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A Law and Economics Approach to Compulsory Union Dues

Introduction

Beginning in the early 1960's,¹ the U.S. Supreme Court started to review First Amendment cases relating to union dues. Within this line of cases on union dues, a small subset relates to dues charged by teacher unions. In 1977, the Supreme Court heard *Abood v. Detroit Board of Education*.² *Washington Education Ass'n v. Washington* (hereinafter "WEA") is the most recent case to bring this topic before the U.S. Supreme Court through a challenge to the Washington "opt-in" law.³ Analysis in this paper begins by limiting analysis to the teacher union cases followed by an extension to other unions.

Part I of this paper outlines the background of the teacher union cases and in particular, WEA. The Washington law was passed as part of campaign finance bill, and Part II

¹ See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

² 431 U.S. 209 (1977).

³ *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash.*, 156 Wash. 2d 543 (2006), *vacated sub nom. Davenport v. Wash. Educ. Comm.*, 127 S. Ct. 2372 (2007). See "The Wea Case," *infra*, for a discussion of the "opt-in" statute.

provides a law and economics of the "opt-in" procedure required by Washington law. Part III discusses an opt-out procedure as a subsidy in relation to political campaign expenditures. Part IV addresses the economic arguments for allowing an extension of the "opt-in" law to other states.⁴

I. Teacher Union Dues Cases Prior to WEA

The teacher union cases arrived at the Supreme Court following enactment of the 1954 National Labor Relations Act.⁵ The NLRA eliminated the closed shop, but allowed labor unions to use a union security clause to provide a union shop.⁶ Union security agreements enable unions to maintain exclusive collective bargaining rights with an employer.⁷ Union shops

⁴ See *Comm'n Workers of America v. Beck*, 487 U.S. 735 (1988). This case appears to extend the holdings in the teacher union dues cases to private sector unions, that union members must object. Some commentary suggests that *Beck* prohibits unions from collecting fees supporting activities from union members and nonmembers paying agency fees. See e.g., EVERGREEN FREEDOM FOUNDATION, *THE STATE OF LABOR: A REVIEW OF ORGANIZED LABOR AND WORKER FREEDOM* 15 (2005), <http://www.ewfa.org/pdfs/labor2005.pdf>. But see *Beck* at 745, 759, 762; Eric J. Felsberg, Note, *Creating a Beck Statute: Recent Congressional Attempts and a Proposal for the Future*, 15 Hofstra Lab. & Empl. L.J. 247, 253 (Fall 1997) ("Once an employee joined a union, he or she could not object to how their fees were utilized.")

⁵ See Lieutenant Colonel Kenneth Bullock, *Official Time as a Form of Union Security in Federal Sector Labor-Management Relations*, 59 A.F. L. REV. 153, 157-58 (2007).

⁶ *Id.* The closed shop requires employers to hire only employees that are union members.

⁷ See Bullock, *supra* note 5, at 157. See also Bullock, *supra* note 5, at 157-162 for a description of possible union

require all employees to join the union as a condition of employment.⁸ In a normal union relationship, the union will require a union security agreement as a contract term.⁹

Teachers are public employees, so in most cases, teachers' contracts with the union are governed by statute and teachers may not be required to join the union.¹⁰ Some states permit agency shops which require nonunion members to pay equivalent dues called agency fees.¹¹ However, "right to work" states prohibit all union security agreements so employees are not compelled to join or pay dues to a union.¹² The U.S. Supreme Court upheld the constitutionality of agency fees,

security arrangements; RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 84-85 (2d ed. 1992).

⁸ See Bullock, *supra* note 5, at 158. See also KEARNEY, *supra* note 7, at 54. There is no constitutional right to collective bargaining, so there must be a law requiring mandatory bargaining.

⁹ See C.J.S. *National Labor Relations Act* LABOR § 325 (April 2007).

