo approach: Campbell Industries, Frito-Lay, and Eagle Signal. The Board emphasized the fact that wording such as “membership dues,” directly linking dues with membership, was “critical” to the outcome of those cases. Note was taken that Shen-Mar was neither discussed nor overruled, even sub-silentio, by the reasoning of those cases. The Board concluded that the language in the signed checkoff authorization impacts whether resigning employees are exonerated from restrictions on revocation. Furthermore, since Shen-Mar remains good law, requiring a resignee to honor her commitment to a dues checkoff authorization is not a per se illegal compulsion of union membership.

The next portion of the Lockheed analysis examined the pertinent statutory provisions and policies of the Taft-Hartley Act. The Board found the language and legislative history of Section 302(c)(4) ambiguous in

130. Id.
131. Id. at 1330.
132. Id.
133. Lockheed, 302 N.L.R.B. at 324.
134. Id.
135. Id.
136. Id.
137. Id.
138. Section 302(c)(4) permits an employer to deduct union membership dues from employees' wages and remit those funds to their exclusive bargaining representative, "[p]rovided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." 29 U.S.C. § 186(c)(4) (1988).

The Lockheed Board found:

The problem is that the express language of the proviso of paragraph (4) does not hinge the irrevocability of authorization on an employee's continued status as a union member, but rather keys it exclusively to time-sensitive criteria—a period of up to 1 year or the expiration of the collective-bargaining agreement, whichever occurred first.

Lockheed, 302 N.L.R.B. at 325 (emphasis added). Therefore, the proviso could be read as "granting authority to unions and employers to enter into checkoff agreements that provide, once employee consent has been given, for limited periods of irrevocability without regard to an employee's maintaining membership status." Id. Buried in a footnote, the
terms of guidance regarding the effect of resignation on continuance of the checkoff obligation. The main portion of Section 302(c)(4) lends credence to the interpretation that dues checkoff is merely a payment mechanism for discharging a preexisting dues obligation imposed by dint of union membership. The language of Section 302(c)(4), however, does not expressly condition checkoff duration on the employee's status as a union member. Rather, checkoff duration is linked to a specific time period, i.e., one year or the expiration date of the collective bargaining agreement. By keying duration to time-sensitive criteria, Section 302(c)(4) ostensibly would permit dues checkoff authorization to survive resignation. Amplification of the statute by resort to legislative history failed to resolve the issue to the Board's satisfaction. Concluding that "at best, Congress seems to have simply stayed its hand from deciding whether in all instances checkoff authorization must ultimately be a function of union membership," the Board resorted to the "more general policies" of the Taft-Hartley Act and relevant contract law principles to resolve the dilemma.

The Board refined the relationship between contract and checkoff by categorizing checkoff agreements within the subset of contracts known as assignments. Specifically, a checkoff authorization constitutes a partial...
assignment of a future right. The employee (assignor) assigns to the union (assignee) a percentage of wages that the employee has a right to receive from the employer (the obligor) in the future as long as he remains employed. The assignment may be conditional on union membership, in which case absence or disappearance of the condition may destroy the assignee union’s right to receive checked-off dues.

Whether the condition is extinguished, either through the union’s expulsion of the member or the employee’s resignation, depends on the language of the checkoff agreement. Interpretation of the effect of the language of the agreement on the existence of the condition requires an understanding of the subtle interplay between the statutory policy requiring “clear and unmistakable” waiver of rights guaranteed by Section 7 of the Taft-Hartley Act and the wording of Section 302(c)(4) of the Taft-Hartley Act.

Language stating that the dues checkoff authorization is irrevocable will be construed as pertaining only to the method of payment conditional on the employee’s membership, and thus be insufficient to preserve a union’s right to receive assigned dues following resignation or expulsion of the employee. However, where additional language in the authorization expressly acknowledges an obligation to pay dues even in the absence of membership, the employee will be bound to her agreement to continue checkoff post-resignation.

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148. Id.
149. Id.
150. Id. (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 320, 331 (1981)).
151. The condition will automatically disappear and the dues authorization expire unless the employee explicitly waives the right to refrain from assisting the union.
152. Id. at 327 & n.18.
153. Id. at 328-29. The Board explained:

Accordingly, we will construe language relating to a checkoff authorization’s irrevocability—i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization’s execution or on the expiration of the existing collective-bargaining agreement—as pertaining only to the method by which dues payments will be made so long as dues payments are properly owing. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis.

154. Lockheed, 302 N.L.R.B. at 329. The Board stated that “[e]xPLICIT language within the checkoff authorization clearly setting forth an obligation to pay dues even in the ab-
Applying its newly enunciated rubric to the facts of *Lockheed*, the Board concluded that a union member such as the employee in *Lockheed* who promised to pay "regular membership dues" by checkoff has not obligated himself to continue paying dues after resignation (by checkoff or otherwise). Such language does not indicate that the employee clearly assented to dues deduction even after submitting his "membership" resignation. Although the "time specification" of the checkoff authorization is clear, it is not clear whether someone who ceases to be a union member has unmistakably assented to continue paying "regular membership dues." In sum, the Board deemed the phrase "regular membership dues" insufficient to constitute "clear and unmistakable" waiver.

D. Significance of the Clear and Unmistakable Waiver Test

The Board's opinion in *Lockheed* is significant because it identifies the dual function of dues checkoff authorization as a method of payment and a potential independent source of dues-paying obligation, where additional language in the authorization explicitly establishes an obligation to furnish dues even in the absence of union membership. *Lockheed*'s focus on the language of the authorization superficially resembles the *Eagle Signal* approach. *Lockheed*, however, examined the authorization's wording to assess whether the Section 7 right to refrain from assisting a

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155. *Id.*
156. *Id.*
157. *Id.* at 330.
158. *Id.*
159. *Id.* at 329 & n.27. The *Lockheed* Board acknowledged this similarity:

Although our rule may often produce the same result with respect to authorizations referring to "membership dues" as would be the case under the *Eagle Signal* doctrine, we are not simply applying that test under another label. As we read the court precedent, the courts were critical of the *Eagle Signal* analysis mainly because it rested on the unsupported assertion that the "language" and the "legal import" of authorizations referring to payment of union membership dues "could not be clearer," i.e., that such authorizations clearly constituted agreements in which the benefits of union membership were the "quid pro quo" for the payment of dues and were revoked by operation of law upon revocation. We now acknowledge that the language is not clear as a matter of contract law. Indeed, as explained above, that is the problem. Acknowledging the ambiguity, we now construe the authorization in the light of the statutory policies that we have identified as relevant.

*Id.* (citations omitted).
union monetarily had been expressly waived, rather than quibbling over the nature of consideration.\textsuperscript{160}

The \textit{Lockheed} opinion establishes that the intersection of statutory policies and contract principles will determine when, if ever, the right not to support a union financially may be waived.\textsuperscript{161} The point of intersection is "clear and unmistakable" waiver. The Board stated that its new approach is designed to promote the twin goals of predictability and employee awareness of assumed obligations.\textsuperscript{162} Implicitly, the Board endorsed "freedom of contract" as the criterion for determining waivability of rights.\textsuperscript{163}

\textit{Lockheed}'s emphasis on voluntary unionism and contract principles provides a rudimentary framework of analysis for determining the waivability of other statutory rights.\textsuperscript{164} The Board focused on voluntary unionism in the context of identifying the nature of the right arguably infringed on by the continuation of dues checkoff subsequent to resigna-

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} See \textit{id.} at 329.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} A persistent question arises from the Board's endorsement of freedom of contract in this context: what subtle relationship exists between freedom of contract for the employee with respect to the union and the concept of individual labor liberty as juxtaposed against employer power?

One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom . . . is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.


Professor Pope has described the Supreme Court's nonprotectionist stance towards labor protest as a labor "black hole" in the Constitution. The origins of the "black hole" are traceable to the popular \textit{Lochner} idea that "labor is a commodity and labor liberty consists solely of an individual's right to sell her labor commodity." Pope, \textit{supra} note 53, at 1073. According to Pope, the modern trend is for courts to shy away from endorsing an "affirmative vision of individual labor liberty." \textit{Id.} at 1078. Market regulation and interest balancing are left to the legislative branch. Nevertheless, constitutional jurisprudence persists in treating workers as commodity sellers. "In the name of avoiding one feature of Lochnerism—judicial enforcement of economic rights—the courts have embraced another—the reduction of labor liberty to the status of an individual's right to sell labor power." \textit{Id.} The \textit{Lockheed} decision injects an increasing measure of voluntarism into the relationship between the union and the member.

\textsuperscript{164} Robert Brousseau, \textit{Toward a Theory of Rights for the Employment Relation}, 56 \textit{WASH. L. REV.} 1, 10 (1980). Without a principled means of determining which rights are waivable and when "the meaning of rights within the employment relation becomes obscure and the duties correlative equally so[,]" we run "the risk of cheapening whatever social and economic values those rights assume, the values they should assure and preserve." \textit{Id.}
In contrast, the Board examined contract principles—waiver and assignments—to determine the manner by which rights may be waived. The Board's rationale in *Lockheed* implies that assessing the waivability of a right entails a two-step process. One must: (1) identify the nature/source of the right being waived and the statutory policy or value being upheld by that right; and (2) invoke contract principles to assure that the manner by which the right is waived is consistent with the statutory policies and provisions implicated by waiver. Before analyzing the bifurcated *Lockheed* rationale to assess waivability of *Beck* and resignation rights, this Comment will first present examples drawn from Board checkoff precedent to demonstrate what language constitutes clear and unmistakable waiver.

### E. Clear and Unmistakable Waiver Exemplified

The Board first found that dues checkoff authorization survived resignation under *Lockheed's* "clear and unmistakable" waiver approach in *United Steelworkers Local 4671 (National Oil Well, Inc.).* In *National Oil Well*, the union member executed a typical checkoff authorization covering "monthly dues, assessments and . . . an initiation fee." The authorization restricted its revocability, as permitted by Section 302(c)(4) of the Taft-Hartley Act. Were such limitations the extent of the irrevocability language, the authorization would not have survived the mem-

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166. Id.
167. Brousseau utilized a similar approach in his endeavor to determine which statutory rights may be waived by the union on the individual's behalf. Brousseau concluded that the distinction between the nonwaivability of the "modest" right to handbill at the workplace, *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), and the waivability of the "elemental" right to strike, *Mastro Plastics Corp.*, 350 U.S. 270 (1956), ensues from the disparate nature of the rights at issue. Brousseau, *supra* note 164, at 5, 12. According to Brousseau, "collective rights" are those rights necessary to restoring economic equilibrium with the employer. The union may waive collective rights because those rights are vested by labor statutes in the collective as a unit. *Id.* at 5. "Participatory rights" are the democratic rights of participation in the formation, administration and dissolution of the collective assured by Section 7 of the NLRA. By definition, participatory rights inhere in the individual. As participatory rights are one of the counterbalances to a system of majority rule, they may only be waived by the individual. *Id.*
168. 302 N.L.R.B. 367, 368 (1991). "Applying the analysis of *Lockheed* to the facts in this case, we find that the Respondent has shown that the dues-checkoff authorization signed by the [employee] obligated him to pay dues after his effective resignation from membership in Local 4671." *Id.*
169. *Id.* at 367 n.2.
170. *Id.* The authorization provided: "This assignment and authorization shall be effective and cannot be canceled for a period of one (1) year from such date appearing above or until the termination date of the current collective bargaining agreement between the Company and the Union, whichever occurs sooner." *Id.*
ber's resignation. The authorization would have been deemed a partial assignment of wages conditioned on union membership.

