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# Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment

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# MAINTAINING UNION RESOURCES IN AN ERA OF PUBLIC- SECTOR BARGAINING RETRENCHMENT

BY  
ANN C. HODGES\*

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## I. INTRODUCTION

As states with collective bargaining requirements for public-sector employees have moved to reduce or eliminate those requirements, attention has turned to the states without collective bargaining rights in an attempt to foresee the future. Unionization exists in southern states without collective bargaining laws, albeit in smaller percentages than in states that authorize bargaining.<sup>1</sup> It is not

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1. See BARRY T. HIRSCH & DAVID A. MACPHERSON, *UNION MEMBERSHIP AND EARNINGS DATA BOOK* 32-37 (2011). The data in this volume are taken from the Current

clear how much of this difference is a result of the absence of bargaining rights and how much is due to the historic hostility to unionization in the south. The unions in these southern states actively participate in representation of workers in the legislatures, local governing bodies, grievance, civil service and tenure procedures, and in court.<sup>2</sup> They offer their members benefits such as work-related training and product and service discounts.<sup>3</sup> Yet these union activities cannot occur without resources, and resources require membership and payment of union dues. A parent union may subsidize an affiliate to some degree, but such subsidies do not substitute for active union membership and dues payment. Without the latter, the union will eventually fade away. For the union, the most efficient method for collecting dues is payroll deduction. In the absence of payroll deduction, the union must establish and maintain its own dues collection apparatus, which will always be less efficient and more costly than payroll deduction.

Many successful unions in Virginia and North Carolina have been able to obtain payroll deduction of union dues because of the state of the law in those jurisdictions. The ability of unions in states restricting collective bargaining to maintain their role will, in part, depend on their ability to do the same.<sup>4</sup> This article will look first at the law relating to payroll deduction of dues in Virginia and North Carolina and in several of the states that have newly restrictive bargaining laws. The article will then discuss the significance of payroll deduction of union dues for effective representation of unionized employees. Next the article will analyze the existing law relating to constitutional challenges to statutory limitations on payroll deduction, along with the current legal challenge to the Wisconsin

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Population Survey, a monthly survey of wage and salary workers conducted by the Census Bureau. *Id.* at 1. Thus, the questions regarding union membership and coverage by a union contract are based on employee self-reporting, and an estimate is made based on the sample. *Id.* at 1-7.

2. Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 749-55 (2009); Ann C. Hodges & William Warwick, *The Sheathed Sword: Public Sector Union Efficacy in Non-Bargaining States*, 27 ABA J. LAB. & EMP. L. 275, 278-82 (2012).

3. Hodges & Warwick, *supra* note 2, at 282-83.

4. While this article focuses on payroll deduction alone, fair share agreements combined with payroll deduction provide an even more valuable method for unions to provide effective representation. Fair share requires all employees represented by the union to pay the cost of representation. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-22 (1977). Of course in nonbargaining states, the union is not required to represent nonmembers, but nonmembers frequently benefit from union actions nevertheless, as legislative changes and even informal agreements and memoranda of understanding typically apply to all employees.

statute. Finally the article will consider how unions might maintain payroll deduction of union dues. The article concludes that while in some states successful challenges to restrictions on payroll deduction may occur, unions would be well-served to explore other options for maintaining union resources.

## II. PAYROLL DEDUCTION LAWS

In both Virginia and North Carolina, although collective bargaining is outlawed,<sup>5</sup> unions may obtain payroll deduction of dues, easing the task of collecting membership dues. North Carolina authorizes payroll deduction of dues if an organization has at least 2,000 members with 500 from the public sector.<sup>6</sup> In addition, local government units can agree to deduct dues for smaller organizations.<sup>7</sup> In Virginia, there is no express statutory authorization of dues deduction,<sup>8</sup> Thus, at least at present, governmental units can agree to payroll deduction of union dues.<sup>9</sup> And if they allow deductions for one employee organization and deny deductions for others, they must articulate a constitutional basis for that distinction.<sup>10</sup> Many unions have been able to obtain payroll deduction by agreement in Virginia.<sup>11</sup>

One explanation for the governmental failure to press for dues deduction bans in states like North Carolina and Virginia may be the desire for lobbying assistance from associations representing public

5. See N.C. GEN. STAT. §95-98 (2012); VA. CODE ANN. § 40.1-57.2 (2011).

6. N.C. GEN. STAT. § 143B-426.40A(g) (2012). This statute was amended by the North Carolina legislature in January 2012 to remove the authority of local boards of education to deduct union dues, but a temporary restraining order prevented the amendment from taking effect, as the court concluded that it was likely unconstitutional. Andrew Ballard, *North Carolina Court Temporarily Blocks Ban on Teachers' Association Dues Deduction*, 6 Daily Lab. Rep. (BNA) A-9 (Jan. 10, 2012). A preliminary injunction was issued in May 2012 and enforcement of the statute was permanently enjoined in December 2012. See Order Granting Plaintiffs' Motion for Preliminary Injunction and Denying Defendants' Motion to Dismiss, N.C. Ass'n of Educators v. North Carolina, No. 12 CVS 404 (N.C. Superior Ct. May 16, 2012) [hereinafter N.C. Preliminary Injunction]; Order Granting Plaintiff's Motion for Judgment on the Pleadings, N.C. Ass'n of Educators v. North Carolina, No. 12 CVS 404 (N.C. Superior Ct. Dec. 17, 2012 [hereinafter N.C. Order]). For further discussion of the North Carolina amendments, see *infra* notes 116-121

7. N.C. GEN. STAT. § 143B-426.40A(g).

8. S. 963, 1993 Leg. Sess. (Va. 1993) (failed by a twenty-one to nineteen floor vote). A bill was introduced in 2012 to limit payroll deduction for state employee associations, but the bill died in committee. See H.D. 1014, 2012 Leg. Sess. (Va. 2012).

9. 1992 Va. Op. Att'y Gen. 126.

10. *Id.*

11. Hodges & Warwick, *supra* note 2, at 278.

employees to assist in accomplishing legislative goals. Where the unions lack the power to bargain, employers may take the calculated risk of allowing dues deduction to give employee organizations the power to lobby for funds that benefit the government employers without fear of making them more powerful at the bargaining table. And once the deduction is given to a group like a statewide employee association, which may be more amenable to employer influence, more militant unions can then press for similar treatment on constitutional grounds.<sup>12</sup>

The Wisconsin legislation, perhaps the most draconian of recent revisions, bans payroll deduction for all but public safety employees.<sup>13</sup> The Ohio legislation, which was overturned by referendum in November 2011, banned payroll deduction only for contributions to political action committees except as provided in campaign finance law.<sup>14</sup> Although Tennessee and Oklahoma eliminated bargaining rights of teachers and employees of large municipalities other than public safety employees, respectively, neither law barred payroll deductions.<sup>15</sup>

Both Arizona and Alabama allow payroll deduction of union dues, but both recently enacted limitations on the use of those dues for political purposes.<sup>16</sup> The Alabama law limits public employee payroll deductions for political activity or for membership dues for organizations that use such dues for political activity. This prohibition may appear narrower than a total ban, but in effect would likely discourage all dues deductions because of the criminal sanctions

12. See 1992 Va. Op. Att'y Gen. 126. The Virginia Governmental Employees Association referenced in the opinion is still emphatically not a union. See *Representing the Commonwealth's Employees and Retirees: The VGEA Works for You!*, VA. GOVERNMENTAL EMP. ASS'N, <<http://www.vgea.org/i4a/pages/index.cfm?pageid=1>> (last visited Nov. 24, 2012) ("VGEA is not a union . . . ." (emphasis in original)).

13. 2011 Wis. Act 10, §§ 58, 227, 298. The provision of the law banning payroll deduction was overturned on March 30, 2012. See *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), further discussed *infra* at notes 77-83 and accompanying text.

14. S. 5 § 4117.09(C), 129th Gen. Assembly (Ohio 2011), available at <[http://www.legislature.state.oh.us/BillText129/129\\_SB\\_5\\_EN\\_N.pdf](http://www.legislature.state.oh.us/BillText129/129_SB_5_EN_N.pdf)>. Ohio campaign finance law already required written consent from employees for deductions used for political purposes. See OHIO REV. CODE ANN. §§ 3517.09(C), 3599.031 (LexisNexis 2012).

15. Ann C. Hodges, *Southern Solutions for Wisconsin Woes*, 43 U. TOL. L. REV. 633, 641 (2012). A bill has been introduced in Tennessee to bar payroll deductions for political purposes, however, including deduction of dues for membership organizations that use funds for political purposes. See H.B. 594 (Tenn. 2011); S.B. 784 (Tenn. 2011).