¹⁰ See KEARNEY, *supra* note 7, at 67-69. See also *Chicago Teachers Ass'n v. Hudson*, 475 U.S. 292, 294-95 (1986) ("The Union made several proposals for a "fair share fee" clause in the labor contract. Because the Illinois School Code did not expressly authorize such a provision, the Board rejected these proposals until the Illinois General Assembly amended the School Code in 1981.").

¹¹ KEARNEY, *supra* note 7, at 72-73.

¹² In other words, union and agency shops are illegal. For a list of right to work states, See KEARNEY, *supra* note 7, at 86.

citing the intent to prevent riders and promote labor peace.¹³

In the public sector, agency shops are the only permissible union security agreements due to the workers' first amendment right.¹⁴ *Abood* upheld payment of agency fees by teachers in an agency agreement, but subject to limitations protecting the teachers' first amendment rights.¹⁵ The case required:

funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative [be paid] by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.¹⁶

¹³ See *Abood*, 431 U.S. at 225. See also *Id.* at 222. Union shops distribute costs of negotiating labor agreements and prevent free riders from benefiting without contributing to these costs.

¹⁴ See *Bullock*, *supra* note 5, at 158-59, 163. Relevant Washington law include: WASH. REV. CODE § 41.56.122 (2007) ("Collective bargaining agreements--Authorized provisions"); WASH. REV. CODE § 41.59.060 (2007) ("Employee rights enumerated--Fees and dues, deduction from pay"); WASH. REV. CODE § 41.59.100 (2007) ("Union security provisions--Scope--Agency shop provision, collection of dues or fees"); WASH. REV. CODE § 42.17.680 (2007) ("Limitations on employers or labor"); WASH. REV. CODE § 42.17.760 (2007) ("Agency shop fees as contributions").

¹⁵ See *Abood*, 431 U.S. at 235-36.

¹⁶ *Id.*

Later, in *Hudson*, the U.S. Supreme Court found unconstitutional the procedure the union used to rebate challenged dues.¹⁷

Most recently, in *Lehnert v. Ferris Faculty Ass'n*, a divided opinion held that the teachers' union "may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation."¹⁸ However, a local union "may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates," but these activities cannot be wholly unrelated to the employees in the unit.¹⁹ Finally, the Court discussed specific union activities challenged in the case.²⁰ *Lehnert* established a three part

¹⁷ See *Hudson*, 475 U.S. at 295-96 for a description of the procedure the CTA used. The U.S. Supreme Court required "adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310. For a description of the *Hudson* packet, see Brief of Petitioner-Appellant, *Wash. v. Wash. Educ. Ass'n*, No. 05-1657 (U.S. Nov. 9, 2006), 2006 U.S. S.Ct. Briefs LEXIS 1166.

¹⁸ 500 U.S. 507, 522 (1991).

¹⁹ *Id.* at 524.

²⁰ See *Id.* at 527-532. For a specific discussion of the Court's holding in *Lehnert*, see R. Bradley Adams, Note, *Union Dues and Politics: Workers Speak Out Against Unions Speaking for Them*, 10 U. FLA.J.L. & PUB. POL'Y 207, 213-14.

test for these activities.²¹ Together, these precedents establish that unions can use agency fees only for collective bargaining purpose, grievances and contract negotiations "germane to employment."²² These funds can be used for other purposes if the nonmembers do not object following *Hudson* procedures, known as opting-out.

The WEA Case

The citizens of Washington overwhelmingly passed the campaign finance act that included the statute related to teacher unions.²³ The statute, WASH. REV. CODE § 42.17.760 (hereinafter "§ 760"), required affirmative authorization from nonmembers before the union can use the dues for political

²¹ The activities "must (1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor policy and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Adams, *supra* note 20, at 213-14.