The checkoff authorization, however, further provided for the continuation of checkoff "irrespective of my membership status in the union." The Board determined that the presence of this clause resulted in the resignee's clear and unmistakable waiver of his right not to support the union after resignation. The Board concluded that the resignee "clearly authorized the continuation of his dues deduction even in the absence of union membership." Consequently, the continued enforcement by the employer and the union of the checkoff authorization subsequent to resignation was not considered an unfair labor practice. Since the parties in National Oil Well had not negotiated a union security clause, the checkoff authorization constituted an independent source of the post-resignation dues obligation.

Similarly, in American Telegraph & Telephone Co., the Board exonerated the employer for deducting, and the union for receiving and retaining, membership dues from the wages of an employee pursuant to checkoff authorization after she had effectively resigned union membership. The checkoff authorization signed by the resignee prior to resignation provided: "This authorization is voluntarily made and is neither conditioned on my present or future membership in the Union, nor is it to be considered as the quid pro quo for membership." The Board deemed such language sufficiently explicit to establish an obligation to pay dues even in the absence of union membership.

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172. See id.
173. National Oil Well, 302 N.L.R.B. at 367 n.2. This provision of the checkoff form stated:

Pursuant to this authorization and assignment, please deduct from my pay each month, while I am in employment with the collective bargaining unit in the Company, and irrespective of my membership status in the Union, monthly dues, assessments and (if owing by me) an initiation fee each as designated by the International Treasurer of the Union.

Id. (emphasis added).
174. Id. at 368.
175. Id.
176. Id.
177. Id. at 368 n.9. "In Lockheed, the Board left open the question of how its waiver rule would apply in the context of a lawful union-security provision. In the absence of a union-security clause requiring union membership here, the Lockheed test is applicable to this case." Id.
179. Id. at 945.
180. Id. at 944 n.3.
181. Id. at 945. The Board stated:
II. WAIVER OF BECK RIGHTS

The Board's decisions left unresolved the extent of the dues obligation arising from clear and unmistakable waiver of the right to revoke dues checkoff authorization. Under these decisions, is the union resignee obligated to pay full dues or may she become a dues objector and obtain a rebate of dues not germane to the negotiation and administration of the collective bargaining agreement? Answering this question requires an understanding of the Supreme Court's decision in Communication Workers v. Beck and the distinction between union security and checkoff authorization as sources of dues-paying obligations.\(^{182}\)

A. Union Security

The right to become a dues objector emanates from the compulsion to pay dues imposed by a union security agreement as permitted under Section 8(a)(3) of the Taft-Hartley Act. In Lockheed and National Oil Well, the parties had not negotiated union security agreements.\(^{183}\) When, as in National Oil Well, a post-resignation dues obligation arose, no corresponding Beck right arose; the sole source of obligation was the checkoff authorization.\(^{184}\) Lockheed and National Oil Well therefore left open the question of the effect of the Board's reasoning in these cases on the waivability of Beck rights.\(^{185}\)

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\(^{182}\) In Lockheed, the Board left open the question of how its waiver rule would apply in the context of a lawful union-security provision. Notwithstanding the inclusion of an agency-shop clause in the collective-bargaining agreement, we note that the sole basis cited by the Respondent Union for continuing to extract membership dues after an attempt to resign was the checkoff authorization itself. See supra note 22.

\(^{183}\) Lockheed, 302 N.L.R.B. at 322 n.3; National Oil Well, 302 N.L.R.B. at 367, 368 n.9 (1991).

\(^{184}\) National Oil Well, 302 N.L.R.B. at 368 ("Applying the analysis of Lockheed to the facts in this case, we find that the Respondent has shown that the dues checkoff authorization signed by the Charging Party obligated him to pay dues after his effective resignation from membership in [the union].").

\(^{185}\) As indicated by clear and unmistakable waiver.
B. Financial Core Employee Rights

The right to become a financial core employee arises when a collective bargaining agreement contains a union security provision. When a collective bargaining agreement contains a union security clause and an employee under the agreement executes a dues checkoff authorization of the type held to survive resignation, the right to become a financial core employee becomes thornier. *Lockheed* left unsettled how its waiver test would operate when a collective bargaining agreement includes a valid union security provision.186 Where a union security clause is in effect, it is uncertain whether the checkoff authorization still functions as an assignment of wages independent of the union security clause, or whether it reverts to its dependent status as the mere perfunctory dictator of the method of payment of financial obligations imposed by the union security clause. The Board's opinion in *Penn Cork & Closures, Inc.*187 implies that it is possible for checkoff authorization to operate independently from a union security clause.188 Not surprisingly, the circumstance under which checkoff functions separately from union-security echoes the underlying rationale of *Lockheed*'s clear and unmistakable waiver test: knowing assumption of an obligation.189

In *Penn Cork*, the employees signed checkoff authorizations while a union security agreement was in effect.190 Subsequently, the employees voted to deauthorize the union,191 rescinding the union's authority to act as their official bargaining representative. Once the deauthorization was certified by the Regional Director of the Board, immediate suspension of the union-shop provision went into effect.192 Employees, liberated from the strictures of union security, availed themselves of the opportunity to

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186. *National Oil Well*, 302 N.L.R.B. at 368 n.9; see also supra note 177.
188. *Id.* at 414.
189. *Id.*
190. *Id.* at 413.
191. *Id.* The Board stated:

Section 9(e)(1) of the Act provides for such petition, as follows: Upon filing with the Board, by 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such a unit and certify the results thereof to such labor organization and to the employer.

*Id.* at 413 n.9.
192. *Id.* at 414 (citing Monsanto Chem. Co., 147 N.L.R.B. 49 (1964)).
resign from membership. The issue for the Penn Cork Board’s resolution was whether those resigenees could then revoke their previously executed checkoff authorizations, even though such revocation would be untimely according to the provisions of their authorizations.

The Board held that the authorizations could be revoked because, when executed, the employees were aware of the existence of a union-security clause and could not reasonably have foreseen the likelihood that a deauthorization would occur, union security terminate, and yet a dues obligation continue. The nuances of the Board’s wording, “on the facts before us we cannot agree that the exercise of this option by employees is in all circumstances independent of the impact of union security,” implies that in some cases, checkoff could be independent. The corollary of the Board’s inference that the Penn Cork employees would not have expected authorization to continue post-resignation is that, where employees are alerted to the potential for continued checkoff post-resignation, checkoff could thus survive the extinguishment of union security. It is the initial employee awareness of incurrence of a future obligation via checkoff at a time when a concomitant union security provision is in effect that imbues checkoff authorization with the authority to extend the obligation after termination of union security. Therefore, when employees are “clearly and unmistakably” aware of the ramifications of voluntary assumption of a checkoff obligation from the outset, the checkoff authorization is independent of union security. As a result, checkoff may still function as an independent assignment of wages in the union security context.

The conclusion that checkoff authorization may function as a distinct source of dues-paying obligation even in the union security context

193. Id. "Many employees took the opportunity to resign from membership, as they were entitled to do under Section 7 of the Act, thus exercising their statutory right as individuals to refrain from union activity in the absence of a union-shop provision." Id.

194. Id. at 413-14.

195. Id. at 414. The Board observed:

Here the Respondent [employer] and the Union had agreed to a contract containing both union-security and checkoff provisions. The contract not only required the employees to be union members but offered them the convenience of paying membership dues effortlessly through wage deductions which the Employer agreed to make. When executing these checkoff authorizations, the employees can hardly have been unmindful of the fact that they had to pay union dues.

196. Id.

197. Lockheed, 302 N.L.R.B. 322, 328 (1991). In Penn Cork, the Union contended that "the right to discontinue union membership is not the right to revoke outstanding checkoff authorization inasmuch as signing a checkoff authorization is optional with employees and not dependent upon the existence of union security." Penn Cork, 156 N.L.R.B. at 414.
means that the Lockheed rationale may be applied to assess waiver of dues-paying obligations where union security is in effect. If the employee may, via checkoff, waive the statutory right not to pay any dues to the union when no union security agreement exists, may the employee laboring under a union security contract also waive her right not to pay the portion of dues directly related to contract negotiation? The answer to the proposed question depends on when, if ever, the right to become a dues objector may be relinquished by clear and unmistakable waiver. Since the waivability of the right to become a financial core employee (Beck rights) is a function of the nature of the right and the manner in which it is waived, the nature of Beck rights and the viability of dues authorization as a method of waiver must be explored.

1. The Nature of Beck Rights

Beck rights originated from a clash between the values of free speech and association embedded in the Constitution and federal labor statutes and the societal commitment to a powerful and independent trade union movement. Some employees complained that mandatory payment of dues was tantamount to coerced support of political and ideological movements antithetical to their own beliefs and thus an abridgement of their First Amendment rights to free speech and association. In 198.

198. See Hartley, supra note 12, at 24. Professor Hartley stated, "I suspect the answer to this question will turn on when, if at all, may the right to become a dues objector, guaranteed by Communications Workers v. Beck, be lost by clear and unequivocal waiver?" Id.

199. See supra notes 111-67 and accompanying text.

200. See Summers, supra note 61, at 697. "National labor policy, as articulated by Congress, was rooted in the first amendment right of freedom of association." Id.; see also Friesen, supra note 2, at 619 ("The first amendment-based inquiry into actual ideological affront has been abandoned. The net result is that first amendment concerns have propelled the Court beyond what the Constitution requires."); James G. Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a 'black hole' beneath the ladder.").

201. Since passage of the Wagner Act in 1935, the encouragement of labor collectivization has been an express national policy:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 29 U.S.C. § 151 (1988) (emphasis added).

202. See supra note 32. Opponents of union security agreements also argued that unions should survive or falter on their own merits, like businesses; that union security agree-
Waiver of Beck Rights

Railway Employees Department v. Hanson, the United States Supreme Court declared that union security provisions do not violate protesting employees’ freedom of speech and association rights or their Fifth Amendment right to “liberty” of employment. Any infringement of First Amendment rights was overcome by the government’s compelling interest in promoting collective bargaining and its exalted goal—industrial peace. The Court expressly reserved the question whether imposition of dues “as a cover for forcing ideological conformity or other action” could abridge employees’ First Amendment rights. In International Ass’n of Machinists v. Street, the Court faced this question in the context of a constitutional challenge to union political expenditures where an agency shop agreement had been negotiated pursuant to Section 2 Eleventh of the Railway Labor Act (RLA). The Court avoided rendering a decision on constitutional grounds, interpreting Section 2 Eleventh to permit exaction of dues from dissenting employees for collective bargaining purposes, but not for political or other purposes.