16. See ALA. CODE § 17-17-5 (2010); ARIZ. REV. STAT. ANN. § 23-361.02 (2011). The Arizona statute applies to both public- and private-sector employees. Proposed legislation in Arizona, however, would eliminate dues deduction for public employees. See *infra* note 27 and accompanying text.

imposed for violation of the law and the inability of individual employees to control the use of their dues.<sup>17</sup> The Alabama law also requires the membership organizations to certify and prove each year that none of the membership dues were spent on political activity.<sup>18</sup> Failure to do so or false submission would result in loss of the organization's ability to obtain dues deduction.<sup>19</sup> The Arizona law requires organizations accepting dues through payroll deduction to certify that none of the dues are used for political purposes or to specify the percentage used for political purposes.<sup>20</sup> It also requires a special written authorization from employees, renewed annually, to have deducted dues used for political purposes.<sup>21</sup> The law exempts charitable organizations, employee benefits organizations, and organizations of public safety officers from its provisions.<sup>22</sup> Both these laws were enjoined by district courts on constitutional grounds.<sup>23</sup>

The efforts to limit dues deduction did not end in 2011. In 2012, the Michigan legislature barred payroll deduction of union dues for teachers, making it unlawful for a public education employer to use public resources to support payroll deduction of union dues or fees.<sup>24</sup> The Michigan law has been challenged by several unions on grounds similar to the Wisconsin legislation and is subject to a preliminary injunction granted June 11, 2012.<sup>25</sup> The North Carolina legislature

17. 2010 Alabama Acts 761 (amending ALA. CODE § 17-17-5). The Alabama law was enjoined from taking effect based on a First Amendment challenge in *Alabama Education Ass'n v. Bentley*, which found the statute both overbroad and vague. 788 F. Supp. 2d 1283, 1327-28 (N.D. Ala. 2011). The Eleventh Circuit narrowed the injunction, however, allowing the law to take effect so long as it applied only to dues deductions for electioneering activities, certifying to the Alabama Supreme Court the following questions: "1. Is the 'or otherwise' language in the statute limited to the use of state mechanisms to support political organizations, or does it cover all contributions by state employees to political organizations, regardless of the source? 2. Does the term 'political activity' refer only to electioneering activities?" Ala. Educ. Ass'n v. State Sup't of Educ., 665 F.3d 1234, 1238, 1239 (11th Cir. 2011).

18. 2010 Alabama Acts 761 (amending ALA. CODE § 17-17-5 (b)).

19. *Id.*

20. 2011 Ariz. Sess. Laws ch. 251 (codified at ARIZ. REV. STAT. ANN. § 23-361.02).

21. *Id.*

22. *Id.*

23. As stated *supra* note 17, the Alabama law was enjoined by the district court in *Alabama Education Ass'n v. Bentley*, 788 F. Supp. 2d at 1327-28. The Court of Appeals narrowed the injunction, allowing it to take effect insofar as it served as a complete ban on deductions for organizations engaged in electioneering. *Ala. Educ. Ass'n*, 665 F.3d at 1239. The court further certified the question of the meaning of the statute to the Alabama Supreme Court. *Id.* at 1238-39. The Arizona law was also invalidated on First Amendment grounds, as the court found it was not viewpoint neutral because it applied to some unions but not others and did not apply to other organizations that could use funds for political purposes. *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1124-25 (D. Ariz. 2011).

24. 2012 Mich. Pub. Acts 53.

25. See Nora Macaluso, *Michigan School Employee Unions Sue Over Law Barring Payroll*

took similar action, although that law also has been enjoined from taking effect based on the procedural process followed in enactment, which the court found violated North Carolina's constitution.<sup>26</sup> Legislation has been introduced in other states to eliminate or limit payroll deduction of union dues.<sup>27</sup> Additionally, a referendum was on the ballot in 2012 in California to ban payroll deduction of political contributions, but it was rejected by voters.<sup>28</sup> Similar proposals were rejected by the voters in 1998<sup>29</sup> and 2005.<sup>30</sup>

### III. THE IMPORTANCE OF UNION DUES

Although the National Right to Work Committee and similar organizations have attempted to brand collection of union dues as a self-interested grab for power and money,<sup>31</sup> the simple truth is that unions, like any other organization, cannot accomplish their purpose

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*Deduction for Dues*, 50 Gov't Empl. Rel. Rep. (BNA) 451 (Apr. 10, 2012). The Michigan law was enjoined from taking effect on constitutional grounds. Order Granting Motion for Preliminary Injunction, *Bailey v. Callaghan*, No. 2:12-cv-11504, 2012 WL 2115300 (E.D. Mich. June 11, 2012) [hereinafter Michigan Order]. In August, the court denied a stay of the injunction pending appeal. 2012 WL 3134338 (E.D.Mich. Aug.1, 2012)

26. See *supra* note 6.

27. See S. 1487, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (prohibiting withholding of public employees' wages for any labor organization); S. 553, 96th Gen. Assembly, 2d Reg. Sess. (Mo. 2012) (setting voter referendum to bar payroll deduction of union dues and requiring employee consent to use dues and fees for political purposes); H.R. 1230, 96th Gen. Assembly, 2d Reg. Sess. (Mo.2012) (allowing payroll deduction of political contributions solicited by employers or unions if employee consents in writing each year); H.R. 1163, 2012 Leg. Sess. (N.H. 2012) (barring employers from withholding union dues); H.R. 1206, 2012 Leg. Sess. (N.H. 2012) (barring the state from withholding union dues from state employees); H.R. 4652, 119th Leg. Sess. (S.C. 2012) (allowing employees to revoke dues deduction at any time). The latter bill was enacted after elimination of the provision relating to dues. Andrew M. Ballard, *South Carolina Lawmakers Approve Bill Aimed at Discouraging Activity by Unions*, 110 Daily Lab. Rep. (BNA) A11 (June 7, 2012).

28. The California measure, entitled Stop Special Interest Money Now Act, qualified for a ballot initiative for November 2012 and included a provision prohibiting public and private employers from payroll deduction of funds to be used for political purposes. See *Initiative to Ban Payroll Deduction for Political Spending Qualifies*, SACRAMENTO BEE (Dec. 6, 2011), <<http://blogs.sacbee.com/capitolalert/latest/2011/12/initiative-to-ban-payroll-deduction-for-political-spending-qualifies.html>>; Letter from Ashlee Titus to Att'y Gen., Initiative Measure to Be Submitted Directly to the Voters (Apr. 1, 2011), available at <[http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i941\\_initiative\\_11-0010.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i941_initiative_11-0010.pdf)>. The proposition was defeated. Evan Halper & Anthony York, *Blue Reign in Sacramento; Democrats' Historic Gains Position them for Unchecked Power*, L.A. TIMES, Nov. 8, 2012, at A1.

29. Paul F. Clark, *Using Members' Dues for Political Purposes: The "Paycheck Protection" Movement*, 20 J. LAB RES. 329, 329 (1999).

30. Peter Nicholas & Jordan Rau, *Results Unsettle Gov.'s Supporters*, L.A. TIMES, Nov. 10, 2005, at A1, available at <<http://www.latimes.com/news/la-me-election10nov10,0,1306155,full.story>>.

31. *Why We Fight*, NAT'L RT. TO WORK COMM., <<http://www.nrtwc.org/about-2/why-we-fight/>> (last visited Nov. 26, 2012).



of representation of employees and balancing the power of employers without resources. The sophistication of employers, the complexity of benefit programs such as pension and health insurance plans, the size and intricacy of governmental budgets, and the powerful anti-tax and anti-government lobbies, among other things, require a sophisticated and powerful union to accomplish the goals and protect the interests of public employees.<sup>32</sup> Labor unions have limited ability to raise funds from sources other than their members, or in some states, all employees who they represent.<sup>33</sup> Accordingly, union dues are not a self-interested obsession of union officials, but rather a necessity to permit the organization to continue to operate. And employees dissatisfied with their union representation can replace the union with another, remove the union altogether, or choose new leadership in the mandatory elections.<sup>34</sup> Without a representative to provide voice in the workplace, the only option employees have is to leave their employment.

Payroll deduction is important because it provides an effective mechanism for dues collection that requires no action on the part of the employee except a single authorization. Dues are then deducted by the employer each pay period and remitted to the union. In the absence of payroll deduction, unions must establish a mechanism for dues collection, and none is available that is comparable to payroll deduction.<sup>35</sup> The union must then expend resources on dues collection

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32. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977); Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 269, 272, 279 (1987).

33. In states that allow fair share, unions can require nonmembers to pay the cost of representation but not the cost of political advocacy. See *Abood*, 431 U.S. at 235-36.

34. See MARTIN H. MALIN ET AL., *PUBLIC SECTOR EMPLOYMENT* 391-92, 787 (2d ed. 2011).

35. For example, in 1988, the Gwinnett County Association of Educators lost 430 members, about one-third of its membership and \$81,000 as a result of the employer's termination of dues deduction. See *Ga. Ass'n of Educators v. Gwinnett Cnty. Sch. Dist.*, 856 F.2d 142, 144 & n.5 (11th Cir. 1988). When dues deduction was ceased for the United Federation of Teachers in 1982, it lost 30 percent of its normal income from dues in the first two months of the suspension, requiring staff layoffs and temporary closing of offices through which it provided representation services. *United Fed'n of Teachers, Local 2*, 15 N.Y. PERB ¶ 3091 (1982). In 2005, cessation of dues deduction for the Transport Workers Union resulted in less than half of bargaining unit members paying their full dues for the first three months, with the union receiving only 64.7 percent of the income it would have received with dues deduction. Affidavit of Roger Toussaint, ¶ 13, *MTA Bus Co. v. Transp. Workers Union of Greater N.Y. Local 100*, 851 N.Y.S. 2d 71 (N.Y. Sup. Ct. 2007) (No. 2005-37468), 2005 WL 6242982. Similarly, when the City of Detroit and Wayne County, Michigan ceased payroll dues collection, AFSCME Council 25 saw an immediate drop in dues collection of 55 percent and an eventual drop of 81 percent. Affidavit of Lawrence Roehrig, Exh. 2, § 8, Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, *Bailey v. Callaghan*, No. 2:12-cv-11504 (E.D. Mich. Apr. 11, 2012), available at <<https://www.bloomberglaw.com/document/2048054380400386?image>>



that might otherwise be spent on activities that directly benefit the membership.

One might argue that the drop off in dues payment that occurs when automatic payroll deduction is stopped indicates that employees do not truly desire union membership and representation. That may be true of some employees, but the facts belie that claim in many instances. For example, one of the cases where a substantial drop occurred was in Georgia,<sup>36</sup> a right to work state where union membership was completely voluntary<sup>37</sup> and where the traditional southern hostility to unionization flourished. That the employees whose dues were deducted chose union representation in such a climate suggests that their support of the union was real. Nevertheless, in the absence of dues deduction, many simply failed to pay their dues.