²² *Id.*

²³ Wash. v. Wash. Educ. Ass'n, 140 Wash. 2d 615, 620 (2000) [hereinafter *Wash. 1*]. In an earlier Washington Supreme Court case, the Court held that under WASH. REV. CODE § 42.17.680(3) (2007) labor organizations were not required to obtain annual written authorization to use funds for political contributions because the labor organization was not responsible for disbursements of funds in payment of wages or salaries. *Wash. 1* at 640. This law applied to both union members and nonmembers.

purposes.²⁴ The case began in August 2000 after the WEA stipulated it violated § 760 by using nonmembers' fees for political purposes without authorization.²⁵ The trial court found that the WEA violated § 760 and assessed a \$200,000 sanction.²⁶ The Washington Supreme Court held that the law was an unconstitutional restriction on the union's expressive activity and that the procedures outlined by *Hudson*,²⁷ were adequate to protect the nonmember's first amendment rights.²⁸ The U.S. Supreme Court granted certiorari and heard oral arguments in January 2007.²⁹

²⁴ WASH. REV. CODE § 42.17.760. "Agency shop fees as contributions. A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." This type of law became known as "paycheck protection." See e.g., Representative Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347 (Summer 1998).

²⁵ 156 Wash. 2d at 551.

²⁶ *Id.* at 552.

²⁷ See *supra* note 17.

²⁸ 156 Wash. 2d at 556.

²⁹ In the writ for certiorari, the petitioners asked the Court to consider issues relating to the first amendment. See Brief for the Petitioner, *Wash. v. Wash. Educ. Ass'n*, 127 S.Ct. 35 (2006) (No. 05-1657), 2006 WL 1763421. This paper will not discuss the first amendment issues.

The procedures outlined in *Hudson* are referred to as opting-out, while § 760 is known as an opt-in law. Opting-out means that the nonunion member notifies the union that they do not wish to have their fees used for political causes. The Washington law, § 760, is an opt-in law that applies to nonunion members, those paying agency fees.³⁰ Not all agency shop fees go toward collective bargaining and political uses.³¹ The Washington law, § 760, does not consider these other uses of agency fees.³²

II. Nonmember contributions and the WEA

In 2000, when this case first entered the legal system, the Court noted that the amount of rebates entitled under *Hudson* were between \$44 and \$76.³³ For the 2006-2007 school year, teachers pay an average of \$783 in dues. A nonmember paying agency fees would be entitled to a rebate of \$172 under *Hudson*.³⁴ There are currently between 2,500-4,000 nonmembers

³⁰ Union members do not have the opportunity to prevent their dues from being used for political purposes. See *supra* note 4.

³¹ See *supra* note 20.

³² See Knollenberg, *supra* note 24.

³³ See *WEA*, 156 Wash. 2d at 551.

³⁴ The average dues for teachers in Washington for the 2006-07 school year were \$783. The WEA and WEA charge a flat fee, while the rate the local union charges varies. The average rebate due to an agency fee payer is \$172 or 21% of the full dues. Interview with Michael Reitz, Legal Director, Evergreen

paying agency fees to the WEA.³⁵ This means that between \$430,000 and \$688,000 could be improperly used by WEA.³⁶

Contract analysis

Essentially, the relationship between nonmembers and the WEA is the formation of a contract. The WEA contracts with nonmembers to supply services, which include required services, like collective bargaining. If the nonmember does not opt-out, this contract allows the WEA to provide political advocacy.³⁷ One problem with this contract is the WEA is relying on silence as acceptance of the contract. When a nonmember fails to notify the union of his dissent, the union treats the failure as acceptance. This acceptance provides the nonmember with contractual benefits he probably would not accept if freely negotiated.³⁸ Silence should not usually be

Freedom Foundation, on telephone. (Apr. 12, 2007). The amount rebated probably differs from the amount the union would use for political campaigns under § 760 because the law only requires an opt-in for political contributions, while the case law may exclude other funds. See generally *supra* p. 6.

³⁵ *Id.* The WEA does not release the number of agency fee payers, but number is between 2,500-4,000. There were 4,400 nonmembers paying agency fee when the case was filed in 2000.

³⁶ This number was calculated by multiplying the \$172 rebate by the range of nonmembers.

³⁷ The contract is actually somewhat forced because state law requires nonmembers to pay agency fees to the WEA. See *supra* note 12.