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks refined the Court’s Street opinion, interpreting Section 2 Eleventh to allow the compulsion of dues only for expenses “necessarily or reasonably” related to the union’s discharge of its collective bargaining duties under the Act.

In Abood v. Detroit Board of Education, the Supreme Court confronted the constitutional issue it had expressly avoided in Hanson and


204. Id. at 238. The Court stated that “the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments.” Id.

205. Id. at 235; see also Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977) (finding that any putative infringement on First Amendment rights of employees “is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress”). Moreover, trade unions were found to support the liberty to work, rather than denigrate it. Railway Employees, 351 U.S. at 235.

206. Railway Employees, 351 U.S. at 238.


208. Id. at 743-44.

209. Id. at 749-50.


211. Id. at 448.

Street. In *Abood* the Court held that agency shop agreements infringe upon a dissenter's First Amendment rights.²¹³ The majority deemed such infringement tolerable where compelled dues are expended on collective bargaining activities because of the state's interest in promoting the practice and procedure of collective bargaining.²¹⁴ Political activities, however, were found to constitute an impermissible invasion of a dissenter's First Amendment rights.²¹⁵

In *Communication Workers v. Beck*,²¹⁶ the Supreme Court first addressed whether Section 8(a)(3) of the NLRA permitted a union and employer to negotiate and enforce an agency shop agreement, and, if so, whether such agreements abrogated the First Amendment rights of dissenting employees.²¹⁷ The Court found that Congress's sole purpose in allowing union security agreements pursuant to Section 8(a)(3) was to ensure that workers who shared the benefits of collective bargaining concomitantly shared the costs of such bargaining.²¹⁸ Consonant with its interpretation of congressional intent, the Court concluded that the union may only compel dissenting employees (dues objectors) to fund those activities directly related to collective bargaining.²¹⁹

²¹³. In *Abood*, the Supreme Court did not require that the government interest be "compelling," a relaxation of standards that incurred Justice Powell's criticism: "Before today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. The Court, for the first time in a First Amendment case, simply reverses this principle." *Id.* at 263 (Powell, J., concurring) (citations omitted).

²¹⁴. *Id.* at 225-26.

²¹⁵. *Id.* at 235-36.


²¹⁷. *Id.* at 738. The Court stated:

Today we must decide whether this provision [Section 8(a)(3)] also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

*Id.*

²¹⁸. *Id.* at 749-50. The Court noted that "'Congress' decision to allow union-security agreements at all reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.'" *Id.* at 750 (alteration and emphasis in original) (quoting *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976)).

²¹⁹. *Id.* at 745. "The statutory question presented in this case, then, is whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not." *Id.* The Court further stated:

We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to "perform-
Although the opinion was couched in terms of statutory interpretation, constitutional values strongly influenced the outcome in *Beck*. The decision actually rests upon the theory that use of compelled dues to promote causes contrary to the dues payor's beliefs offends notions of free speech and association. The Court essentially equated forced subsidization of union expression with government-compelled affirmation of belief, which constitutes a classic First Amendment violation.

Having isolated the importance of First Amendment, free association values to the nature of *Beck* rights, further refining whether the *Beck* decision explicitly relied on the First Amendment in its decision becomes superfluous. The Taft-Hartley Act, like other labor statutes, incorporating the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”

Id. at 762 (quoting Ellis v. Brotherhood of R.R., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984)).

220. The opinion has been heavily criticized by commentators for its reliance on Section 2, Eleventh of the RLA and the legislative history of the RLA, which was drafted four years after the NLRA. See, e.g., Dau-Schmidt, supra note 37, at 53-54, 72-73 (arguing that the Court failed to analyze the words, administrative interpretations, and legislative history of the Taft-Hartley Act which would not limit exaction of dues simply to collective bargaining purposes).

221. *Hartley*, *supra* note 30, at 82-85. Professor Hartley maintains that “constitutional values, and not the label ‘germane to collective bargaining,’ determine which union activities are chargeable to objectors in both the public sector and the RLA dues objector cases.” *Id.* at 82.

222. *See Friesen*, *supra* note 2, at 608.

223. This equation has come under heavy critical fire. *See, e.g., Cloke, supra note 32*, at 582 (“Requiring an individual to contribute to a union which spends a portion of the contribution on political causes does not constitute a compulsion to believe in, express support for, or espouse ideas the money finances.”); *Shiffrin, supra* note 32, at 590-91 (stating that “compulsory support of union political activities does not compel [objectors] to believe anything or to express anything, nor does it prohibit them from believing or expressing anything”); *see also* Harry H. Wellington, *The Constitution, The Labor Union, and “Governmental Action,”* 70 Yale L.J. 345 (1961). For an insightful look into the relationship between expenditure of dues and the capacity to engage in expressive activity, see Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 3, 27-28 (1983).

224. Much has been written concerning the interrelationship between the state action doctrine and the Supreme Court decisions concerning dues rebate for public sector employees, those employees covered by the RLA, and those employees affected by the Taft-Hartley Act. *See, e.g.,* Dau-Schmidt, *supra* note 37; R.J. Staaf & E.G. West, *Paying for Compulsory Union Services: The Entanglement Consequences of Agency Shops in the Public Sector*, 17 Wake Forest L. Rev. 359, 361 (1981) (using economic and public choice analysis to examine the public/private issue). Recall that invoking the First Amendment and most other constitutional protections requires state action. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972). A thesis of this Comment, however, is that the state action question can be avoided entirely because Congress, in drafting the Taft-Hartley Act, injected First Amendment values into the provisions of the Act. *See Summers, supra* note 61, at 687. In a much earlier article that concentrated on appropriate legal means for moderating unions’ power, Professor Wellington described how “[r]anging wide through society
rates constitutional values into the provisions of the Act.225 Beck rights were created to protect employees' right to freedom of association,226 which is not a per se unwaivable right.227 Accordingly, the assessment of

and deep into the Constitution, commentators have suggested that all or most 'powerful' private groups should be subject to all or most provisions of the Constitution." Wellington, supra note 223, at 346 (citing Arthur S. Miller, The Constitutional Law of the "Security State," 10 Stan. L. Rev. 620, 655-56 (1958)). Professor Wellington acknowledged that the Bill of Rights and the Fourteenth Amendment are "great instruments" for protecting people from government tyranny and unions have characteristics in common with the government. Id. at 348. Wellington grudgingly recognized the "aesthetic and emotional appeal" of the view that because unions are similar to government and the Constitution protects the individual from government encroachment, the Constitution should be invoked to protect individuals from unions. Id. Conceding that regulation of unions is desirable, he nonetheless cautioned that "it need not be assumed a priori that the Constitution is the proper regulatory instrument. Other, more appropriate, means may be available to accomplish the same desirable ends." Id. Twenty-five years later, Professor Summers pointed out that Congress had already provided those means by incorporating constitutional values into the labor statute. Summers, supra note 61, at 697. Professor Summers argued eloquently for the proposition that where the Supreme Court is prohibited from resorting to constitutional safeguards if a controversy lacks state action, the legislature is responsible for providing requisite protection equivalent to constitutional rights. Id. at 695. In his estimation, "constitutional values are not cabined in the confines of state action and the limited competence of the Court to mandate constitutional rights. Other institutions of government have equal, indeed greater, responsibility for protecting and promoting constitutional values, and every legal process should be permeated and informed by those values." Id. Noting the blurred distinction between state and private action, Summers declares that "[w]hen we privatize control over people's lives we must protect constitutional values against private control. We must privatize personal freedom." Id. at 691.

225. Summers, supra note 61, at 696-702. Professor Summers examined Congress's incorporation of the right of freedom of association into the Norris-La Guardia Act of 1932, the Wagner Act of 1935, and the Landrum-Griffin Act of 1959, commenting that "[n]ational labor policy, as articulated by Congress, was rooted in the first amendment right of freedom of association." Id. at 697. 226. See discussion supra notes 86-252 and accompanying text. 227. The enduring enigma of unionization is that it endeavors to protect the interests of the individual worker through means of collectivization. Legislators, cognizant of the danger of substituting the tyranny of the employer for that of the majority union, crafted labor statutes concomitantly to promote the power of the collective while protecting the autonomy of the individual employee. Accordingly, rights that have been found to constitute collective rights cannot be individually waived because they inhere in the collective and not the individual. One example of such right is discriminatory discharge pursuant to Title VII of the Civil Rights Act of 1964. The employee's case may be taken to arbitration regardless of whether the employee wants to press the issue because of the importance to all other employees that the work environment be devoid of discrimination. By contrast, other rights deemed to inhere in the individual cannot be waived by the collective union. NLRB v. Magnavox Co., 415 U.S. 322 (1974) (finding that Section 7 rights, unlike economic rights, cannot be waived by the collective bargaining agent of the employee). Since the right of freedom of association evolved to protect the individual from the forces of government (via the First Amendment) or government-like institutions (via Sections 7 and 8(a)(3) of the Taft-Hartley Act), the right "belongs" to the individual. Therefore, it may be individually waived.
waivability of Beck rights demands sensitivity to the manner of waiver, ensuring that employees' freedom of association is not violated.\(^{228}\)

2. **Manner of Waiver of Beck Rights**

While Beck rights exist to uphold the value of free association that may be compromised by the forced compulsion of dues, Beck rights can be waived so long as waiver does not violate the right to free association. The distinguishing feature of checkoff authorization as a source of dues paying obligation, in contrast to union security, is that each checkoff authorization must be individually executed.\(^{229}\) Therefore, even though the employer and the union may agree to a dues checkoff clause in a collective bargaining agreement, each employee is to decide whether or not to execute a checkoff authorization. An employee may be required to pay dues under union security but decline to agree to dues checkoff authorization and/or decline to agree to waiver of the revocability of the authorization. In this manner, dues checkoff authorization and the waiver of its revocability injects an element of voluntarism into the union security arrangement.

If compelling an employee to pay money to support ideological causes is deemed improper because it would be the equivalent of coercing ideological beliefs, then if the employee voluntarily and knowingly agrees to pay money to support certain causes she objects to, it cannot be argued that the payment constitutes coercion any particular belief.\(^{230}\)

\(^{228}\) This Comment proposes the use of individual contracts as the means of waiver. However, questions arise as to the distinction between this scenario and that of "yellow dog" contracts which flourished during the last century. Yellow dog contracts were contracts, individually executed by the employee, promising not to join a union as a condition of obtaining and maintaining employment. BARTOSIC & HARTLEY, supra note 7, at 9-11. Congress expressly prohibited yellow dog contracts in Section 3 of the Norris-LaGuardia Act of 1932. 29 U.S.C. § 103 (1988). Proposed waivers of Beck rights differ from yellow dog contracts because such waivers are not prerequisite to obtaining and maintaining employment. As voluntary executions, agreements to waive Beck rights are expressions of the right of free association. Moreover, since waivers would permit the union to expend dues on political and other activities, such agreements improve the union's ability to perform its function as an employee representative. Ultimately the congressional policy of promoting collective bargaining would be enhanced.