Union dues not only fund representation activities and member benefits, but unions also spend funds on political activities.<sup>38</sup> In the public sector, political activities are not only generally related to employees' terms and conditions of employment, as in the private sector,<sup>39</sup> but also provide "the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table."<sup>40</sup> Many terms and conditions of employment are set by law in the public sector, even in collective bargaining states, and thus political activity and lobbying provide a vehicle to influence these laws.<sup>41</sup> Further, the political process may afford public

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name=11-4.pdf>. Even in hiatus periods between contracts when dues deduction is not available, the delinquency rate is substantial, requiring devotion of resources to collection rather than representation. Affidavit of Gretchen Dziadosz, Exh. 1, § 6, Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, *Bailey v. Callaghan*, No. 2:12-cv-11504 (E.D. Mich. Apr. 11, 2012), available at <<https://www.bloomberglaw.com/document/2048054380400386?imageame=11-3.pdf>>.

36. See *Ga. Ass'n of Educators*, 856 F.2d at 144 & n.5.

37. See GA. CODE ANN. § 34-6-23 (2011).

38. Of course, political activity is a broad term that might encompass varied conduct including campaign funds for candidates or ballot initiatives as well as lobbying. For example, the Idaho law restricting payroll deduction for political activities upheld in *Ysursa v. Pocatello Education Ass'n*, 555 U.S. 353 (2009), defined political activities as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." *Id.* at 356 (quoting IDAHO CODE ANN. § 44-2602(1)(e) (2003)).

39. For example, a union might lobby for enactment or amendment of a statute that benefits employees such as the Family and Medical Leave Act or a workers' compensation statute.

40. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 228 (1977).

41. Catherine Fisk & Brian Olney, *Labor and the States' Fiscal Problems: Not the Problem But Perhaps Part of the Solution*, in *WHEN STATES GO BROKE* 253, 263 (Peter Conti-Brown & David Skeel eds., 2012).

employees more direct influence on matters such as government appropriations that increase employer resources.<sup>42</sup> In states without collective bargaining, the importance of political activity is magnified by the absence of the bargaining process as a means of influencing the employer. When states pass statutes limiting the use of dues for political purposes through payroll deduction limitations or otherwise, the political contributions of public-sector unions drop,<sup>43</sup> impacting their ability to use political activity to benefit the membership.

#### IV. CONSTITUTIONAL CHALLENGES TO PAYROLL DEDUCTION BANS

Statutory bans on payroll deduction like the one recently enacted in Wisconsin face constitutional challenge. There are two potential grounds of challenge for such bans, the First Amendment and the Equal Protection Clause. The Supreme Court has addressed dues deduction under both theories.

##### A. First Amendment

In *Ysursa v. Pocatello Education Ass'n*,<sup>44</sup> the Supreme Court addressed the question of whether Idaho's ban on payroll deduction of public employees' contributions to union political activities violated the First Amendment. *Ysursa* did not involve a ban on payroll deduction of union dues in general, but rather deduction of dues used for political purposes.<sup>45</sup> The Court rejected the First Amendment challenge, stating that the law merely declined to assist in promoting speech and did not actively abridge the employees' freedom of speech.<sup>46</sup> As a result, the state need only show a rational basis for its decision, and the desire to avoid entanglement in partisan

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42. For a discussion of which activities are chargeable to objecting fee payers in fair share states, see *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In *Davenport v. Washington Education Ass'n*, the Court upheld the constitutionality of a Washington statute that barred the use of agency fees paid by nonmembers for political purposes, rejecting a claim that it unconstitutionally burdened the union's First Amendment rights. 551 U.S. 177 (2007).

43. JAMES SHERK, HERITAGE CTR. FOR DATA ANALYSIS, CDA06-08, WHAT DO UNION MEMBERS WANT? WHAT PAYCHECK PROTECTION LAWS SHOW ABOUT HOW WELL UNIONS REFLECT THEIR MEMBERS' PRIORITIES 7-9 (2006), available at <<http://www.heritage.org/research/reports/2006/08/what-do-union-members-want-what-paycheck-protection-laws-show-about-how-well-unions-reflect-their-members-priorities>>.

44. 555 U.S. 353 (2009).

45. *Id.* at 353. Utah has a similar law, enacted in 2001 and upheld by the Tenth Circuit in 2009. See *Utah Educ. Ass'n v. Shurtleff*, 565 F.3d 1226 (10th Cir. 2009) (upholding UTAH CODE ANN. § 34-32-1.1 (2008)).

46. *Ysursa*, 555 U.S. at 359.

politics satisfied that standard.<sup>47</sup> That the law might reduce funds available to the union was of no moment in the absence of a direct abridgement of speech.<sup>48</sup>

While this decision might seem to doom any challenge to payroll deduction bans, it does require at least a rational basis to support such a ban. Further, cases in recent years have demonstrated that not every rationale of government constitutes a rational basis.<sup>49</sup> Courts require "that the classification bear a rational relationship to an independent and legitimate legislative end, [to] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."<sup>50</sup> In addition, if the legislation more directly impairs First Amendment rights, strict scrutiny will be applied.<sup>51</sup> While the government can freely decline to assist or fund citizen speech, it cannot do so for reasons based on viewpoint.<sup>52</sup> Once it chooses to subsidize any speech, it cannot make subsidy decisions based on viewpoint. Because many dues deduction bans apply to some groups of employees and organizations and not others, they are vulnerable to legal challenge.<sup>53</sup>

### B. Equal Protection

In *City of Charlotte v. Local 660, International Ass'n of Firefighters*,<sup>54</sup> the Court upheld the city's refusal to deduct union dues despite the fact that it granted deduction requests for other purposes.

47. *Id.*

48. *Id.*

49. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996).

50. *Id.* at 633.

51. See *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1263 (4th Cir. 1989).

52. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (stating "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas,'" quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983), and "a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace'" quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that denial of student activities funds on the basis of viewpoint violated the First Amendment, despite space and funding limitations).

53. See, e.g., *Int'l Ass'n of Firefighters Local 3858 v. City of Germantown*, 98 F. Supp. 2d 939, 948 (W.D. Tenn. 2000) (invalidating statute requiring dues deductions for firefighters in some counties and not others, finding no rational basis for distinguishing between them that was relevant to dues deduction); *Truck Drivers & Helpers Local Union No. 728 v. City of Atlanta*, 468 F. Supp. 620, 623 (N.D. Ga. 1979) (reaching similar conclusion regarding dues deduction distinctions between police and firefighters, finding any distinction in their functions was unrelated to dues deduction).

54. 426 U.S. 283 (1976).

The Court held that the city's established standards for determining which dues deduction requests it would grant met the rational basis test.<sup>55</sup>

The city has determined that it will provide withholding only for programs of general interest in which all city or departmental employees can, without more, participate. Employees can participate in the union checkoff only if they join an outside organization the union. Thus, Local 660 does not fit the category of groups for which the city will withhold. We cannot say that denying withholding to associational or special interest groups that claim only some departmental employees as members and that employees must first join before being eligible to participate in the checkoff marks an arbitrary line so devoid of reason as to violate the Equal Protection Clause. Rather, this division seems a reasonable method for providing the benefit of withholding to employees in their status as employees, while limiting the number of instances of withholding and the financial and administrative burdens attendant thereon.<sup>56</sup>

The decision indicates that a total ban on payroll deduction of association or union dues would pass muster, at least if the employer does not allow any other deductions for outside organizations.

### C. Lower Court Decisions

Applying the Supreme Court's standards, lower courts have upheld some dues deduction policies which distinguish among eligible deductions or organizations, while striking down others. The courts have addressed statutory dues deduction limitations on both First Amendment and Equal Protection grounds. With respect to these claims, courts have typically focused on the absence of any duty to affirmatively assist employees in the exercise of their rights to speech and association, drawing from that conclusion a right to condition the privilege of dues checkoff on meeting rational statutory requirements, so long as the requirements don't directly burden the associational or speech rights.<sup>57</sup>

In *Memphis American Federation of Teachers, Local 2032 v. Board of Education of Memphis City Schools*,<sup>58</sup> the court rejected both First Amendment and Equal Protection challenges to the

55. *Id.* at 288.

56. *Id.*

57. See, e.g., *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319-22 (6th Cir.1998); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-62 (4th Cir. 1989); *Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983).

58. 534 F.2d 699 (6th Cir. 1976).

employer's grant of exclusive dues deduction privileges to a union which was the majority representative of the employees, while refusing to deduct dues from rival unions.<sup>59</sup> The court found that the goals of labor peace and stability justified the grant of this privilege to the authorized representative only.<sup>60</sup>

In *Brown v. Alexander*,<sup>61</sup> the court, applying strict scrutiny, struck down a requirement that labor organizations be independent and unaffiliated in order to obtain dues checkoff privileges because such a requirement directly burdened the associational rights of the union without a compelling justification.<sup>62</sup> Applying the rational basis test, the court upheld requirements that the organization be domestic, have membership of at least 20 percent of the employees in the executive branch of the state government, and have as one of its objectives the promotion of an effective and efficient governmental work force.<sup>63</sup> The court concluded that the numerosity requirement, like the limitation of checkoff to majority union representatives, served the goal of labor peace by limiting the number of competing unions.<sup>64</sup> And since employees are required to promote efficient service, the court saw no constitutional flaw in requiring their associations to do so as a condition of obtaining payroll deduction.<sup>65</sup>

In *South Carolina Education Ass'n v. Campbell*, the court upheld as rationally related to a governmental purpose a law which barred dues deductions for all membership organizations except one open to all state employees.<sup>66</sup> The court recognized several legitimate bases for the distinction, including the administrative and financial burdens of deducting dues for every requesting organization and fostering healthy employment relations with its own employees through the organization open to all state employees.<sup>67</sup> Where termination of dues

59. *Id.* at 702-03.