³⁸ These contractual benefits are the WEA's use of a portion of the agency shop fees for political purposes.

considered acceptance of a contract.³⁹ However, sometimes silence can be considered acceptance in an effort to reduce mailing costs.⁴⁰ In this situation, it appears that opt-out is preferable and silence can be considered acceptance.⁴¹ However, the results are not clear because there are 60,000 people that do not opt-out. This group probably does not opt-in due to information problems, although some might support the union's political activities. One additional problem is that the contract entered into by nonmembers does not give nonmembers the same contractual rights as members because nonmembers are not participants in the collective bargaining process.⁴²

The WEA is required to follow the *Hudson* procedures, which includes sending out a packet biannually informing nonmembers of their right to a rebate (opting-out).⁴³ The *Hudson* packet does not give nonmembers an opportunity to learn

³⁹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 103 (9th ed. 2002).

⁴⁰ *Id.* When silence is not used as acceptance two letters must be mailed: first, the offer and second, the acceptance. (Today, there are cheap alternatives to mailing contracts, but the mailing costs are probably a proxy for other costs associated with negotiating a contract.)

⁴¹ See Table. Under opt-out, 20% of members opt-out in 1993-1994. However, under opt-in, only 6.10% opt-in in 2003-2004.

⁴² See Knollenberg, *supra* note 24, at 366-67. The nonmembers did not willingly enter into their labor contract.

⁴³ See *supra* note 10.

about the contract they are entering.⁴⁴ This situation leads to imperfect information in the contract. If the two parties knew what they were contracting in advance, the nonmember probably would not have entered into the contract (they would opt-out).⁴⁵ Those nonmembers with some interest in the union (and the unions' political causes) probably will chose to read the literature and opt-in.

Coase Theorem and Information Costs

The Washington opt-in law gives an example that will help explain how members behave when members are not automatically required to contribute to the union.⁴⁶ In 1993-1994, Washington passed WASH. REV. CODE § 42.17.680, the opt-in law that required affirmative authorization before money could be withheld from paychecks for political contributions. The law took effect in 1994-1995, which explains the decrease in donors.⁴⁷ As mentioned above, the table does not explain why 60,000 members do not opt-out during 1993-1994. However, it is clear that there are individuals that will chose to opt-in (11.2% in 1994-1995). Again, the most likely reason for not

⁴⁴ See *infra* note 48; Table.

⁴⁵ This is suggested by the nonmember's choice in not joining the WEA. The nonmembers are not likely to read literature printed by the union.

⁴⁶ See Table.

⁴⁷ *Id.*

opting-out is the cost of acquiring the information that informs the teachers of the right to opt-out. Another possible reason preventing members from opting-out is a fear of negative consequences in the workplace ("reputation cost").⁴⁸

**Table: Washington Education Association
Voluntary Member Contributions⁴⁹**

Year	WEA Members	Member Donors	Percent Donors
1993-1994	60,000	48,000	80.00%
1994-1995	62,000	6,921	11.20%
1995-1996	63,000	9,411	14.90%
1996-1997	64,000	11,671	18.20%
1997-1998	65,740	10,032	15.30%
1998-1999	67,213	11,520	17.10%
1999-2000	68,253	11,121	16.30%
2000-2001	69,199	9,826	14.20%
2001-2002	71,449	6,437	9.00%
2002-2003	71,449	3,371	4.70%
2003-2004	74,089	4,537	6.10%

The Coase theorem suggests that if transactions are costless, then the party that can undertake a transaction the

⁴⁸ See Brief for Institute for Justice as Amici Curiae Supporting Petitioners, *Wash. v. Wash. Educ. Ass'n*, 127 S.Ct. 35 (2006) (No. 05-1657), 2006 U.S. S.Ct. Briefs LEXIS 1657, *13-14; Knollenberg, *supra* note 24 at 364-65.