\(^{230}\) Recent Supreme Court decisions excluding voluntary members from the class of employees who may become dues objectors support the emphasis on voluntariness as the crucial element enabling waiver of Beck rights. See Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) (stating that it is the nonunion employee whose First Amendment rights are affected by political spending, although no full union members joined the suit). Judge Murnaghan of the United States Court of Appeals for the Fourth Circuit, who cast the deciding vote to find union liability in Beck v. Communications Workers, 800 F.2d 1280 (4th Cir. 1986), aff'd, 487 U.S. 735 (1988), carefully limited his rationale to the nonunion, involuntary fee payor. Id. at 1287 & n.10. Justice Brennan's
rights were created to counteract the element of coercion in union security.\textsuperscript{231} Since under a dual union security and dues checkoff arrangement dues checkoff is voluntary, the act of voluntarily agreeing to pay money pursuant to dues checkoff should negate the element of coercion that \textit{Beck} rights guard against.\textsuperscript{232} Therefore, if an employee were clearly and unmistakably to waive her right to revoke a dues checkoff authorization of the \textit{National Oil Well} form, i.e., the type of authorization which the Board has found gives rise to a continuing dues obligation post-resignation,\textsuperscript{233} that waiver could also function as a waiver of his \textit{Beck} rights.

3. \textbf{Comment: Notice of Special Considerations}

Having determined that \textit{Beck} rights may be waived, it is necessary to incorporate the fairness and contract concerns implied by \textit{Lockheed}'s clear and unmistakable waiver test. Most prominent among the additional conditions for waiver of \textit{Beck} rights are provision of notice and consideration.

\textit{a. Notice}

When an employee is bound by a union security agreement and afforded the option of waiving the post-resignation right to revoke checkoff authorization, notice is a threshold impediment to finding the checkoff authorization a voluntarily assumed partial wage assignment. Pursuant to \textit{Lockheed}'s rational, dues checkoff authorization may operate both as an

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Scholars also tend to support the view that regular, voluntary union members are prohibited from asserting \textit{Beck} rights. \textit{See} \textit{Lawrence Tribe, American Constitutional Law} § 12-4, at 805 n.5 (2d ed. 1988) ("Presumably, membership being voluntary, members were deemed to have consented to the expenditure."); Friesen, \textit{supra} note 2, at 620 n.57 ("As a common sense matter, a full member's rights against the union might be governed only by contract law, in addition to whatever union rules the membership has approved. Thus, the fee speech rules are commonly assumed to apply only in favor of nonmembers or 'financial core' members.").

231. \textit{See} discussion \textit{supra} notes 26-38 and accompanying text.

232. \textit{See} Sales, Serv., & Allied Workers' Union, Local No. 80 (Capitol-Husting Co.), 235 N.L.R.B. 1264 (1978). The contract involved in \textit{Capitol-Husting} contained both a union security clause and a checkoff provision allowing checkoff of membership dues and nonmember service fees (i.e., financial core employee dues). An employee resigned from the union and attempted to effectuate revocation of his checkoff authorization outside the permissible escape periods. The Board held that revocation was ineffective but the union was only entitled to receive checkoff of nonmember service fees. \textit{Id.} at 1264-65.

233. For a discussion of the \textit{National Oil Well} case, \textit{see} \textit{supra} notes 161-70 and accompanying text. To access the language of the agreement form verbatim, \textit{see} \textit{supra} note 166.
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independent source of payment obligation and as a method of payment.\textsuperscript{234} Absent clear and unmistakable language to the contrary, the authorization will be construed as merely a method of payment and not a source of dues obligation.\textsuperscript{235} Accordingly, the employee executing a waiver of the right to revoke dues checkoff authorization would reasonably infer that she had only agreed to a checkoff of those dues required by union security.\textsuperscript{236} Since Beck rights ordinarily arise under union security, the employee would not be alert to the possibility that she has clearly and unmistakably waived her Beck rights. Fairness demands that the employee be apprised of the ramifications of her signature.

By analogy to the Board’s remedy in unfair labor practice determinations, the mere posting of a notice in a conspicuous location in the workplace where all the employees would be likely to observe it, such as on the employee and/or member bulletin boards, might be sufficient.\textsuperscript{237} However, it seems that something more should be required to constitute proper notice where the issue is notification of a right for the purpose of clear and unmistakable waiver as opposed to notification of the bare existence of the right.\textsuperscript{238} Proper notice under the circumstances could entail conspicuous language on the authorization form itself (in English and other pertinent languages) explaining the significance of the waiver language.\textsuperscript{239} Since the waiver issue is complex, it might also be advisable

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\item[234.] See supra notes 19-43 and accompanying text.
\item[235.] See supra note 20 and accompanying text.
\item[236.] The Second Circuit’s opinion in \textit{Penn Cork} supports the normalcy of inferring that waiver of the post-resignation right to revoke checkoff when under a union security agreement limits the partial assignment of wages via checkoff to that imposed by the union security agreement alone. \textit{Penn Cork & Closures, Inc.}, 156 N.L.R.B. 411, 412 (1965), enforced, 376 F.2d 52 (2d Cir.), cert. denied, 389 U.S. 843 (1967).
\item[237.] See \textit{Lockheed}, 302 N.L.R.B. 322, 331 (1991); see also \textit{American Labor Policy: A Critical Appraisal of the National Labor Relations Act} 372-75 (Charles J. Morris ed. 1985) (suggesting promulgations of special rules, including provision of clear notice of rules pertaining to checkoff and strike resignations).
\item[238.] For example, in the criminal law context, spoken Miranda warnings are given to apprise an arrestee of the existence of rights in order to assure that his subsequent waiver of those rights is knowing and intelligent. \textit{See generally} E. Cleary, \textit{McCormick On Evidence} § 153 (3d ed. 1984).
\item[239.] U.C.C. § 1-201(10) (1992). The Uniform Commercial Code definitions state:
\begin{quote}
“Conspicuous”: A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color.
\end{quote}
\textit{Id.}
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to have someone present at the signing of the authorization form who is able to clarify any confusion orally.\footnote{240}

\textbf{b. Consideration}

The second issue is whether separate consideration is necessary for the effective waiver of Beck rights where the employee is also under a union security agreement. In the non-union security context, such as \textit{National Oil Well}, the consideration for an employee's promise to pay union dues following resignation is the union's willingness to grant membership. The promise of membership can constitute the consideration for the promise to pay dues even after resignation because the union is not legally obligated to provide membership in a non-union security context.\footnote{241}

By contrast, where union security is in effect, the individual employee already has a right to union membership.\footnote{242} Because the union has a pre-
existing duty by virtue of union security to offer membership, the promise of membership alone is insufficient to support the employee’s additional promise to pay full union dues following resignation.

The determination that in the union security context consideration other than the promise of union membership is a prerequisite for enforceable waiver of the right to revoke dues checkoff authorization requires identification of what constitutes valid additional consideration. Since courts will not inquire into the adequacy of consideration, the consideration need not match identically the value of the right the employee is waiving. Nevertheless, “in consideration” of the nature of the Beck

243. An agreement to discharge an existing obligation and an agreement to modify an existing contract may have implications for the adequacy of consideration because of the “pre-existing duty rule.” The pre-existing duty rule dictates that the performance or promise to perform a pre-existing duty is invalid consideration. See Farnsworth, supra note 107, § 4.21.

The modern trend away from the pre-existing duty rule is reflected in Section 89(a) of the Restatement (Second) of Contracts, which provides: “A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . .” Restatement (Second) of Contracts § 89(2) (1979). See generally Morton J. Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917 (1974) (tracing the history of modern contract law).

Section 89(a) of the Restatement only enforces a modification if the parties voluntarily agree and if (1) the promise modifying the original contract was made before the contract was fully performed on either side, (2) the underlying circumstances which prompted modification were unanticipated by the parties, and (3) the modification is fair and equitable. Restatement (Second) of Contracts § 89(a). Since the checkoff authorization presents no unanticipated change in circumstances, waiver of its revocation probably could not be considered an enforceable contract modification pursuant to the terms of the Restatement.

244. The pre-existing duty rule also applies where the pre-existing duty is imposed by law, instead of by contract. Farnsworth, supra note 105, § 4.21, at 272 (citing Grant v. Green, 41 Iowa 88 (1875) (holding that a wife is under a duty to care for her insane husband)). Where Beck rights are concerned, the pre-existing duty is a legal duty imposed by the second proviso to Section 8(a)(3) of Taft-Hartley, as interpreted by Communication Workers, 520 F.2d at 411.

245. See Haigh v. Brooks, 113 Eng. Rep. 119 (K.B. 1839) (following the traditional rule indicating that it is not the court’s function to concern itself with the adequacy or inadequacy of the legal detriment); see also In re American Coils Co., 187 F.2d 384 (3d Cir. 1951). See generally John D. Calamari & Joseph M. Perillo, The Law of Contracts § 4-3, at 136 (2d ed. 1977) (“As a general rule it is settled that any detriment no matter how economically inadequate will support a promise.”); Robert Braucher, Freedom of Contract and the Second Restatement, 78 Yale L.J 598 (1969).

Economic inadequacy of the detriment (consideration) is still one of the factors that a court will consider in assessing whether the consideration induced the bargain. Calamari & Perillo, supra § 4-3. Courts have generally, however, deemed relief of an adult party from a bad bargain to constitute an unwarranted interference with freedom of contract. Black Indus. v. Bush, 110 F. Supp. 801, 803 (D.N.J. 1952). The court in Black Industries stated:
rights the employee is waiving, it is tempting to suggest that the union offer something related to a free association right. For example, unions are not required by law to permit non-members to attend meetings. The union could promise to allow non-member employees who have waived their Beck rights via checkoff authorization to attend meetings and voice their opinions regarding how their dues are being spent. In a similar First Amendment vein, the union could offer waives a free subscription to the union's periodical for the duration of the waiver period. Neither the invitation to attend meetings nor regular receipt of the union’s journal, however, may prove sufficient to dissuade members from relinquishing the opportunity to receive a dues rebate. The most persuasive consideration the union could offer, in terms of tangible benefits, is Union Privilege.

Union Privilege is a non-profit organization established by the AFL-CIO to provide both union members and nonmember union sympathizers fringe benefits and consumer services. The international or national organization selects which Union Privilege services to offer to its mem-

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Even if it were proved that the plaintiff was to have received a far greater profit than the defendants for a much smaller contribution, the defendant would nevertheless be bound by his agreement by the familiar rule that relative values of the consideration in a contract between business men dealing at arm's length without fraud will not affect the validity of the contract . . . .

_Id._ (citations omitted).

246. Nonmembers, or "financial core" members, are unable to participate democratically in collective union decisions about the use of union funds. See Friesen, _supra_ note 2, at 620.

247. The Union Privilege concept originated from a report by the AFL-CIO Committee on Work. The report isolated the factors contributing to the decline of unionism and offered a number of constructive solutions to stimulate union resurgence. One suggestion involved generating employment-related services, such as job training and other fringe benefits which employers insufficiently provided. The result is the currently burgeoning Union Privilege program. AFL-CIO Comm. on the Evolution of Work, The Changing Situation of Workers and Their Union 14-16 (1985).