60. *Id.* Other cases have reached the same result. See *Am. Fed'n of Teachers Local 858 v. Sch. Dist. No. 1*, 314 F. Supp. 1069, 1076 (D. Colo. 1970); *Bauch v. New York*, 237 N.E.2d 211, 212 (N.Y. 1968). The Supreme Court approved the award of exclusive privileges based on the union's status as majority union representative in *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 54 (1983) (upholding as permissible under the First Amendment an agreement allowing only the designated union representative, and not other unions, to use the teacher mailboxes and intraschool mail system).

61. 718 F.2d at 1423.

62. *Id.* at 1426.

63. *Id.* at 1424-25.

64. *Id.* at 1424.

65. *Id.* at 1425.

66. 883 F.2d 1251, 1262-64 (4th Cir. 1989).

67. *Id.* at 1263-64. The court also found no First Amendment violation. *Id.* at 1256-57.

checkoff is in retaliation for the exercise of speech and associational rights, however, it violates the First Amendment, although the employer need not provide the checkoff in the first instance.<sup>68</sup>

#### D. The Wisconsin Challenge

Until the recently enacted Michigan and North Carolina legislation, the Wisconsin law was the only recently enacted law that totally bans payroll deduction of dues for some categories of employees. A group of unions in Wisconsin filed a lawsuit challenging the Wisconsin ban on payroll deduction along with other aspects of the new Wisconsin law. The complaint alleged both First Amendment and Equal Protection claims, based primarily on the factual circumstances of the Wisconsin law which bars payroll deduction for all employees except public safety employees.<sup>69</sup> The complaint alleged, *inter alia*, that the law removed the ability of the "disfavored" group of employees to use payroll deduction to financially support the activities of the union, including the political speech of the union, while permitting the favored group of public safety employees to support their unions, many of which supported the election of the governor who proposed the legislation.<sup>70</sup> According to the complaint, the distinctions have no rational relation to a legitimate state objective and burden speech based on the identity and viewpoint of the speaker, thereby violating both the First and Fourteenth Amendments.<sup>71</sup>

The state articulated several defenses to the claim. On the First Amendment claim, the state first argued that there was no core political speech involved because union dues are used for many purposes and may not be used for political speech at all.<sup>72</sup> Further, the refusal to subsidize speech through payroll deduction does not

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68. *Ga. Ass'n of Educators v. Gwinnett Cnty. Sch. Dist.*, 856 F.2d 142, 144-46 (11th Cir. 1988) (reversing summary judgment for employer on claim of retaliatory revocation of dues deduction because of conflicting evidence on the employer's motive). The district court in *Arkansas State Highway Employees v. Kell* apparently held to the contrary, but the Court of Appeals affirmed the decision on other grounds. 628 F.2d 1099, 1102, 1103-04 (8th Cir. 1980).

69. Complaint for Declaratory and Injunctive Relief, ¶¶ 1-5, *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012) (No. 3:11-cv-00428-wmc).

70. *Id.*

71. *Id.*

72. Defendants' Brief in Support of Motion for Judgment on Pleadings, at 19-20, *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d 856 (No. 3:11-cv-00428-wmc) [hereinafter Defendants' Brief].

abridge speech in any way, according to the employer.<sup>73</sup> Finally, the state argued that there was no viewpoint discrimination because any discrimination was based on the type of organization, not the viewpoint of the organization.<sup>74</sup> On the equal protection claim, the state argued that only a rational basis was required since no fundamental right or suspect classification was involved.<sup>75</sup> The articulated rational basis was to prevent any work stoppage by public safety employees that would create a public safety risk.<sup>76</sup>

In March, the court, without ever ruling on a preliminary injunction request, issued a decision on the merits, striking down the dues deduction provision of the law.<sup>77</sup> The court found that the employer's rationale of preventing strikes by public safety employees did not justify withholding dues deduction from general employees, but not public safety employees. The court concluded that the selective restriction of dues deduction burdened the speech of both the employees and their unions.<sup>78</sup> Citing the controversial decision of *Citizens United v. Federal Election Commission*,<sup>79</sup> the court pointed out that the availability of a more onerous alternative for collecting dues did not relieve the burden on constitutional rights.<sup>80</sup> Having found a burden on speech, the court then looked for an adequate justification and found none.<sup>81</sup> The employer cited no justification, relying on the argument that denial of dues deduction did not implicate the First Amendment at all. The court considered the argument that the legislation would prevent public safety strikes, but found any relationship between dues deduction and strikes tenuous at best.<sup>82</sup> The court concluded that the only apparent reason for differential treatment was the different viewpoints of the unions,

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73. *Id.* at 21-22.

74. *Id.* at 23-24.

75. *Id.* at 2-3, 6.

76. *Id.* at 8-9.

77. *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d at 859-60 & n.2. The court declined to strike down the provisions limiting collective bargaining to wages for general employees (all but public safety employees), accepting the state's rationale that the distinction was justified by the goal of avoiding strikes by public safety employees. *Id.* at 866. The court struck down the unprecedented requirement that general employee unions be recertified as representatives each year, including the requirement that the union obtain support from 51 percent of the bargaining unit employees, not just those voting, finding the justification for the distinction between unions insufficient. *Id.* at 864.

78. *Id.* at 871.

79. 130 S.Ct. 876, 897 (2010).

80. *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d at 871.

81. *Id.* at 875.

82. *Id.* at 868.



noting that *Ysursa* upheld the ban on all political dues deduction to avoid partisan political entanglement and here there was at least "apparent, if not actual, favoritism and entanglement" because of the discriminatory legislation.<sup>83</sup>

The district court's decision is, of course, not the last word in this pitched battle. The state almost immediately filed a notice of appeal and asked the Seventh Circuit Court of Appeals for a stay of the judge's injunction against enforcing the law pending resolution of the appeal.<sup>84</sup>

#### V. MAINTAINING PAYROLL DEDUCTION

It is perhaps initially surprising that right-to-work, traditionally anti-union states like Virginia<sup>85</sup> have not expressly banned payroll deduction of union dues.<sup>86</sup> The explanation may lie in the fact that employers value the support of statewide employee associations, and in some cases educational associations and unions as well, as lobbying forces supporting the objectives of the government agencies and school districts. And in the anti-union south, without collective bargaining rights, that support may outweigh any threat posed by the unions to the employers' interests. Yet dues deduction has helped the unions survive in the hostile environments of the southern states. Current efforts to curb payroll deduction are driven by a perception that public-sector unions are too powerful<sup>87</sup> and have emerged in

83. *Id.* at 876.

84. Michael Bologna, *Wisconsin Attorney General Seeks Halt to Ruling for Collective Bargaining Rights*, 69 Daily Lab. Rep. (BNA) A-5 (Apr. 10, 2012). The stay was denied, except as to unions that have been decertified. Opinion and Order, *Wis. Educ. Ass'n Council v. Walker*, No. 3:11-cv-428-wmc (W.D. Wis. Apr. 27, 2012). Accordingly, dues deduction had to be reinstated by May 31, 2012 for unions that had not been decertified. *Id.* The case was argued before the Seventh Circuit in September 2012. Michael Bologna, *Seventh Circuit Hears Oral Argument in Challenge to Wisconsin Labor Law*, 185 Daily Lab. Rep. (BNA) A-11 (Sept. 24, 2012). A few days earlier, in a different case, the Dane County Circuit Court found that many provisions of the law, including the limit on payroll deduction of dues, violate the free speech and equal protection provisions of both the U.S. and Wisconsin Constitutions. *Madison Teachers, Inc. v. Scott Walker*, Case No. 11CV3774 (Sept. 14, 2012), available at <http://op.bna.com/dir/cases.nsf/r?Open=mcan-8y8qd2>. Just as this article was going to press, the Seventh Circuit issued a decision upholding the entire statute, thus reversing the district court's holding that the dues deduction provisions were unconstitutional. See *Wisconsin Education Ass'n Council v. Walker*, Nos. 12-1854, 12-2011 & 12-2058 (Jan. 19, 2013).

85. RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 32-33 (4th ed. 2009); Hodges, *supra* note 2, at 758-63.

86. Even South Carolina allowed deduction of dues for the state employees association, while banning it for the state NEA affiliate. *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1253 (4th Cir. 1989).

87. See Christopher Ruddy, *Public-Service Unions Are Too Powerful*, NEWSMAX (Mar. 9, 2011, 12:03 PM), <<http://www.newsmax.com/Ruddy/scott-walker-unions-wisconsin/2011/03/09/>

some states with a long history of unionization such as Wisconsin and Michigan.

#### A. Bans on Deductions for Political Purposes

In recent years, with a few exceptions, most of the focus on limiting dues deduction has been on deductions for political purposes.<sup>88</sup> While these bans are somewhat less debilitating than bans on deducting any dues, depending on their structure they can create several problems for unions. First, it may be difficult to discern what constitute political expenditures under the statute.<sup>89</sup> Second, it may require complex, sophisticated and therefore expensive, reporting and accounting to separate permissible and banned expenditures.<sup>90</sup> Particularly in the public sector, where government officials are the employer, political activity is deeply embedded in union representational activities. These bans may chill legitimate union activity for fear of running afoul of the statute. Further, the greater the restrictions on collective bargaining, the more important political activity and lobbying are to employee representation.