⁴⁹ EVERGREEN FREEDOM FOUNDATION, *Supra* note 4, at 19. One note of caution, *Wash 1*, *supra* note 23, held that WASH. REV. CODE § 42.17.680 did not apply to unions, so it is unclear where Evergreen Freedom Foundation got these numbers.

most efficiently should bear the contractual burden.⁵⁰

Nonmembers should not bear the burden of reading literature to find out about their rights. Of the two possible reasons for not opting-out, information costs and reputation costs, the information cost is probably the main factor prohibiting members from opting-out. The *Hudson* packet telling teachers about the right to opt-out is often ignored, like a layperson would do when encountering a contract (the adhesion contract). There are a few reactions to the *Hudson* packet: "some nonmembers fail to respond to the Hudson packet because they do not receive it, the packet comes at the busiest time of the school year, they do not understand it, or they put it away for later."⁵¹ However, each of these has the same result: the union members fail to opt-out because of the information cost associated with reading and comprehending the packet.⁵²

The union should convince potential members to contribute and bear the costs of the costs of acquiring the donations.⁵³

⁵⁰ See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁵¹ See Brief of Petitioner, *supra* note 17

⁵² An additional cost could occur when opting-out. While most individuals would give up after trying to get through red tape, some do persist, perhaps explaining the 20% in Washington that did opt out. See Knollenburg, *supra* note 24 at 368-69 for some anecdotes.

⁵³ See Brief for Cato Institute et. al. as Amici Curiae Supporting Petitioners, *Wash. v. Wash. Educ. Ass'n*, 127 S.Ct. 35

Under opt-out, the union gets funds almost automatically because the contract is small and few people take the time to learn about the right to opt-out.⁵⁴ To the union this is a potentially large contract and the union will choose to participate by convincing members to support the political causes. The table of voluntary membership contributions illustrates how many members stop contributing when no longer forced to do so by law.⁵⁵ After Washington passed the opt-in law, the number of members contributing dropped from 80% to 11.2%.⁵⁶ Clearly, the least cost method would be to allow members the opportunity to opt-in because opt-in does not have the information cost problem and will not harm the members' reputation.

While opt-in seems like the optimal solution under the Coase theorem, there has been some criticism of opt-in. In

(2006) (No. 05-1657), 2006 U.S. S.Ct. Briefs LEXIS 1186 ("strange given that it is far easier to opt in than to opt out...")

⁵⁴ See *Id.* ("the system effectively enabled the union to automatically take money to which it had no proper entitlement.")

⁵⁵ See *supra*, p. 10.

⁵⁶ Other states had similar responses from members after opt-in laws were passed. See Brief for Evergreen Freedom Foundation, et. al. Supporting Petitioners, *Wash. v. Wash. Educ. Ass'n*, 127 S.Ct. 35 (2006) (No. 05-1657), 2006 U.S. S.Ct. Briefs LEXIS 1165, *18-*19 [hereinafter Brief for Evergreen Freedom Foundation].

responding to the WEA's claim that the costs would be too burdensome on the WEA, amici to the case argued that the *Hudson* packet would be the likely place to include a notice about opting-in.⁵⁷ In fact, an opt-in system actually increases communication between the union and members, so might be a benefit to the union.⁵⁸ Finally, opt-in would be no more costly than the current system. Under *Hudson*, the WEA must hold the nonmembers fees in a trust-like system.⁵⁹ Opt-in would no longer require the costs of maintaining this system.

III. Subsidizing Union Political Speech

⁵⁷ See Brief for Mountain States Legal Foundation as Amici Curiae Supporting Petitioners, *Wash. v. Wash. Educ. Ass'n*, 127 S.Ct. 35 (2006) (No. 05-1657), 2006 U.S. S.Ct. Briefs LEXIS 1160 ("Further, the *Hudson* packet, which the WEA currently disseminates twice per annum, could simply be replaced by a packet requesting affirmative authorization. As a result, the net administrative cost, if any, of sending an affirmative authorization packet instead of a *Hudson* packet would be *de minimis*"). See also Brief for Evergreen Freedom Foundation at *17, which suggests a postcard with a checkbox to approve the use of dues for political purposes would satisfy § 760.