248. Currently available Union Privilege programs include a no-annual fee credit card, low-interest and education loans, special home-mortgage rates for first-time purchasers, supplemental term life insurance, discount legal advice, mail service pharmacy and car rental. AFL-CIO, _Union Privilege, AFL-CIO, Leadership Guide to Using Union Privilege Benefits_ (1993).

249. The structure of unions is loosely analogous to the two-tiered federalist system of the United States Government: (1) a centralized national or international body; and (2) an amalgamation of scattered locals that respond to membership needs on a daily basis. The details of the interrelationship of local and national/international responsibilities vary from union to union. Respective obligations are set forth in the national/international and local constitutions as permitted under the LMRDA. This arrangement evolved from eclectic historical response to the need for standardized employment conditions that was created by increased employee mobility, among other factors. See generally _Labor Relations Law: Cases and Materials_ 6-11 (Leon S. Merrifield et al. eds, 1989).
Waiver of Beck Rights

The locals then submit membership lists to the Union Privilege office, where members are evaluated for service eligibility on an individual basis. The international and local organizations could agree to include Beck waivees on their membership rosters, enabling waivees to be considered for admission to the Union Privilege associate program.

III. WAIVER OF THE RIGHT TO RESIGN

Waiver of the "right to resign" differs from waiver of Beck rights in two significant ways. Both differences stem from the fact that checkoff authorization is explicitly provided for by statute, unlike the right to resign. By contrast, waiver of the right to resign will require a separate contract. Second, the Taft-Hartley Act limits the duration of dues checkoff authorization to the lesser of twelve months or the expiration date of the contract. The right to resign is not specifically addressed by the statute, nor does the statute address the permissible time frame for putative waiver of the right to resign.


251. Telephone interview with Cathy Van Helden, Director of Union Services (June 25, 1993) (describing the associate program and its use in union organizing campaigns).


253. Dues checkoff authorizations are assignments of dues. Waivers of the right to revoke checkoff are usually incorporated into the language of the checkoff authorization. Since Beck rights relate to dues, language clearly waiving the right to receive dues rebate on the checkoff authorization form itself rather than on a separate contract would be reasonable and expedient. See Sales, Serv., & Allied Workers Union, Local No. 80 (Capitol-Husting Co.), 235 N.L.R.B. 1264, 1265 (1978).

254. It could be argued that, because, under NLRB v. General Motors, the only legally enforceable requirement of membership is dues payment, in waiving the right to resign, the employee is merely waiving her right to stop paying dues. See NLRB v. General Motors Corp., 373 U.S. 734 (1963). According to this line of reasoning, the resignation right is equivalent to a dues-paying obligation, which is the subject matter of checkoff authorizations. Therefore, resignation rights might also be waivable on the checkoff form itself. However, since resignation rights invite a host of possible limitations from other sources, i.e., the doctrine of unconscionability, a separate contract is preferable. For further explanation of this position, see discussion infra notes 252-257 and accompanying text.

255. 29 U.S.C. § 186(c)(4). For text of statute, see supra note 11.

256. The Lockheed Board, in specifically leaving open the question of waiver of resignation rights, stated that "we need not, and do not, decide whether or not an employee may, by authorization or other form of contract that he signs as an individual, agree to an enforceable waiver of the right to resign for a limited period." Lockheed, 302 N.L.28. 322, 328 n.25 (1991) (emphasis added).
In assessing the waivability of the right to resign, the fact that the right is not explicit in the statute impacts analysis of the nature of the right. The nature of the right to resign must be gleaned from the overall scheme of the NLRA, as affected by the Taft-Hartley amendments and the judicial gloss on resignation in the context of union discipline. Statutory silence regarding the duration of waiver of the right to resign will affect the manner of waiver, once waivability of the right is established.

A. Nature of the Right to Resign

1. Taft-Hartley Induced Tug of War

The 1947 Taft-Hartley amendments injected a dynamic tension into the NLRA between the rights of labor unions and the rights of individuals to choose or reject union participation. Nowhere is this tension more evident than between Sections 7 and 8 of the Act. Section 7 guarantees employees the right to engage in or, as amended by Taft-Hartley, refrain from any or all union activities. Section 8(b)(1)(A) renders union restraint or coercion of employees in the exercise of their Section 7 rights an unfair labor practice. Congress, in establishing the individual em-

257. "Union Discipline" refers to the types of punitive rules a union may legally impose upon its members. For a trenchant article pointing out the need for an intelligible theory to rationalize limitations on union discipline (a need which has yet to be met), see Clyde W. Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049 (1951). Professor Summers proposed that courts should recognize that "a union member is essentially a citizen within an industrial government." Id. at 1101. Therefore, courts should simply prescribe the minimum standards necessary to protect the employee within that government, although "[t]he problem will still be the difficult one of defining an individual's rights within a democratic society." Id. Professor Summers described the double-edged sword of union discipline as follows:

Union discipline is only one of the many facets of union government, but it frequently reflects the most stubborn problems of union democracy. Discipline of individual members is essential if a union is to survive as an effective organization, but discipline may also be a ready tool of oppression within the union. There is a twilight zone between these two uses rather than a clear line of demarcation.

Id. at 1049 (footnote omitted).


259. Id.

260. 29 U.S.C. § 157 (1988). Section 7 guarantees employees the right to "form, join, or assist labor organizations," and also "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3) of the Act]." Id. § 158(a)(3).

261. 29 U.S.C. § 158(b)(1)(A). Section 8(b)(1)(A) forbids union restraints on an employee's right to engage in or refrain from concerted activity for mutual aid and protection. However, the proviso to Section 8(b)(1)(A) states that Section 8(b)(1)(A) should not be interpreted to impair union imposition of its own internal rules. Id.
ployee's right to refrain from union activities, concomitantly balanced this right by amending Section 8(b)(1)(A) to provide that the obligation not to restrain or coerce employees in the exercise of their Section 7 rights does not impair the right of a labor organization to adopt reasonable rules with respect to the acquisition or retention of membership in the organization.262

Despite efforts to offset the increase in individual employee rights by inclusion of the proviso to Section 8(b)(1)(A), Congress nevertheless imposed substantial limitations on the union's power to enforce solidarity.263 Congress categorized its restrictions on unions into two separate sections of the Act, depending on whether the union's actions influenced the employee directly or indirectly through union pressure on the employer.264 Ostensibly, indirect pressure applied to the workers' employer was considered more pernicious, because Congress placed tighter strictures on this category of union activity.265 Labor unions are prohibited from violating Section 8(a)(3) of Taft-Hartley by seeking employer discrimination against an employee for any reason except the employee's "failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."266 By comparison, Congress treated union action aimed directly at the individual employee more liberally.267 Perhaps such tolerance sprang in part from recognition that unions, like any voluntary association, must be permitted some leeway to govern their internal affairs.268 Consequently, in declaring union restraint or coercion of employees in the exercise of their Section 7 rights an unfair labor practice pursuant to Section 8(b)(1)(A), Congress retained the right of labor organizations to govern their internal affairs, including disciplining their members.269

The right to resign is born of this bipolar pull between the individual's right to refrain and the union's right to promulgate rules pertaining to

262. Id. The Section states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." Id.
264. See Locke, supra note 258 at 710-11.
265. Id. Pursuant to Section 8(b)(2) of Taft-Hartley, a union cannot elicit employer discrimination against an employee unless the employee fails to pay dues or initiation fees. 29 U.S.C. § 158(b)(2).
266. Id.
The nature of the right is determined by NLRB and Supreme Court opinions attempting to accommodate this statutorily-imposed dichotomy. To isolate the nature of the right to resign, several pivotal opinions are examined below.

2. Membership Resignation—"Fine" or Finable?

In *NLRB v. Allis-Chalmers Manufacturing Co.*, the Supreme Court held that, where the fined employee was a current union member, a union's court-enforcement of a fine for acts such as strikebreaking was within the scope of internal union affairs as defined by the Section 8(b)(1)(A) proviso. In reaching its decision, the Court interpreted union membership as a contract. The Court implied that enforcement of penalties was no more a restraint or coercion than punishments imposed on citizens for failure to comply with civic obligations such as income tax filings. The majority opinion stressed the NLRA's sanction of majority rule and employees' right to engage in collective action. Union democracy, as interpreted by the Supreme Court in *Allis-Chalmers*, mandates that the union majority should be able to compel individual members to comply with the majority's decision.

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270. Pattern Makers' League, AFL-CIO v. NLRB, 473 U.S. 95, 116 (1985) (White, J., concurring) (“The [Section 7] right to join or not join a labor union includes the right to resign and § 8(b)(1)(A) forbids unions to interfere with that right” except for promulgation of rules pertaining to membership acquisition and retention.).

271. 388 U.S. 175 (1967).

272. Id. at 181-82. The Court indicated that fines are permitted as long as not coercively steep, vague, or violative of procedural guarantees. Id. at 192-93. The strikebreaking members in *Allis-Chalmers* had “[e]ach executed the pledge of allegiance to the UAW constitution and [taken] the oath of full membership.... [T]wo disciplined employees testified that they had fully participated in the proceedings leading to the strike. They attended the meetings at which the secret strike vote and renewed strike vote were taken.” Id. at 196.

273. Id. at 179; see also Abraham, supra note 57, at 1305 n.163. Abraham states:

In construing union membership as a contract, the Court looked at it as one rather like a constitution, to which the concept of “adhesion” would not apply.... Although the union member may not bargain over the terms of his membership contract, the union's constitution, bylaws, and such are the fruits of a process that must be democratic and may be revised or repealed.

Id. For further discussion of contracts of adhesion, dickered terms, and the doctrine of unconscionability, see discussion infra notes 341-57 and accompanying text.

274. *Allis-Chalmers*, 388 U.S. at 179 (stating that the obligation went no further than “enforcement of penalties imposed on citizens for violation of their obligations... to pay income taxes, or court awards... for nonperformance of a contractual obligation”).

275. Id. at 180. “The [national labor] policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.” Id.

276. Accord Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (indicating that “[Section 7 rights] are, for the most part, collective rights,
Waiver of Beck Rights

The dissenting opinion, by contrast, focused on the Section 7 right of individual employees to refrain from union activity. The dissent reasoned that the union's suing in state court to enforce an internal union fine, as opposed to "merely" expelling a strikebreaker from membership, was not sufficiently internal to be protected by the Section 8(b)(1)(A) proviso that permits union rules regarding acquisition and retention of union membership. One scholar concluded that "[t]he dissenter... thereby began the restoration, in the labor law area, of the pristine world of freely contracting atomistic individuals."277

To resolve the conflict between the majority and dissenting opinions in Allis-Chalmers, "another concept was needed: the voluntariness of union membership."279 The voluntary agreement to be bound by union rules seemed to provide the basis for evaluating the fairness of union discipline for the member's breach of a union rule.280

In Scofield v. NLRB,281 the Supreme Court upheld a union rule designed to prohibit "rate-breaking" by members compensated on a piece-rate basis.282 The Court's reasoning centered on voluntariness: employees had chosen to join the union and they were "free to leave the union and escape the rule."283 The Scofield opinion established that union rules were enforceable in court when the rule "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."284

rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining'" (emphasis added)).