Two primary rationales have emerged for such limitations, one a concern for compelling employees to support political causes through union dues<sup>91</sup> and the other a concern for restricting government entanglement in politics and avoiding any suggestion of political corruption.<sup>92</sup> Underlying both, however, is the reality that unions lean heavily Democratic and any impairment of their ability to collect

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id/388874>; see also John O. McGinnis & Max Schanzbach, *The Case Against Public Sector Unions*, POL'Y REV., Aug./Sept. 2010, at 3, available at <<http://www.hoover.org/publications/policy-review/article/43266>>; Steven Greenhouse, *A Watershed Moment for Public-Sector Unions*, N.Y. TIMES, Feb. 19, 2011, at A14, available at <<http://www.nytimes.com/2011/02/19/us/19union.html>>.

88. See Clark, *supra* note 29, at 333-34 (describing "paycheck protection" efforts spurred by the American Legislative Exchange Council (ALEC) to bar unions from collecting dues for political purposes using state and federal legislation and state voter initiatives); see also ALA. CODE § 17-17-5 (2010); ARIZ. REV. STAT. ANN. § 23-361.02 (2011); *Yursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009). Recently, however, several states have focused on barring deductions for education unions. See *infra* notes 133-134.

89. See *supra* note 17, and accompanying text.

90. See Calvin Siemer, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members: Much A-Dues About Nothing?*, 60 FORDHAM L. REV. 1057, 1076-77 (1992) (discussing the difficulty and expense for unions of differentiating between chargeable and non-chargeable expenditures); see also *Ala. Educ. Ass'n v. Bentley*, 788 F. Supp. 2d 1283, 1318-22 (N.D. Ala. 2011) (discussing difficulties of compliance with Alabama legislation).

91. SHERK, *supra* note 43; Clark, *supra* note 29, at 329.

92. See, e.g., *Yursa*, 555 U.S. at 361. More recently, this justification has taken a different shape, as critics argue that dues deduction gives unions too much power to affect the operations of government through bargaining and/or lobbying. See *supra* note 87 and accompanying text.

funds benefits Republican and conservative causes.<sup>93</sup> Supporters of both political and general restrictions on payroll deduction of dues are conservative and Republican groups.<sup>94</sup> While this support suggests a motive of suppressing political speech with a certain viewpoint,<sup>95</sup> without more it is unlikely to convince courts to invalidate restrictions as the motives of supporters of legislation are not automatically attributed to legislators. Courts are notoriously reluctant to probe the views of individual legislators to discern the motive for particular legislation.<sup>96</sup> Evidence of political motives can be discerned from the form and timing of the legislation in many cases, however, and such

93. Clark, *supra* note 29, at 340; Richard Michael Fischl, "Running the Government Like a Business": Wisconsin and the Assault on Workplace Democracy, 121 YALE L.J. ONLINE 39, 39-40, 60-63 (June 21, 2011), <<http://www.yalelawjournal.org/images/pdfs/996.pdf>>; Beau Hodai, *Publicopoly Exposed: How ALEC, the Koch Brothers and Their Corporate Allies Plan to Privatize*, IN THESE TIMES (July 11, 2011), <<http://www.inthesetimes.com/article/11603/>>.

94. See SHERK, *supra* note 43; Clark, *supra* note 29, at 334-36, 340; McGinnis & Schanzenbach, *supra* note 87; Joel Rogers & Laura Dresser, *Business Domination Inc.*, THE NATION, Aug. 1, 2011, at 18, 18-20, available at <<http://www.thenation.com/article/161977/alec-exposed-business-domination-inc>>; *Who's Behind Paycheck "Protection"*, CAL. EDUCATOR, Sept. 2005, at 16, 16-17, available at <<http://archive.cta.org/NR/rdonlyres/D05CC266-CE27-4C10-BF4D-34ABA0101784/0/features.pdf>>; Hodai, *supra* note 93; Gary D. Robertson, *Late-Night Veto Override Maneuver Risky for N.C. GOP*, THE VIRGINIAN-PILOT (Jan. 8, 2012), <<http://hamptonroads.com/2012/01/latenight-veto-override-maneuver-risky-nc-gop>>; *History*, AM. LEGISLATIVE EXCH. COUNCIL, <<http://www.alec.org/about-alec/history/>> (last visited Nov. 26, 2012); *Frequently Asked Questions*, AM. LEGISLATIVE EXCH. COUNCIL, <<http://www.alec.org/about-alec/frequently-asked-questions/>> (last visited Nov. 26, 2012); *infra* note 129 and accompanying text..

95. See JOSEPH E. SLATER, AM. CONSTITUTION SOC'Y FOR LAW & PUB. POLICY, ISSUE BRIEF, THE ASSAULT ON PUBLIC SECTOR COLLECTIVE BARGAINING: REAL HARMS AND IMAGINARY BENEFITS 1, 14-15 (2011), available at <[https://www.acslaw.org/sites/default/files/Slater\\_Collective\\_Bargaining.pdf](https://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf)> (arguing that the efforts by Republican governors and legislators to change public-sector collective bargaining laws and limit dues deduction are motivated by desire to weaken unions, which have traditionally supported the Democratic party); Fisk & Olney, *supra* note 41, at 254-55 (arguing that the fiscal problems of states are not caused by collective bargaining and that the lines drawn in the Wisconsin legislation between public safety employees and teachers appear to be more about politics than budgets); Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293, 293-95 (2012) (arguing that the coordinated legislative efforts to curtail collective bargaining and impose other restrictions on unions in Wisconsin and other states were an attempt to restrict the political power of organizations that advocate for working and middle class Americans); Fischl, *supra* note 93, at 60-63 (arguing that the Wisconsin legislation was substantially motivated by a desire to defund the Democratic party and silence the political voice of workers).

96. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (stating that "[t]his Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided'"; quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (additional citations omitted)); *United States v. O'Brien*, 391 U.S. 367, 384 (1968) (stating "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork"); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1258, 1261 (4th Cir. 1989).

evidence offers more promising grounds for reversal of dues deduction bans.<sup>97</sup>

To overturn a statutory ban, *Ysursa* would require a showing either that no rational basis for the ban exists or that it was designed to suppress speech based on viewpoint or to retaliate for exercise of constitutional rights. Under equal protection doctrine, a similar showing of no rational basis would suffice or, if there is unequal treatment on the basis of viewpoint, a more compelling justification would be required.<sup>98</sup> Each situation is, of course, unique, but previous cases demonstrate some elements that may make a statutory ban vulnerable to challenge as viewpoint discrimination. A statute that bars dues deduction for some, but not all unions, may suggest viewpoint discrimination.<sup>99</sup> The history of the unions' political activities, the timing of the legislation in relation to those activities, and statements from sponsors and legislative supporters of the law may help to demonstrate the motivation to suppress particular speech.<sup>100</sup>

#### B. General Bans on Payroll Deduction of Dues

General dues bans may pose an additional litigation hurdle. Like the state of Wisconsin, the employer may argue that the dues ban does not impact "core political speech" and therefore does not violate the First Amendment.<sup>101</sup> Further, with a political contributions ban, it may be easier to trigger strict scrutiny based on the argument that a fundamental right is involved.<sup>102</sup> Nevertheless, even bans on political

97. See *Arlington Heights*, 429 U.S. at 266-68 (noting that in determining the motive for legislative action, the impact of the decision, the history of the action including contemporary statements by decisionmakers and official minutes and reports of the action, the sequence of events leading up to the decision, and the historical background of the decision are all relevant factors).

98. The controversial *Citizens United v. Federal Election Commission* decision has reaffirmed the salience of speaker identity discrimination under the First Amendment. 130 S.Ct. 876, 898 (2010) (stating, "[p]remised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content" (citations omitted)).

99. *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1124-25 (D. Ariz. 2011). Of course some courts have upheld such distinctions based on size of the union or on the basis that the organization must be open to all employees. See, e.g., *S.C. Educ. Ass'n*, 883 F.2d at 1263-64; *Brown v. Alexander*, 718 F.2d 1417, 1424-25 (6th Cir. 1983).

100. These factors may also support challenges to general dues deduction bans and are discussed further *infra* at notes 105-134.

101. Defendants' Brief, *supra* note 72, at 19-20.

102. This argument has not been successful in the past where a complete ban is involved. See

speech may not require strict scrutiny if they are sufficiently broad to defeat a claim of viewpoint discrimination without being so overbroad or vague as to chill political speech.<sup>103</sup>

Universal bans, whether focused on dues for any outside organization or political deductions for any purpose are almost certain to be upheld.<sup>104</sup> When the prohibition is not universal, however, the potential for establishing either a First Amendment or Equal Protection violation rises. Careful scrutiny of the provisions of the legislation, the ostensible rationale for its passage and any evidence of other purposes, the groups covered and not covered, and the actual effects of the legislation may reveal the basis for a successful legal attack.

### C. Strategies for Challenging Bans

#### 1. Establishing the Purpose and Effect

The key factor for a successful challenge to dues deduction bans is establishing a purpose of suppressing political viewpoint or retaliating for political speech. In these times of intense political polarization, the ammunition for challenging a dues ban might be more easily available. Legislative strategies and comments by politicians are more likely to identify political viewpoint as a motivation for legislative bans. The Supreme Court's recent decision in *Citizens United* provides support for close scrutiny of barriers to speech based on the identity of the speaker.<sup>105</sup> Further any administrative justification for banning dues deduction in this age of computerization of payroll has limited utility.<sup>106</sup> Finally, courts may be somewhat more willing to explore and recognize political motivations supporting legislation.<sup>107</sup>

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*Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009).

103. See *id.* at 359-60.

104. *Id.* at 361 n.3.

105. *Citizens United v. Fed'l Election Comm'n*, 130 S.Ct. 876, 899 (2010).