⁵⁸ The union could provide descriptions of the benefits the union provides through its political activities in this material. This is under an opt-in system that applies to all employees, not just nonmembers.

⁵⁹ The union cannot use the funds for objectionable purposes and must hold in trust while the nonmembers object because the union has no right to the money. See *Hudson*, 475 U.S. at 295-96?

One of the major arguments in favor of the opt-in plan is that it will eliminate a subsidy of union speech.⁶⁰ A subsidy creates an inefficient allocation of resources.⁶¹ While the market for political contributions is not the typical market transaction,⁶² the same economic rules apply. Washington teachers that chose not to join the WEA likely do not want to help the WEA's political agenda by contributing "donations."⁶³ Therefore, political contributions taken from a portion of

⁶⁰ When the nonmember fails to opt-out under *Hudson*, his agency fees will be used to support political causes. See *Hudson*, 475 U.S. at 300. "forced subsidization of political or ideological views"

⁶¹ Requiring nonmembers to support union political speech is also a violation of the first amendment. See generally, *Aboud*, 431 U.S. 209. Regarding subsidies as inefficient, Cf. Mark Pauly, *Who Pays? Who Benefits? Distributional Issues in Health Care*, 69 LAW & CONTEMP. PROB. 83 (Fall 2006) (In an article explaining how the tax subsidy for medical benefits harms low income workers: "Subsidy tends to harm low-wage workers..., low-wage workers suffer not because income is taken from them and given to others, but rather because they are compelled to use the income they have in less (net) beneficial ways than they would prefer. Rather, because the subsidy causes substantial overall inefficiency, in aggregate, workers lose.").

⁶² For example, government aid to farmers.

⁶³ See e.g., Brief for Association of American Educators as Amici Curiae Supporting Petitioners, *Wash. v. Wash. Educ. Ass'n*, 127 S.Ct. 35 (2006) (No. 05-1657), 2006 U.S. S.Ct. Briefs LEXIS 1162. ("agency fee payers who have chosen not to associate" with the union).

agency fees are "extra" funds not normally contributed under a free market.⁶⁴

The market situation that results is one where there is a greater quantity supplied,⁶⁵ shown by a rightward shift in the supply curve from the pre-subsidy equilibrium.⁶⁶ At the pre-subsidy market price, the opt-in system, nonmembers demand less political campaign spending. Under the opt-out system the subsidy results in more political campaign spending than consumers would like to spend. This reflects a lower priced commodity, which may indicate that each dollar is less valuable to the WEA.⁶⁷

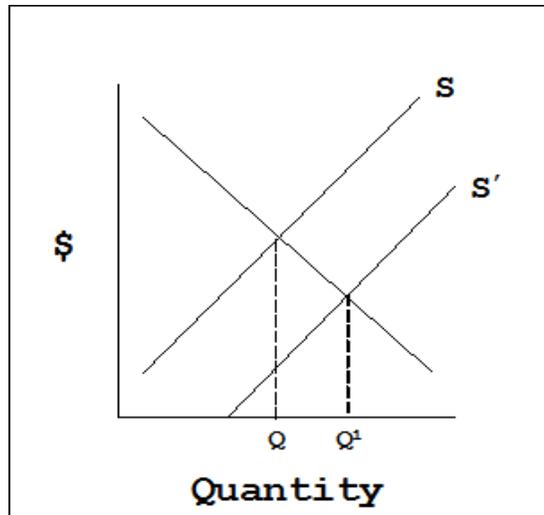
Figure:
Supply and Demand of WEA Political Campaign Funds

⁶⁴ A free market in the sense that union members can chose to contribute.

⁶⁵ The intersection of supply curve S^1 and demand curve D at Q^1 . See Figure.

⁶⁶ See Figure. The intersection of the supply S and demand curve D at Q. See LLOYD G. REYNOLDS, MICROECONOMICS 62 (3d ed. 1979).

⁶⁷ This idea is explored further in the next section.