277. As Justice Black wrote for the dissent:

   It is one thing to say that Congress did not wish to interfere with the union's power, similar to that of any other kind of voluntary association, to prescribe specific conditions of membership. It is quite another thing to say that Congress intended to leave unions free to exercise a court-like power to try and punish members with a direct economic sanction for exercising their right to work.

Allis-Chalmers, 388 U.S. at 203 (Black, J., dissenting).

278. Abraham, supra note 57, at 1307.

279. Locke, supra note 258, at 713. Locke states that "[s]o long as an employee's agreement to be bound by union rules was voluntary, union discipline for breaching that obligation seemed less offensive." Id.

280. Id.


282. Id.

283. Id. at 430. The Court found that nonmember employees engaged in the same task were not subject to the union rule. Id.

284. Id. The Supreme Court has since refined the three-pronged test. See NLRB v. Boeing Co., 412 U.S. 67, 74 (1973) (stating that the NLRB is not empowered by the Act to assess the reasonableness of fines). One scholar noted that "[o]ne might reasonably ask whether Boeing should not also apply to fines imposed for violation of commitments law-
Three years later the Supreme Court encountered a factual scenario in which the employees had literally taken *Scofield* at its word and resigned before becoming strikebreakers to escape the union rule and incumbent discipline.\textsuperscript{285} In *NLRB v. Granite State Joint Board, Textile Workers Local 1029*,\textsuperscript{286} the Supreme Court held that by fining the strikebreakers, the union had unlawfully coerced the employees in their right to refrain from striking, despite the fact that each strikebreaker had participated in both the vote to strike and the vote to authorize fines against strikebreakers.\textsuperscript{287} The key to *Textile Workers* was that neither the union constitution, its by-laws, nor the collective bargaining agreement included any provision clearly delineating the conditions for membership resignation.\textsuperscript{288} The next logical step was for unions to include resignation restrictions in their constitutions.\textsuperscript{289}

Unions created essentially two kinds of resignation restrictions.\textsuperscript{290} The first type forbid acceptance of employment during a lockout or with a struck employer and also provided that resignation would not relieve the fully undertaken by union members not to engage in strikebreaking." Abraham, *supra* note 57, at 1311 n.204. Abraham's suggestion that the Board should not involve itself in evaluating the reasonableness of fines where union members have abrogated their voluntary promise not to break a strike supports the thesis of this Comment that clear and unmistakable waiver of statutory rights, such as the right to resign, provides a rationale for decreasing Board intervention in the union-member relationship.

\textsuperscript{285} See *NLRB v. Granite State Joint Bd., Textile Workers Local 1029*, 409 U.S. 213 (1972). The collective bargaining agreement at issue in *Textile Workers* contained a maintenance of membership clause requiring members to remain in good standing "as to payment of dues" for the duration of the contract. Shortly before the collective bargaining agreement expired, the union members voted to strike if no agreement was reached prior to a prearranged deadline. When the deadline passed before agreement had been reached, strike and picketing ensued. The union membership subsequently passed a resolution to fine any member "aiding or abetting" the employer during the strike. *Id.* at 214.

\textsuperscript{286} *Id.* at 213.

\textsuperscript{287} *Id.* at 214, 218-19. The Court similarly upheld an NLRB opinion that suit in state court by a union to enforce fines against employees who had tendered membership resignations prior to becoming strikebreakers constituted an unfair labor practice. *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB*, 412 U.S. 84 (1973).

\textsuperscript{288} *Textile Workers*, 409 U.S. at 214. Justice Douglas opined for the majority: 

[the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. . . . [W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

*Id.* at 217.


\textsuperscript{290} Locke, *supra* note 258, at 714. Within these two general categories are further temporal limitations, i.e., restrictions on resignation during strike periods only or during
resignee from her obligation not to accept such employment. The second form of restriction prohibited resignation during a strike or when a strike seemed imminent.

The first type of restriction was rejected by the NLRB in Machinists Local 1327. The Board analyzed a union rule providing that resignation would not relieve a member's obligation to honor the picket line if the member resigned either fourteen days prior to establishment of the picket line or during the period that the picket line is maintained. The Board concluded that the rule constituted an unlawful restriction on the member's right to resign, but left open the question of what restrictions on resignation, if any, would be lawful. The Supreme Court has not definitively ruled on this issue.

both strike and nonstrike periods; and occasional stipulation that leadership must approve all resignation requests. See Gidley, supra note 289, at 342 n.19.

291. See, e.g., Machinists Local 1327, Int'l Ass'n of Machinists, 231 N.L.R.B. 719 (1977), enforcement denied, 725 F.2d 1212 (9th Cir. 1979). The rule in the union's constitution stated:

"Improper Conduct of a Member: ... Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement . . ."

Id. at 1214 (quoting union's constitution).

292. See, e.g., Pattern Makers' League v. NLRB, 473 U.S. 95, 97 (1985) (exemplifying the second form of restriction). The Pattern Makers' union constitution provided: "[n]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent." Id. (quoting union's constitution).


294. Machinists Local 1327, Int'l Ass'n of Machinists & Aerospace Workers, 263 N.L.R.B. 984, 993 (1982), enforcement denied, 115 L.R.R.M. (BNA) 2972 (9th Cir. 1984), overruled by International Ass'n of Machinists & Aerospace Workers, Local Lodge 1414, 270 N.L.R.B. 1330 (1984). In Machinists Local 1327, the Board split on this issue. Two Board Members declared they would permit a union rule restricting member resignation for 30 days subsequent to tender of resignation "to protect the interests of employees who maintain their membership" and "to dispose of administrative matters arising from such resignation." Id. at 987. Two Board members found "any restriction imposed upon a union member's right to resign to be unreasonable." Id. at 988. Two years later the Board determined that any restriction on a union member's resignation was unlawful. International Ass'n of Machinists & Aerospace Workers, Local Lodge 1414, 270 N.L.R.B. 1330 (1984).


296. Some commentators, however, interpret the Supreme Court's decision in Pattern Makers' as precluding all forms of union restrictions on the right to resign. See, e.g., Colette M. Foissotte, Comment, Justice Brennan and Union Discipline Under the NLRA: The Fight For Solidarity Impinges Upon Individual Rights, 20 J. MARSHALL L. REV. 127 (1986); Douglas H. Wiegerink, Note, Unions Are Forced to Loosen Their Grip On Mem-
In *Pattern Makers' v. NLRB,* the Supreme Court held that union discipline of a strikebreaker who resigned in violation of a constitutional provision prohibiting resignation during a strike or when a strike is imminent is an unfair labor practice. The Court reached this conclusion despite the fact that the strikebreakers had participated in both the strike vote as well as the vote that amended the union's constitution to prohibit resignation.

The Supreme Court narrowly framed the issue as "whether the Board's construction of section 8(b)(1)(A) is reasonable." Although the Court interpreted the language of the statute and "tinkered modestly with congressional history," the text of the opinion reiterates the Court's duty of deference to the Board. Justice White, who provided the pivotal fifth vote, so grounded his concurring opinion on deference to the Board that he acknowledged that had the Board's opinion come out the opposite and upheld the union rule, he would still have affirmed the Board's decision.

In dissent, Justice Blackmun took issue with the majority's concept of "voluntary unionism." The dissent argued that freedom of choice should require an individual to be bound by the choice that she has freely made. The dissent buttressed its opinion with inferences from legislators—*Pattern Makers' League of North America, AFL-CIO v. NLRB, 22 Wake Forest L. Rev. 367 (1987).* This line of interpretation, however, de-emphasizes the crucial fact that the Supreme Court in *Pattern Makers'* merely deferred to the Board's expertise in administering the NLRA. *Pattern Makers'*, 473 U.S. at 101. The Court never explicitly stated that all restrictions on resignation, such as those provided by a separate contract as proposed by this Comment, would be invalid. *Id.* at 101, 102 n.9 ("In both *Textile Workers, 409 U.S. at 217,* and *Machinists, 412 U.S. at 88,* the Court explicitly left open the question of "the extent to which contractual restriction on a member's right to resign may be limited by the Act.").

298. *Id.*
299. The Supreme Court failed to find in such democratic participation the requisite "voluntariness" needed to support the policy of "voluntary unionism" embedded in the NLRA. *Id.* at 114.
300. *Id.*
302. *Pattern Makers'*, 473 U.S. at 114. "Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" *Id.* (quoting Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979)).
303. *Id.* at 117.
304. *Id.* at 126.
305. Locke, *supra* note 258, at 715. Justice Blackmun observed:
tive history and Section 13 of the Act, which provides that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as to interfere with or impede or diminish in any way the right to strike." According to Justice Blackmun, the resignation restriction in the union's constitution must be preserved because it enhances the effectiveness of collective action by promoting the statutory-protected right to strike.

3. Individual Waiver: Free Choice Promotes Voluntary Unionism

Judicial depiction of the right to resign fails to delineate the nature of the right to the extent that its waivability can be unequivocally established. Certain salient aspects of the Supreme Court's opinions, however, suggest that waiver may be possible under particular circumstances. First, despite deference to the Board's expertise in administering the statute, the Court has not yet expressly upheld the Board's position that all restrictions on the right to resign are impermissible. Second, the Court has relied on the concept of voluntary unionism, imbedded in the NLRA, which implicitly requires that a union member not be coerced into declining to exercise her right to refrain from protected, concerted activities.

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Once an employee freely has made the decision to become a member of the union, has agreed not to resign during a strike, and has had the opportunity to participate in the decision to strike, his faithfulness to his promise is simply the quid pro quo for the benefits he has received as a result of his decision to band together with his fellow workers and to join in collective bargaining. *Pattern Makers*, 473 U.S. at 129 (Blackmun, J., dissenting), cited in Locke, supra note 258, at 715 n.26.


307. *Pattern Makers*, 473 U.S. at 130 (Blackmun, J., dissenting) ("Enforcement of a promise not to resign during a strike, then, is not a limitation of a § 7 right, but is a vindication of that right to act collectively and engage in collective bargaining, so long as the promise is voluntarily made.").

308. One commentator observed:

The recent cases involving a member's right to convert to "financial core" status can be understood as a further extension of the conclusion that a union's power to fine a member is an internal union matter because the member, as the Court stated in *Scofield*, was "free to leave the union and escape the rule." One may ask whether there is a circumstance in which an employee can waive his statutory right to resign. Resolving this question may be the next evolutionary step in the development of the law.

Locke, supra note 258, at 7171 (quoting *Scofield* v. NLRB, 394 U.S. 423, 430 (1969)).

309. See *Pattern Makers*, 473 U.S. at 103 n.13 ("In *International Assn. of Machinists, Local 1414* (Neufeld Porsche-Audi, Inc.), a majority of the Board held that any restriction on the right to resign violates the Act. This was the position taken by Chairman Van de Water and Member Hunter in *Machinists Local 1327 (Dalmo Victor II . . . .)*" (citations omitted)).