106. When payroll is computerized, a function for deductions is necessarily programmed because of legally required deductions. Therefore deducting dues is simply one added deduction and an electronic transfer of the total to the union. Computerization has dramatically reduced the cost and time required for payroll administration. See Michael Cohn, *New Options: 21st Century Payroll*, ACCT. TECH., Feb./Mar. 1996, at 18; Ripley Hotch, *Accounting Programs You Can More Than Count on*, NATION'S BUS., June, 1995, at 45; see also Michigan Order, *supra* note 25, slip op. at 6-7 (noting that the Michigan legislature determined that any cost savings from elimination of dues deduction would be negligible and that the Defendants provided no additional evidence supporting the cost saving rationale for the statute).

107. See *Ricci v. Stefano*, 557 U.S. 557, 597-605 (2010) (Alito, J., concurring) (suggesting

Three recent cases challenging dues deduction bans in Michigan, North Carolina and Wisconsin reveal some common elements supporting the claim that the motivation for their passage is either suppression of certain political views or retaliation for political activity or both.<sup>108</sup> Since each of the laws applies to some but not all unions, the effect is to burden the speech of the disfavored organizations. If the complaint allegations and reported facts regarding enactment of the legislation are established in court,<sup>109</sup> each of the laws was enacted using surreptitious and unusual, if not improper, legislative tactics. Each targeted particular unions that had recently engaged in political activities in opposition to proponents of the legislation. And in each case, leaders of the legislative body made public statements suggesting political motivations for the legislation.

Consider the following allegations from the complaint of the unions challenging the Michigan dues deduction ban.

36. On March 6, 2012, Michigan unions and their members, including Plaintiff unions, announced a petition drive to place an amendment to the Michigan Constitution on the November 2012 general election ballot. The amendment would create a right to collective bargaining and protect that right from interference, and it would impair or invalidate a number of the laws restricting public employees' bargaining rights that had passed or were then pending in the Legislature. The ballot initiative campaign was announced at a press conference held at the Michigan Capitol and it was widely publicized.

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that based on the evidence a reasonable jury could find that the city did not discard the results of the firefighter promotion examination based on concern about liability but instead to satisfy a politically important constituency). *Ricci* did not involve legislative action but rather the actions of the civil service board. *Id.* The concerns about inquiry into motivation, however, apply similarly to actions of legislative and administrative bodies. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Where the question is whether a decision was based on viewpoint discrimination, inquiry into motivation is essential. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812-13 (1985) (remanding for determination of whether exclusion of advocacy organization from the federal employees' fundraising campaign was based on viewpoint).

108. In addition, similar elements appear in *Alabama Education Ass'n v. Bentley*, 788 F. Supp. 2d 1283, 1295-97 (N.D. Ala. 2011) (detailing the Alabama Education Association's conflicts with the Republican administration leading up to the limitations on payroll deduction, first implemented by the administration and then enacted into law by a special session of the legislature held just before the Governor left office). Although the Alabama law does not differentiate between unions, the law does allow deductions for other organizations that use funds for political purposes without similar restrictions. *Id.* at 1298.

109. The North Carolina law has been enjoined from taking effect on both procedural and substantive constitutional grounds, *see* Temporary Restraining Order at ¶¶ 2-29, *N.C. Ass'n of Educators v. North Carolina*, No. 12 CVS 404 (N.C. Superior Ct. Jan. 9, 2012) [hereinafter *N.C. TRO*]; *N.C. Preliminary Injunction*, *supra* note 6, at ¶1; *N.C. Order supra* note 6, at 2, while the challenge to the Wisconsin law on procedural grounds ultimately failed in the Wisconsin Supreme Court. *See* *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011).

37. On the following day, March 7, 2012, the Senate Reforms, Restructuring and Reinventing Committee took up HB 4929 [banning payroll deduction of dues for education unions], which had lain dormant for over five months. With minimal notice to the public and no public hearings, the Committee adopted and recommended passage of a slightly altered substitute to HB 4929. Within two hours of being reported out by the Committee, HB 4929 was put to a vote of the Senate, with the Senate majority suspending Senate rules in order to bring the bill to an immediate vote. The bill passed by a vote of 20 to 18. The Senate substitute to HB 4929 was transmitted to the Michigan House of Representatives immediately. Within one hour of receiving the bill, the House suspended its rules and adopted the bill by a vote of 56 to 54, and also voted to give the Bill immediate effect. The entire enactment process was completed in an extraordinarily short time – five hours during one session day . . . . The bill was presented to the Governor of the State of Michigan on March 9, 2012, who signed it into law on March 15, 2012.<sup>110</sup>

At least as alleged, the dues deduction ban was prompted by a political action campaign by the targeted unions, announced the day prior to the enactment of the legislation, which had lain dormant for months and was resurrected and passed within hours after the union's announcement of its political campaign, using a suspension of rules in both chambers. The enactment of the dues deduction ban will clearly impact the unions' ability to effectuate the petition drive by limiting their ability to collect dues, requiring them to invest in an alternative and almost certainly less effective collection mechanism, and therefore limiting their available resources. According to the complaint, the petition drive followed a series of legislative enactments curbing collective bargaining rights and reducing the benefits of school employees, which triggered a political response by the union, including a recall effort directed against the primary sponsor of the legislation.<sup>111</sup> The complaint also quotes the Speaker of the House stating that the union has "declared war" by promoting recalls and the Senate Majority Leader as saying "[t]he teachers union specifically the Michigan Education Association have lost their (sic) way and public school employees should no longer be forced to join them."<sup>112</sup> Further as in most other cases, the ban applies to one

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110. Complaint at ¶¶ 36-37, *Bailey v. Callaghan*, No. 2:12-cv-11504 (E.D. Mich. Apr. 5, 2012) [hereinafter *Complaint*]. A first amended complaint was filed on April 18, 2012, with substantially similar allegations. First Amended Complaint at ¶¶ 38-39, *Bailey v. Callaghan*, No. 2:12-cv-11504 (E.D. Mich. Apr. 18, 2012) [hereinafter *First Amended Complaint*].

111. Complaint, *supra* note 110, at ¶¶ 30-33.

112. *Id.* ¶ 33.



group of public employees and their unions (those in public education), leaving others free to utilize governmental dues deduction mechanisms.<sup>113</sup> The District Court for the Eastern District of Michigan enjoined the legislation from taking effect, concluding that the union plaintiffs were likely to succeed on the merits of both their Equal Protection and First Amendment claims.<sup>114</sup> The court found no rational basis for the legislation, suggesting that it appeared to be directed at limiting the power and the speech of a politically unpopular group based on viewpoint.<sup>115</sup>

The North Carolina legislation followed a similar pattern. The complaint alleges that the enactment of the legislation limiting dues deduction for the only large educational union violated the North Carolina Constitution, because it was improperly enacted using a veto override at a midnight session convened solely to consider another bill.<sup>116</sup> Despite numerous legislative sessions and a Senate override vote, the House of Representatives failed for months to consider overriding the Governor's veto of the legislation, which was scheduled to take effect July 1, 2011.<sup>117</sup> Then in January 2012 after a late night veto session called for the sole purpose of considering another vetoed bill, the House adjourned and reconvened to override the Governor's veto on the dues deduction bill, which it did at 12:45 a.m.<sup>118</sup> The North Carolina Superior Court issued a temporary restraining order, and later preliminary and permanent injunctions, preventing the legislation from taking effect on grounds that these procedures violated the state constitution.<sup>119</sup>

Like the Michigan and Wisconsin bills, the North Carolina legislation did not affect all public employees and their unions. Indeed, in this case only one union was affected, the North Carolina Association of Educators.<sup>120</sup> The Speaker of the House was quoted as stating that the legislation was prompted by the Association's

113. 2012 Mich. Pub. Acts 53, §10(1)(b).

114. Michigan Order, *supra* note 25, at 5-11.

115. *Id.*

116. Verified Complaint at ¶¶ 2-29, N.C. Ass'n of Educators v. North Carolina, No. 12 CVS 404 (N.C. Superior Ct. Jan. 9, 2012) [hereinafter Verified Complaint].

117. *Id.* ¶¶ 12-15.

118. *Id.* ¶¶ 14-29.

119. N.C. TRO, *supra* note 109, at ¶¶ 2-29; N.C. Preliminary Injunction, *supra* note 6, at ¶1; N.C. Order, *supra* note 6, at 2. The permanent injunction is based on both the procedural violations and unconstitutional "retaliatory viewpoint discrimination." *Id.*

120. Brief In Support of Plaintiffs' Motion for Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss at 23, N.C. Ass'n of Educators v. North Carolina, No. 12 CVS 404 (N.C. Superior Ct. Mar. 28, 2012).

mailings targeting Democrats who had voted with Republicans on the state budget, and he subsequently acknowledged that the organization's politics were a factor in the legislation.<sup>121</sup> As in the case of Michigan, these statements reflect the strategic timing of the legislation, in direct response to political activity by the Association.

Finally, the highly publicized Wisconsin legislation reveals a similar pattern. It was peculiarly structured using unprecedented classifications that targeted unions which did not support the governor's election, while preserving dues deduction for unions that supported the Governor.<sup>122</sup> Statements by State Senate Majority Leader Scott Fitzgerald were clearer than even those in Michigan and North Carolina regarding the intent to suppress political views. Fitzgerald stated,

If we win this battle [over the passage of the Act], and the money is not there under the auspices of the unions, certainly what you're going to find is President Obama is going to have a . . . much more difficult time getting elected and winning the state of Wisconsin.<sup>123</sup>

As in Michigan and North Carolina, quick votes and limited opportunities for public input at hearings characterized the legislative process. Initial efforts to pass the legislation surfaced quickly and surprised advocates, resulting in the escape of the Democratic legislators to Illinois to avoid passage.<sup>124</sup> The actual passage involved parliamentary maneuvers that were challenged as violative of the Open Meetings Law and state constitutional provisions requiring open hearings.<sup>125</sup> The law was passed quickly without opportunity for debate.<sup>126</sup>

121. See Verified Complaint, *supra* note 116, at ¶ 50; Laura Leslie, *State Seeks Dismissal of NCAE Lawsuit*, WRAL.com (Mar. 30, 2012), <http://www.wral.com/news/state/nccapitol/blogpost/10928368/#commentform>; John Rottet, *N.C. teachers group says it was in GOP's sights*, newsobserver.com, (Jan. 6, 2012), <http://www.newsobserver.com/2012/01/06/1756668/teachers-group-says-it-was-in.html>.

122. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 859, 863-65 (W.D. Wis. 2012).

123. Combined Brief in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Judgment on the Pleadings at 53, *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d 856 (No. 11-cv-428-wmc).

124. See *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 442 (Wis. 2011); Murrey Jacobson, *Wis. Senate's Surprise Vote to Restrict Bargaining Stuns Unions, Democrats*, PBS NEWSHOUR (Mar. 9, 2011, 11:24 PM EDT), <<http://www.pbs.org/newshour/rundown/2011/03/wis-senates-surprise-vote-to-restrict-bargaining-stuns-unions-democrats.html>>.

125. *Ozanne*, 798 N.W. 2d at 442-43. The circuit court enjoined the law from taking effect but the Wisconsin Supreme Court overruled the decision on separation of powers grounds, rejecting the challenges to the procedure. *Id.* at 439-40.

126. *Id.* at 442-43. One might argue, of course, that the questionable parliamentary maneuvers were prompted by the need to respond to the delaying tactics of the legislators who opposed the bill.

There is an unmistakable pattern in the passage of the legislation in these three states, revealing political purposes behind the enactments.<sup>127</sup> This pattern may not be surprising in light of recent publicity about the efforts of the American Legislative Exchange Council (ALEC) to enact conservative legislation in states across the country, developing model legislation through its membership of legislators and predominantly corporate private-sector members.<sup>128</sup> ALEC works with other conservative think tank organizations, and their policy papers and proposed legislation reveal a goal of elimination of payroll deduction of union dues.<sup>129</sup> Given these efforts, along with Republican successes at the state level in 2010, the emergence of strikingly similar legislative campaigns was predictable.

As noted previously, the current critique of provisions mandating union dues or payroll deduction is often couched in terms of the unwarranted political power that collection of union dues provides to labor organizations.<sup>130</sup> *Citizens United*, however, firmly rejected the notion that restrictions on speech can be justified because of the distorting effect resulting from aggregating power in the corporate

127. Each of the three pieces of legislation has been enjoined, with judges finding either a likelihood of success on the merits or actual unconstitutionality in each case.

128. See *Frequently Asked Questions*, *supra* note 94; *History*, *supra* note 94.

129. See, e.g., PAUL KERSEY, MACKINAC CTR. FOR PUB. POLICY, POLICY BRIEF, MICHIGAN'S PUBLIC EMPLOYMENT RELATIONS ACT: PUBLIC-SECTOR LABOR LAW AND ITS CONSEQUENCES (2009), available at <<http://www.mackinac.org/archives/2009/S2009-07.pdf>> (arguing that public employee unions use dues money furnished by the government to advocate for political causes that harm the state and its citizens, creating a "taxpayer funded lobby for big government", *id.* at 18, and advocating change in the law); Ctr. for Media & Democracy, *Public Employer Payroll Deduction Policy Act*, ALEC EXPOSED, <[http://alecexposed.org/w/images/c/c9/1R9-Public\\_Employer\\_Payroll\\_Deduction\\_Policy\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/c/c9/1R9-Public_Employer_Payroll_Deduction_Policy_Act_Exposed.pdf)> (last visited Nov. 27, 2012) (prohibiting payroll deduction of union dues by public employers); Ctr. for Media & Democracy, *Public Employer Payroll Deduction Policy Act*, ALEC EXPOSED, <[http://alecexposed.org/w/images/b/b8/Paycheck\\_Protection\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/b/b8/Paycheck_Protection_Act_Exposed.pdf)> (last visited Nov. 27, 2012) (prohibiting unions from using dues for political activities and prohibiting payroll deduction of funds for political activities without compliance with specific limitations and mandatory disclosures and providing criminal penalties for violations). For information about the connections between the Mackinac Center, ALEC and other similar organizations, see Brendan Fischer, *Koch-Funded Mackinac Center Brings Wisconsin Act 10 Provisions to ALEC*, CTR. FOR MEDIA & DEMOCRACY (May 1, 2012, 7:37 AM), <http://www.prwatch.org/news/2012/05/11490/koch-funded-mackinac-center-brings-wisconsin-act-10-provisions-alec> (indicating that Kersey of the Mackinac Center would be proposing for adoption as model legislation a bill similar to Wisconsin's Act 10 at an upcoming ALEC committee meeting).

130. See, e.g., KERSEY, *supra* note 129, at 17-19; *Are Dues Check-Off and Agency Shop in the Public Interest?*, PUBLIC SECTOR INC., <[http://www.publicsectorinc.com/online\\_debates/2012/04/are-dues-check-off-and-agency-shop-in-the-public-interest.html](http://www.publicsectorinc.com/online_debates/2012/04/are-dues-check-off-and-agency-shop-in-the-public-interest.html)> (last visited Nov. 27, 2012) (comments of Daniel DiSalvo, Senior Fellow at the Manhattan Institute's Center for State and Local Leadership and Assistant Professor of Political Science at the City College of New York); sources cited *supra* note 87.

form.<sup>131</sup> Similarly, the articulated justification is not a constitutional reason to limit dues collection for unions.<sup>132</sup> While more attenuated in terms of evidentiary value, these rationales proffered by think tanks connected to ALEC, which is composed of corporate and legislative members, provide context to the legislative proposals, their timing, the procedures relating to their enactment, and the statements by legislative leaders that suggest the motivation for the legislation.

Further, each of the three states focused the dues restrictions on educational employee unions, Michigan and North Carolina exclusively, and Wisconsin, along with general state and local employee unions. As in the case of public-sector unions generally, political rhetoric and research from conservative organizations and politicians has focused heavily on teachers and their unions as impediments to education reform.<sup>133</sup> Notably these conservative groups frequently cite the size, power, and political spending of the National Education Association, the largest union in the country.<sup>134</sup>

131. *Citizens United v. Fed'l Election Comm'n*, 130 S.Ct. 876, 903-05 (2010).

132. In enjoining the Michigan legislation, the judge stated: "The attempt to undercut union power coupled with the legislative history of Act 53 strongly supports the argument that Defendants' real motive for the amendment was to suppress an unpopular group." Michigan Order, *supra* note 25, slip op. at 8. The Michigan defendants offered the purpose of restricting union power as an intended goal of the legislation. *Id.* at 6.

133. See, e.g., *Bills Affecting Americans' Rights to a Public Education*, ALEC EXPOSED (last modified Jan. 30, 2012, 5:23 PM), <[http://alecexposed.org/wiki/Bills\\_Affecting\\_Americans%27\\_Rights\\_to\\_a\\_Public\\_Education](http://alecexposed.org/wiki/Bills_Affecting_Americans%27_Rights_to_a_Public_Education)>; Lindsay Burke, *Creating a Crisis: Unions Stifle Education Reform*, THE HERITAGE FOUND. (July 20, 2010), <<http://www.heritage.org/research/reports/2010/07/creating-a-crisis-unions-stifle-education-reform>>; Jessica Calcifati, *Gov. Christie: NJEA Leaders Are "Bullies" that Use a "\$130 Million Slushfund"*, NJ.COM (updated May 4, 2012, 5:57 AM), <[http://www.nj.com/news/index.ssf/2012/05/gov\\_christie\\_njea\\_leaders\\_are.html](http://www.nj.com/news/index.ssf/2012/05/gov_christie_njea_leaders_are.html)>; *Impact of Teachers Unions on Education and Schools*, THE HERITAGE FOUND. (Sept. 7, 2011), <<http://www.heritage.org/multimedia/video/2011/09/impact-of-teachers-unions-on-education-and-schools>>; *Teachers Unions Oppose Education Reform*, TEACHERS UNION EXPOSED, <<http://teachersunionexposed.com/blocking.cfm>> (last visited Nov. 27, 2012); see also *Ala. Educ. Ass'n v. Bentley*, 788 F. Supp. 2d 1283, 1296-98 (N.D. Ala. 2011) (describing political conflicts between the Alabama Education Association and the governor and a state senator and gubernatorial candidate who attacked the association as "the single greatest impediment to quality education in this state . . .").

134. See Burke, *supra* note 133; *About NEA*, NAT'L EDUC. ASS'N, <<http://www.nea.org/home/2580.htm>> (last visited Nov. 27, 2012) (describing NEA as largest professional employee organization in the U.S. with three million members and affiliates in every state); National Education Association Form LM-2 (2011), available at <<http://kcerds.dof-esa.gov/query/getOrgQry.do>> (in "Union Name by Abbreviation" drop down menu, select "NEA-National Education ASN IND," in "Report Type," drop down menu, select "LM-2," select the "submit" button at the bottom of the screen; on the results page, scroll to file number 000-342, and click on "2011 Report" link in the second column) (showing total membership of 3,167,412 and total receipts of \$391,147,761). According to the National Institute on Money in State Politics, the NEA and its affiliates were the top political donors in 2007-08, contributing over \$56 million. Nat'l Inst. on Money in State Politics, *Top National Donors*, FOLLOWTHEMONEY, <<http://www.followthemoney.org/database/top10000.phtml>> (last visited Nov. 27, 2012).