Under this situation less funds are available for other uses. Subsidies normally impact other markets because funds normally used to purchase "item A" are used to purchase "item B."⁶⁸ Therefore, in a market for political donations, there are less funds supplied to other causes under opt-out. An opt-in system will return funds to what the nonmember would ordinarily purchase. Thus, the market outcome with opt-in might result in some nonmembers support other political causes with their returned funds.

Opt-out causes an excess of funds to go to causes the WEA supports. This has a negative impact on competition in the market for ideas and political advertising. For example, the union contributed \$731,841 to political committees opposed to

⁶⁸ Good A is a market for all other political campaign funds, while Good B is the market for WEA political campaign funds.

school vouchers and charter schools in 1996.⁶⁹ Under the opt-out system, the WEA subsidy causes reduced political contributions (and less spending) to promote alternative issues.⁷⁰ Less funding for other political contributions causes the WEA's speech to be heard more than the opposing causes. Opt-in benefits the market for ideas because the money returned could be spent on ideas competing with causes the union supports. Finally, under the opt-in system, money previously used for political contributions could be allocated toward other productive resources.

Tragedy of the Commons in Union Political Funding

The tragedy of the commons describes a situation where two individuals compete for a resource which results in resource over overexploitation.⁷¹ One of the key features of a

⁶⁹ See *Wash. 1*, *supra* note 23, at 658

⁷⁰ The question about whether the WEA's political advocacy actually promotes the teaching profession and helps teachers is a difficult question not discussed here. There are a various sources both condemning unions and in particular the teacher's union as harmful to the economy and education policy. See *eg.*, Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1009 (1984); PETER BRIMELOW, *THE WORM IN THE APPLE: HOW THE TEACHER UNIONS ARE DESTROYING AMERICAN EDUCATION* (2003). Under the WEA's anti-school choice spending, groups promoting school choice had less money to spend to support school choice. This makes sense because the union naturally will advance what is in its best interest, event at the detriment of students.

⁷¹ See Shi-Ling Hsu, *What is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV.

tragedy of the commons is the good is "rivalrous in consumption."⁷² In the market for political funding, there is typically competition to raise more funds and buy more advertising and for each dollar to one side, there is one dollar less to the opposition.⁷³ Hsu argues that this creates a tragedy of the commons because the message is eventually lost on consumers because consumers tune out the increasing amount of ads.⁷⁴

An opt-in system would help fix the tragedy of the commons because the WEA would likely have a reduced stream of funds as nonmembers decide not to opt-in. This means that each dollar that the union has remaining will be more valuable. The reduction in available funds to support political causes will enable the union to more effectively advocate their causes. In essence, the opt-in system would

75, 80-81 (2005-2006). Garrett Hardin first described the tragedy of the commons in *The Tragedy of the Commons* 162 SCIENCE 1243 (1968). The classic example which provides phenomena's name refers to two farmers overgrazing animals in a common field.

⁷² See Hsu, *supra* note 65, at 82. This can be compared with public goods, which are nonrival and nonexcludable. Nonrival means that A's consumption does not interfere with B's consumption of the good. See REYNOLDS, *supra* note 60, at 242. Nonexcludable means it is impossible to prevent someone from using the good. *Id.*

⁷³ It is impossible to spend the same one dollar on two things.

⁷⁴ See Hsu, *supra* note 65, at 133.

use the supply curve "S" which has a higher price for political funds.⁷⁵

IV. Application to Other Unions

The first portion of this paper concerns the Washington law requiring an opt-in system. However, a U.S. Supreme Court decision in the WEA case will apply nationally. States considering an opt-in law can enact a similar statute with the interpretation provided by the WEA U.S. Supreme Court decision. However, those employees under a union security agreement mandating union membership (a union shop), a Supreme Court decision will apply *Beck*. *Beck* allows nonmembers alone to reject the Union's political spending. However, states could enact a law allowing all union members to withhold fees that go toward political causes (opt-in). This will have all of the benefits of the WEA opt-in.⁷⁶

A statute allowing all union members to opt-in to have union dues used for political purposes may create a free rider problem. Allowing all union members to opt-in will likely decrease the number of employees that allow dues to be used

⁷⁵ Where price is synonymous with a higher value.