310. See supra notes 288-98 and accompanying text.
The Board in *Lockheed* concluded that this policy of voluntary unionism, which the Supreme Court relied on in *Pattern Makers'*, does not preclude voluntary waiver of the post-resignation right to revoke dues checkoff authorization. The acid test for waivability, according to *Lockheed*, is voluntariness, as evidenced by the clear and unmistakable waiver of each individual employee involved. The Supreme Court has determined that participating in the vote to amend the union constitution to prohibit resignation during strikes and presence during the strike vote are insufficient to constitute clear and unmistakable waiver of the right to resign. Though a member may voluntarily participate in the collective decision to amend the union constitution to prohibit strike-period resignations and vote to strike, such participation may be inadequate to safeguard an employee’s right to refrain from union activity, including striking, because the individual employee may be the minority vote. Nevertheless, the minority employee is bound by the decision of the majority. In effect, her vote is subsumed by the majority’s, and there is no way to ascertain whether the employee intended to waive her right to resign. A resignation restriction in a union constitution or even a collective bargaining agreement, however, differs from an individually executed contract waiving the right to resign in that the latter more clearly effectuates *individual* freedom of choice by means of freedom of contract. Consequently, the employee’s vote cannot constitute a suffi-
ciently clear and unmistakable waiver to the extent that an individual contract, or an individual execution of a checkoff authorization, can. Indeed, the Lockheed Board pointed out that the Pattern Makers’ Court “did not pass on the efficacy of individual agreements.”

B. Other Sources of Potential Limitations on Resignation Waiver

Two legal constructs command attention as potential candidates for restricting waiver of resignation rights: the Thirteenth Amendment and the doctrine of unconscionability. Accordingly, both potential sources of waiver limitation will be explored briefly.

1. The Thirteenth Amendment

The Thirteenth Amendment provides a possible source of restriction on waiver of the right to resign union membership. Commonly pigeonholed as the amendment that abolished the private institution of slavery, the text and legislative history of the Thirteenth Amendment permit a far more expansive interpretation. Indeed, recent reexamina-

317. Lockheed, 302 N.L.R.B. at 328 n.25. Cf. United Mine Workers (Canturbury Coal Co.), 305 N.L.R.B. 516, 519 (1991) (holding unenforceable individual contracts of employees who promised to repay the union the amount of money received from the selective strike fund in the event of crossover during a strike are unenforceable).

318. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

319. Unlike the Fourteenth Amendment, state action is not required to trigger Thirteenth Amendment protection. Compare U.S. Const. amend. XIV, § 1 with U.S. Const. amend. XIII, § 1. Therefore private action, such as that of a union, can be reached by the Thirteenth Amendment.

320. See Herman Belz, The Civil War Amendments to the Constitution: The Relevance of Original Intent, 5 Const. Commentary 115, 139-40 (1988). But see Pope, supra note 53, at 1096 (“The Supreme Court has long held that the thirteenth amendment not only abolished slavery, but also ‘established universal freedom’ and mandated a ‘basic system of free labor’ . . . .” (footnotes omitted)).

321. Pope, supra note 53, at 1099.

tion of the Reconstruction debates unearthed a yet-unrealized, comprehensive labor goal—free labor.324

The Congress that convened at the close of the Civil War faced the daunting task of implementing the goals of the Union in a divided, if not shattered, nation.325 One of the most pressing issues confronting Congress was the effect of the elimination of the slave status of four million laborers who had buttressed the economy of an entire region.326 Congress must have been cognizant of the profound impact emancipation would have on the legal ordering of labor relations.327 Slaves occupied the bottom step of a hierarchical stairway of labor status, that stairway progressing from "peons, bonded servants, apprentices, [and] employees not under written contract" to professionals.328 Abolition of slavery removed the bottom step, flooding the labor market at the next higher level. Heightened awareness of the plight of the "wage slave" factory workers of the North translated into recognition of the need to accord the wage-slave laborer liberty equivalent to that of his newly-emancipated brethren.329 The Thirteenth Amendment reflects this quest to protect labor liberty on a grander scale than the modest language of the amendment reveals.330

The text of the Thirteenth Amendment was chosen for its symbolic association with President Jefferson.331 Congress borrowed the phrase "neither slavery nor involuntary servitude" from the text of the Northwest Ordinance.332 In grafting Jefferson's words onto the text of the new amendment, Congress assuaged its discomfort with altering a revered

323. The term "Reconstruction" or "Reconstruction Congress" denotes the Congress which convened after the close of the Civil War to rebuild or "reconstruct" the nation. See 1 BRUCE ACKERMAN WE THE PEOPLE 44 (1991) ("Reconstruction was just that—rebuilding the Union from the ground up.").

324. Senator Harry Wilson explained the position of the advocates for the Thirteenth Amendment as follows:

[W]e have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country. . . . The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.

CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

325. VanderVelde, supra note 322, at 441.

326. Id.

327. Id.

328. Id.

329. Pope, supra note 53, at 1102; Buchanan, supra note 322, at 11.


331. VanderVelde, supra note 322, at 449, 450 n.70. Although the words assumed "mythical proportions" for the Reconstruction Congress because they were attributed to Jefferson, some historical evidence indicates that Jefferson did not draft the phrase.

document by accomplishing the transformation via the authority of a founding father.\textsuperscript{333} The debates thus focused on the objectives and effects of the amendment, rather than its text.\textsuperscript{334}

Contemporary legal scholars stress that the oblique albeit capacious term "involuntary servitude" suggests that the drafters of the Thirteenth Amendment intended to borrow one of "those 'vague and elastic' concepts 'purposely left to gather meaning from experience.'"\textsuperscript{335} Indeed, courts have interpreted the words "involuntary servitude" to outlaw personal service contracts, thereby granting employees at least a limited right to quit.\textsuperscript{336} If the Thirteenth Amendment can be interpreted to forbid employers from forcing employees to work for them, the question persists whether it would also prohibit unions from enforcing contracts signed by members who promised not to resign. A possible clue to answering this question lies in the fact that covenants not to compete\textsuperscript{337} do not violate the Thirteenth Amendment. In other words, under some circumstances employees may contract away their individual labor liberty.\textsuperscript{338} To withstand scrutiny on contract grounds, however, covenants not to compete

\begin{footnotes}
\textsuperscript{333} \textit{Id. Cf.} ACKERMAN, \textit{supra} note 323, at 40-47 (discussing the Thirteenth Amendment's dramatic departure from the basic procedures for constitutional revision provided for by the nation's founders, including the stricture of federalism).

\textsuperscript{334} VanderVelde, \textit{supra} note 322, at 451.

\textsuperscript{335} Pope, \textit{supra} note 53, at 1099 (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 382, 646 (1949) (Frankfurter, J., dissenting)).

\textsuperscript{336} VanderVelde, \textit{supra} note 322, at 489. VanderVelde states: From the texts of the debates, there is little doubt that Congress intended to accord workers the right to quit, but the parameters of this right were more complex. In addition to widespread agreement to prohibit specific performance of labor contracts, speakers repeatedly raised the specter of laborers forcibly being dragged back to either their former masters or their new employers and subjected to the boss's will. \textit{Id.} (footnotes omitted).


\textsuperscript{338} \textit{See, e.g.,} Schmidt v. Central Laundry & Supply Co., 13 N.Y.S.2d 817, 823 (Sup. Ct. 1939) (holding that employee's liberty is uppermost in assessing the effect of post-employment restraint agreements); Arthur Murray Dance Studios, Inc. v. Whitter, 105 N.E.2d 685, 692 (Ohio C.P. 1962) (stating that the benchmark for assessing the validity of an agreement is whether it is "unduly harsh and oppressive on the employee"). \textit{But see} Callahan, \textit{supra} note 337, at 718-19 ("But personal freedom includes freedom of contract, and the freedom to contract by definition allows the voluntary restriction of one's options.").
must be reasonable in terms of time and geographical scope.\textsuperscript{339} Although the factor of geographical location is irrelevant to the issue of waivability of resignation rights, the time dimension is significant.\textsuperscript{340} Law pertaining to covenants not to compete indicates that the key to unlocking a Thirteenth Amendment challenge may be found in the concepts of voluntariness (covenants not to compete must be voluntarily assumed) and duration.

\textbf{2. Unconscionability}

Since voluntarism\textsuperscript{341} is the underlying rationale for permitting waiver of resignation rights, a crucial issue is how to assure that the employee’s assumption of contractual obligation is voluntary. Such assurance is problematic because the transaction occurs between a single individual and a “colossal” union.\textsuperscript{342} Moreover, because the not-so-hidden agenda lurking behind resignation waiver is to furnish solidarity during a strike,

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\textsuperscript{339} For an extensive list of cases, grouped by jurisdiction and in terms of the geographic extent of the restriction, see Annotation, Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction, 43 A.L.R.2d 94 (1955); Annotation, Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction, 41 A.L.R.2d 15 (1955).

\textsuperscript{340} See Blake, supra note 337, at 677-78 (discussing reasonable time restraints tailored to suit the circumstances of the restrictive covenant). Recall the importance of time limitations on duration of checkoff authorization, 28 U.S.C. § 186(c)(4), and statutorily imposed time restraints on duration of the contract bar, infra note 359, among other pertinent temporal limitations.


\textsuperscript{342} After all, the premise behind promoting unions in a democracy is that the individual laborer is imbued with insufficient bargaining clout to counteract the strength of the employer. See Vegelahn v. Guntner, 44 N.E. 1077, 1081 (1896) (Homes, J., dissenting) (“Combination on the one side [management] is patent and powerful. Combination on the other [labor] is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.”). Similarly, the lone laborer loses his significance when up against the collective union.
where the individual's economic interests are at stake, problems of duress and unconscionability emerge.

Traditional nineteenth century "will theorists" believed that voluntarism was the core of contractual obligation, and thus contracts required assent. In fashioning a body of duress precedent, the bottom line was the reality of the assent. Later critics attacked both the notion of "free will" as the paradigm of contract relations and the vaunted neutrality of the government as enforcer of private will. Such early twentieth century thinkers perceived that "all contracting involves a measure of coercion, and that the advantaged person enjoys that position because the legal system has created entitlements for him." To counteract this coercion in extreme circumstances, the doctrine of unconscionability evolved.

The purpose of the doctrine of unconscionability is to counteract coercion through prevention of oppression and unfair surprise. This bifurcation of purpose has led to a distinction between substantive (oppression) and procedural (unfair surprise) unconscionability. Case law indicates that inequality of bargaining power, lack of meaningful

343. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979). Section 175(1) singles out the factor of assent; voiding contracts to which manifestation of assent has been "induced by an improper threat . . . that leaves the victim no reasonable alternative." Id.

344. The term "unconscionability" has been defined as that which "affronts the sense of decency." Gimbel Bros. v. Swift, 307 N.Y.S.2d 952, 954 (N.Y. Civ. Ct. 1970). The term has also been defined as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (citation omitted). The dictionary adds "lying outside the limits of what is reasonable or acceptable: shockingly unfair, harsh or unjust." WEBSTER'S THIRD NEW INT'L DICTIONARY 2486 (1981).