One can trace a direct line from this rhetoric and research to various legislative proposals to reform education, along with efforts to limit the power of teachers' unions to oppose such reform. And the political maneuverings in each state and the statements of the legislators confirm this intent to limit the voice of the education unions in the legislative process. Establishing unequal burdens on similarly situated unions, supplemented by evidence of political motivation is the most promising route to invalidating state embargoes on payroll deduction of union dues under both First Amendment and Equal Protection Doctrine. In the absence of a direct burden or differential treatment based on the speech or speaker, however, a rational basis for restrictions will suffice.

## 2. Negating the Proffered Motivations

Legislators supporting bans on union dues almost always proffer viewpoint neutral, apolitical explanations for dues bans, despite their political rhetoric. To sustain a challenge, opponents of dues bans must be prepared to negate these rationales, a much easier task where a compelling justification is required.<sup>135</sup> Among the more common rationales offered in recent cases are the following: 1) avoiding involvement of the government in partisan politics;<sup>136</sup> 2) preserving government funds and reducing administrative burdens;<sup>137</sup> 3) ensuring union accountability and individual responsibility;<sup>138</sup> 4) preventing political pressure on employees to authorize dues deductions;<sup>139</sup> and 5) "reflect[ing] and encourag[ing] technological advances in local, private banking" that allow automatic dues deduction.<sup>140</sup>

Only two of these have been previously successful. *Ysursa* approved the rationale of avoiding government entanglement in politics, but that case involved a complete ban on political dues deduction.<sup>141</sup> Where the ban is limited to one or several unions or

135. See *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1126 (D. Ariz. 2011).

136. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355, 361 (2009); Defendant's Memorandum of Law in Support of Motion to Dismiss and In Opposition to Motion for Preliminary Injunction at 15-16, *N.C. Ass'n of Educators v. North Carolina*, 12 CVS 404 (N.C. Super. Ct. Mar. 28, 2012) [hereinafter Defendant's Memorandum].

137. Defendants' Memorandum, *supra* note 136, at 1-2; Defendants' Brief In Opposition to Plaintiffs' Motion for Preliminary Injunction at 7, *Bailey v. Callaghan*, No.2:12-cv-11504 (E.D. Mich. 2012) [hereinafter Defendants' Brief].

138. *Id.* at 7; Defendants' Memorandum, *supra* note 136, at 1-2.

139. *Id.* at 15-16.

140. *Id.* at 16.

141. 555 U.S. at 361 n.3.

even where it allows payment of dues to political organizations with other government funds, it casts doubt on the state's justification even under a rational basis test.<sup>142</sup> It is certainly not intuitively obvious why it is more important to ban government entanglement in politics in education but not law enforcement, for example. North Carolina mentions the education of children,<sup>143</sup> as if the entanglement to be avoided would have some impact on children, but there is no apparent involvement of children in payroll deduction, and teachers as well as other government employees have every right to engage in political activity regardless of their membership in the union or the deduction of their dues.

The Fourth Circuit found in *South Carolina Education Ass'n v. Campbell* that administrative burdens and cost to government justified restricting dues deduction to unions with membership open to all employees.<sup>144</sup> Among the additional reasons was the desire to foster strong relations with the state's own employees.<sup>145</sup> Unions challenging bans should be prepared to show that the administrative burdens and costs are substantially reduced in the current age of computer-processed payroll.<sup>146</sup> In addition, they may show the absence of a fit between the law and the rationale.<sup>147</sup> For example, a desire to reduce administrative burdens and costs might justify limiting the number of unions or other organizations that could demand payroll deduction, but selecting particular unions for the ban instead of using neutral criteria or criteria related to the objective<sup>148</sup> casts doubt on the legitimacy of the rationale.

The other articulated rationales also suffer from a poor fit

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142. See *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *Ala. Educ. Ass'n v. Bentley*, 788 F. Supp. 2d 1283, 1297 (N.D. Ala. 2011) (noting that the Alabama law banning all dues deduction allowed the government to pay dues to other organizations that engaged in political activity such as municipal leagues and school board associations).

143. Defendants' Memorandum, *supra* note 136, at 16.

144. 883 F.2d 1251, 1263-64 (4th Cir. 1989).

145. *Id.* at 1264.

146. *South Carolina Educ. Ass'n* was decided in 1989. In *City of Charlotte v. Local 660, International Ass'n of Firefighters*, decided in 1976, the union apparently accepted the city's contention that it would be expensive and burdensome to deduct dues for every requesting organization. 426 U.S. 283, 287 (1976).

147. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (stating "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.").

148. An example of criteria related to the objective would be certified unions or unions with a certain level of membership.

between the objective and the means, if the deduction ban is less than complete. While legislatures need not regulate precisely and can engage in incremental legislation,<sup>149</sup> "by requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."<sup>150</sup> Thus, unions must marshal evidence relevant to the particular jurisdiction to establish the absence of a rational connection and the likelihood of a purpose of disadvantaging the targeted employees and their unions.<sup>151</sup> With such evidence, unions may be able to sustain a constitutional challenge to limitations on payroll deduction that are less than total bans.<sup>152</sup>

## VI. THE REALITY FOR UNIONS

The previous sections suggest that at least some current laws limiting dues deduction may be vulnerable to challenge on constitutional grounds. Nevertheless, it would be a mistake to be too sanguine about the prospects for invalidation. Much of the evidence supporting political motivation is of a sort that courts are often reluctant to countenance. Without concrete, admissible evidence of an unconstitutional motive, the court need only find a rational reason for the legislation. It need not even be the reason offered by the legislature, so long as there is no evidence of improper motivation. And while *Romer* offers hope of establishing a discriminatory motivation, courts are far less sensitive to discrimination against labor unions and their supporters than to discrimination on other invidious bases. Although conservative judges have been solicitous of challenges to restrictions on corporate speech, unions cannot be

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149. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) (stating that "[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (citations omitted)).

150. *Romer*, 517 U.S. at 633.

151. In Michigan, for example, the legislation took the form of an amendment to the statutory provision barring certain employer assistance to unions. *Michigan Order*, *supra* note 25, slip op. at 3-4. The court concluded that the purpose of the provision was to maintain the independence of unions and found that the proffered rationales of cost savings, union accountability, and restricting union power had no rational relationship to that purpose, particularly when applied only to certain unions. *Id.* at 5-8.

152. In some states, the state constitution may provide another avenue of challenge where the provisions are more favorable to the union's claims than the federal constitution.



certain that similar solicitude will prevail in the case of challenges to limitations on laws limiting payroll deduction for unions. Unions have rarely succeeded in recent dues cases in the Supreme Court.<sup>153</sup>

Furthermore, successful challenges to targeted bans may result in more drastic action: laws banning all payroll deduction of organizational dues. Under current Supreme Court precedent, such laws will almost certainly survive challenge. Accordingly, unions must consider alternative methods of dues collection. Automatic bank drafts or credit card payments offer an alternative to employer payroll deduction which, while not equivalent in value to the union, provide a method of collection that is relatively efficient and requires a reduced expenditure of union resources. Employees can terminate these deductions more easily than employer-based deductions, however, requiring the union to engage in continual marketing to convince employees of the value of their union membership. While this effort too requires investment of funds, the current climate, with the massive sums of money expended by affluent union opponents to convince employees that unions are not acting in their best interest, makes such campaigning essential to survival and effective employee representation. Organizing is the *sine qua non* of unions in a society where the recurring question seems to be "What have you done for

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153. See, e.g., *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Ysursa v. Pcatello Educ. Ass'n*, 555 U.S. 353 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007) (stating, when describing the union's authority to collect the costs of representation from the employees that it represents, "it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees" and referring to this collection as an "extraordinary" power). The *Knox* Court not only ruled against the union on the issue before the Court, but also reached out to decide an issue neither briefed nor argued. *Knox*, 132 S. Ct. at 2296 (Sotomayor, J., concurring in judgment). The Court held that the union had to issue a separate notice of the right to object when it implemented a special assessment during the year after the annual notice had already been issued. *Id.* at 2291-93 (majority opinion). Further, the Court concluded that the union could not charge objectors even the percentage of the assessment that represented chargeable expenses from the previous year, although this resulted in objectors failing to pay the full cost of representation. *Id.* at 2293-96. Finally, the Court ruled that nonmembers could not be charged the assessment unless they opted in, instead of applying the opt out rule used by all prior cases, a position not even advocated by the plaintiffs. *Id.* at 2292-93; *id.* at 2297, 2298-99 (Sotomayor, J., concurring in judgment); *id.* at 2303-04 (Breyer, J., dissenting). The majority opinion extensively discussed and critiqued previous decisions allowing the union to charge nonmembers the cost of representation unless they opted out of the charges, although not overruling those decisions. See *id.* at 2288-91. For criticism of *Knox* as inconsistent with *Citizens United* and other cases involving associational speech rights, see Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU Local 1000*, 98 CORNELL L. REV. No. 6 (forthcoming 2013). For pre-*Knox* criticism of the difference in treatment between unions and corporations with respect to use of dissenters' funds for political purposes, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt out Rights after Citizens United*, 112 COLUM. L. REV. 800 (2012).

me lately?" Only where employees see unions as an effective vehicle for workplace voice and workplace benefits will unions be sustainable organizations in both the public and private sectors.

#### VII. CONCLUSION

Union dues are the lifeblood of labor organizations. No organization can operate effectively without resources. As attacks on unions and collective bargaining escalate, resources are more important than ever to enable unions to support employees and maintain their rights and benefits, as well as their voice in the workplace. Continued organization of both members and nonmembers is crucial to insure the necessary commitment of employees to unions. Employee commitment is the first step to maintaining funding, but, particularly in tough economic times, an efficient and effective dues collection method is essential to insure that even committed members continue to support the union. Where payroll deduction is possible, that may be the method of choice. But given the political climate and the legal reality, unions would be wise to explore recurring bank drafts or credit card charges as an alternative. The attacks on unions, and the efforts to restrict their funds, are not likely to recede in the current partisan political climate.