⁷⁶ The opt-in system in Washington applies only to nonunion members.

for political purposes.⁷⁷ If applied to other states, allowing nonunion members alone to opt-in will reduce funds available to the union by a small amount. However, allowing all union members to participate in opt-in will likely reduce the funds available to union political contributions by a large amount. Members that do not opt-in will try to free ride on those that do. However, this free rider problem is present in all political contributions. For example, not all nonunion members contribute to the Evergreen Freedom Foundation,⁷⁸ but all nonmembers received the benefits of its advocacy in the Washington courts. For union members and those that support the policy of labor unions, supporting the union through political contributions makes sense. However, those members that do not support labor union policy should not be required to contribute, even if there is a potential for free rider problems.⁷⁹

⁷⁷ Most unions have a separate political action committee that members can choose to support through separate reductions in wages. See WEA, *supra* note 3. Figures on the number of union members contributing to Political Action Committees are unavailable.

⁷⁸ EFF is the organization responsible for providing counsel to nonmembers in the two suits against the WEA, See *supra* note 3, 23.

⁷⁹ 30% of union members are Republican and 10% support third-party candidates, See Knollenberg, *supra* note 24, at 360, but an overwhelming majority of political contributions go to democrats. EVERGREEN FREEDOM FOUNDATION, *supra* note 4, at 14.

Conclusion

By finding the § 760 supporting an opt-out provision, the Washington Supreme Court allows unions to engage in rent-seeking behavior. Rent seeking behavior should be discouraged, but is possible when unions collect agency fees from nonmembers.⁸⁰ In order to maintain their present standing, the unions will attempt to maximize their income, primarily at the detriment of these nonmembers. A law and economics approach to contracts suggests an opt-in law especially when applying the Coase theorem. In addition, opt-in prevents the WEA from using silence as a means of acceptance of the contract to provide funds used for political purposes.⁸¹

As a subsidy to the WEA political speech, the opt-out law should not be the benchmark standard as the Washington Supreme Court held in WEA.⁸² Allowing nonmembers to opt-in is

⁸⁰ Roger Miller and Raymond Fishe define rent-seeking as "An attempt to secure monopoly profits by investing resources to influence public policy." ROGER LEROY MILLER & RAYMOND P.H. FISHE, *MICROECONOMICS: PRICE THEORY IN PRACTICE* 430 (1995). See also, Robert H. Lande and Richard O. Zerbe, Jr., *Anticonsumer Effects of Union Mergers: An Antitrust Solution* 46 *DUKE L.J.* 197 at note 72 (1995). While the definition does not fit perfectly, the unions are attempting to extract all money from members and nonmembers in order to gain more members and repeat the process.

⁸¹ See *supra* pp. 10-11.

⁸² See *supra* pp. 13-16.

preferred in order to prevent the subsidy to the union from members that do not opt-out under the current system. The subsidy allows the WEA to spend more than nonmembers would normally contribute to the WEA for political spending. At its core, this subsidy is a redistributive labor policy used to maintain the political clout of the WEA and other unions.⁸³ In the context of an opt-in law for both union and nonunion members, the free rider problem may prove to be detrimental to the union movement. With decreasing funds available from union dues, the union will be less effective in lobbying for beneficial labor policy. To advocate for labor policy, these funds are necessary to elect sympathetic candidates and lobby elected officials. Without the express will of Congress, the Union cannot survive because Unions only exist through Congress's power.⁸⁴ In this sense, a challenge to the § 760 by the WEA will be beneficial to all unions if the U.S. Supreme Court rules in the WEA's favor.

⁸³ See Daron Acemoglu, *Inefficient Redistribution*, 95 AM. POL. SCI. REV. 649 (2001) ("It appears that a number of redistributive labor market policies are chosen to be inefficient, at least in part, to preserve their constituency. In this way, they ensure continuity in the political power of the policies' beneficiaries.").

⁸⁴ See Posner, *supra* note 64, at 1003.