345. See Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 YALE L.J. 997, 1025 (1985) ("The story of the doctrines of duress and unconscionability reveals . . . efforts over time to create a private domain in which individuals can reach binding agreements and courts can enforce them, despite the difficulties presented by the problem of power.").


347. Dalton, supra note 345, at 1027.

348. Id. at 1029 (quoting Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 472 (1923)).

349. U.C.C. § 2-302 cmt. 1 (1987). Dalton comments: [o]ne way of explaining the place of unconscionability in the body of contract doctrine is to describe it as the public face of a concern for which duress and fraud then appear as the private expressions. An unconscionable contract is one that shocks the public conscience. Duress and fraud concentrate, by comparison, on the effect of the coercive or fraudulent conduct on the contractual capacity of the affected party.

Dalton, supra note 345, at 1036.

choice, or a situation where freedom of contract is exploited by a stronger party in control of negotiations are important factors in finding unconscionability.\textsuperscript{351}

An unlimited duration of waiver of the right to resign is arguably oppressive in that unforeseeable circumstances could necessitate that the employee have the opportunity at some point to change her mind. Where the employee is not provided with adequate notice to allow her to understand the ramifications of the decision to waive her resignation rights, such as permanent replacement and effective job loss during an economic strike, waiver of her right to resign may be found procedurally unconscionable. Unless caution is taken in drafting the individual contracts providing for waiver of resignation rights and assuring that employees are fully apprised\textsuperscript{352} of the potential consequences of their signature, such waivers may be unconscionable, analogous to contracts of adhesion in the context of consumer transactions.\textsuperscript{353}

\textbf{C. Manner of Waiver}

Although the right to resign does not appear so radically distinct from other statutory rights as to preclude waivability of the right per se, the nature of the right demands particular attention to the manner of waiver. Given the Thirteenth Amendment’s outlaw of involuntary servitude,\textsuperscript{354} the Fifth Amendment’s protection of liberty interests,\textsuperscript{355} and the traditional common law prohibition of assignments of wages,\textsuperscript{356} courts would likely consider indefinite waiver of the right to resign to be unconscionable.

\textsuperscript{351} See, e.g., Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (1960) (discussing the effect of a virtually illegible disclaimer of warranty clause in the context of standardized mass contacts). One commentator stated:

Where an aggrieved party is ignorant of the risk involved, ignorant of the contract terms which transfer or allocate that risk and/or lacks alternative terms for that risk allocation, the contract or clause may be unconscionable . . . . Stated simply, contract terms which transfer risks or the burdens of a transaction from that which might be expected in an exchange, absent a written agreement, are unenforceable unless intelligently, knowingly, and voluntarily assumed.


\textsuperscript{352} Lockheed’s clear and unmistakable waiver test assures that the employee is aware she has taken on a certain obligation. However, mere awareness generally cannot defuse the problem of power. See Lockheed, 302 N.L.R.B. 322, 329 (1991).


\textsuperscript{354} U.S. Const. amend. XIII, § 1.

\textsuperscript{355} U.S. Const. amend. V.

\textsuperscript{356} Farnsworth, supra note 105, § 11.4.
To avoid a finding of unconscionability, the union must carefully tailor contracts waiving resignation rights to accommodate concepts of limited duration, independent consideration, and notice.

1. Limited Duration

The NLRA does not expressly provide for a right to resign, nor does it address the issue of reasonable duration of waiver of the right. To avoid implications of unconscionability, the union should include in resignation right-waiving contracts a window period permitting resignation, analogous to the mandatory provision for revocation of dues checkoff authorization in Section 302(c)(4) of the Act. Ideally, the timing of the resignation period should constitute a balance of (1) the union's end of accumulating waivers of resignation rights to amass numbers of reliable, potential strikers and enhance bargaining clout and (2) the employees' right to refrain from collective activity.

This Comment suggests permitting employees to revoke their resignation-right waivers, and/or resign at the end of three years or between sixty and ninety days prior to the expiration date of the collective bargaining agreement, whichever occurs first. This period is preferable because it mirrors the permissible time frame for filing of RC petitions by a rival union desiring to oust the incumbent union. In determining the time frame for entertaining such petitions, the Board struck a balance between society's need for industrial stability and individual choice in representation. Since waiver of the right to resign is intended to promote industrial stability by replenishing the union's bargaining power, and

357. See Note, Restriction on the Right to Resign: Can a Members' Freedom to "Escape the Union Rule" Be Overcome by Union Boilerplate?, 42 GEO. WASH. L. REV. 397, 415 (1974) ("[P]ermitting resignations during any period reduces the strength of the union . . . [however,] it is the timing of the escape period that is crucial.").

358. One commentator has proposed that union members be permitted to resign until the taking of a strike vote. See Gidley, supra note 289, at 368. This author, however, considers such a time to be "too late" to promote union stability, and difficult to attain in the wake of Pattern Makers'. Strikes often occur at the expiration of a collective bargaining agreement, when negotiations are stalled. Requiring resignation or release from waiver 60 to 90 days prior to the contract's expiration would grant the union time to assess the strength of its bargaining position and negotiate more efficiently to avert a potential strike. The upper limit of three years addresses the practical reality that most collective bargaining agreements last for three years, but where the contract has been prematurely extended, accommodation of individual rights requires providing the employee the option of changing her mind. See Hertz Corp., 265 N.L.R.B. 1127, 1129 (1982).

359. The contract bar generally prohibits elections for a period of three years or the expiration term of the contract, whichever is shorter. General Cable Corp., 139 N.L.R.B. 1123, 1124 (1962) (extending the Board's previously established two-year contract bar rule to three years).

360. Id. at 1126.
"voluntary unionism" mandates protection of individual choice in the exercise of Section 7 rights, it seems reasonable to conclude that the balance once struck by the Board to accommodate such twin goals need not be recalibrated.  

2. Consideration

The Supreme Court interpreted the Taft-Hartley Act to find union membership, "as a condition of employment . . . whittled down to its financial core." Consequently, the most the union can exact from non-members, i.e. financial core members employed under union-security agreements, is to tender periodic dues and initiation fees. The union, however, has a judicially-recognized duty to represent fairly both financial core and full union members. A contract waiving the right to resign could not be enforced absent additional consideration because the union has a pre-existing duty to represent all employees in collective bargaining, whereas the employee has no parallel obligation to waive her right to resign in exchange for the benefits of union representation.

Therefore, the union must provide additional consideration in order to effectuate a valid contractual waiver of the right to resign.

Having determined the necessity of additional consideration, the next hurdle is isolating what the union may offer in consideration of the individual employee's waiver of the right to resign. The proffered consideration deemed adequate in the Beck rights waiver scenario, the right to attend union meetings, would be inadequate. The inadequacy stems from the fact that those employees who waive their right to resign will generally not be dues objectors, but rather full members already entitled to attend meetings. The union could, however, offer relief of an obliga-

361. Cf. Engineers Union Local 444 (Sperry Rand Corp.), 235 N.L.R.B. 98 (1978) (finding contracts with resignation periods limited to last 10 days of the year or contract to be unduly restrictive).


363. See discussion of judicially created duty of fair representation, supra note 36.

364. See also Miller v. Hanson, No. 493363 (St. Louis County Cir. Ct. filed July 26, 1983). In Miller, the Board filed a Section 8(b)(1)(A) charge against the union for its attempt to enforce agreements against employees who had promised to remain union members until the union's cessation of unit representation or the individual's cessation of employment in the unit, whichever occurred first, where the union's promise to continue to represent the bargaining unit constituted the consideration.

365. Consideration is also significant in assessing whether or not a contract is unconscionable. See Fort, supra note 351, at 771-75 (finding grossly unequal exchanges per se unconscionable).

366. This Comment proposes that the fairest result would be to deprive strikebreakers of the benefits achieved by the union during a strike, although to do so would be impermissible under Section 101 of the LMRDA. There is little incentive for the individual worker to see any strike through to its conclusion once her private costs begin to mount if she can
tion imposed by the union’s constitution in exchange for limited waiver of the right to resign. For example, the union could offer to relieve those right-waiving employees of picket duty, in event of a strike.

3. Notice

Finally, to ensure that waiver of the right to resign is not unconscionable, the union should provide each employee with information, both written and oral, that explains the potential ramifications of waiver of the right to resign. The language of the waiver contract should indicate clearly and unequivocally what the employee is giving up and what the union is offering her in consideration for waiver of the right to resign.

IV. Conclusion

The Board has increasingly regulated the union-member relationship. Perhaps nowhere is this more evident than in the Board’s inflation of the right to resign by virtue of its tight-fisted control of union discipline. Yet the Board’s opinion in Lockheed tentatively begins to loosen the Board’s grip on the union-member relationship by yielding to the power of freedom of contract, individually exercised, to affect the union-member relationship. By permitting “clear and unmistakable” waiver of the right to revoke dues checkoff authorization, the Board has opened the door for speculation on the extent of waivability of other statutory rights. At the barest minimum, the Board has greatly expanded the benefits from both the employer’s paycheck for strikebreakers and the benefits the union attains in the event her former comrades are successful in attaining the goals of the strike. 

The War Labor Board’s “maintenance of membership” rule addressed the inequity of such a situation. The rule required that anyone joining a union, for whatever reason, was obligated to retain membership until the next contract was signed. HARRY A. MILLIS & EMILY C. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 296-97 (1969).

367. This Comment declines to speculate at this point on the inevitable conundrum: “When does relief of an obligation constitute the conferral of a benefit?”

368. See generally Hartley, supra note 72, at 12 (discussing how the Board has become a major regulator of internal union government despite protestations to the contrary).

369. See supra notes 258-317 and accompanying text.
capacity of individual contract—and the individual employee—to refine the union-member relationship.\footnote{Whether this development is beneficial for labor law is an issue this author leaves open for speculation. From one vantage point, the use of individual contracts to waive \textit{Beck} rights and resignation rights may be viewed as a return to the commodity theory of labor popular during the \textit{Lochner} era which championed individual freedom of contract as the best guarantor of labor liberty. \textit{See} Pope, \textit{supra} note 53, at 1076-77. In line with this markedly individualistic perspective, permitting individual waivers may decrease Board involvement in union affairs once the parameters for waiver have been set, i.e., clarity of waiver language, duration, notice, and consideration. However, emphasis on individual contracts could subtly erode the essence of solidarity achieved by the uniformly applicable collective bargaining agreement and majority rule, even defeating the goal of such waivers as a tool for creating solidarity. \textit{See}, \textit{e.g.}, Brousseau, \textit{supra} note 164, at 12 (stating that “the law of labor relations is designedly and necessarily anti-individualistic”). Whether courts will uphold waivers of \textit{Beck} rights and resignation rights remains undetermined. If waivers are deemed consistent with the current direction of federal labor policy, they will be permitted. The passage of a near century has not altered the veracity of Justice Holmes’ adage: “[t]he true grounds of decision are considerations of policy and social advantage.” Vegelahn v. Guntner, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting).}