Paycheck Protection or Paycheck Deception? When Government "Subsidies" Silence Political Speech

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INTRODUCTION

Political activity is essential to unions' mission of representing their members' interests and ensuring that the voice of working and middle class employees is included in the political process so that public policies reflect their needs.[1] This helps explain why the relentless decline in union density has not been matched by a decline in union political activity. To the contrary, union political activity, measured by political spending, has increased sharply in recent years and set new records in the 2012 election cycle.[2] Nearly all of it went to Democrats.[3] This increase has been driven in part by a need to remain relevant amidst an

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> From the first, there has been no line of demarcation between the bargaining, educational and political activities of unions. There is a tradition of over one hundred years of union political activity in this country. As the federal government has increasingly legislated in the field of union activity and on economic matters such as wages, hours and conditions of employment which are of the most immediate concern to laboring men as workers and as union members, the necessity for labor union political activity has correspondingly increased. Today the passage or defeat of any large number of bills affecting working men and their unions may be of as great importance to union members as the collective bargaining process itself.

Joseph L. Rauh, Jr., *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 163 (1961) (quoted in Marick F. Masters et al., *Worker Pay Protection: Implications for Labor's Political Spending and Voice*, 48 INDUS. REL. 557, 562 (2009)); *see also* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 800 (1961) (Frankfurter, J., dissenting) ("[W]hat is loosely called political activity of American trade unions . . . [is] indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions.").

2. It is important to note that the political strength of unions rests primarily on their ability to mobilize voters, and not on contributing money, since contributions from business dwarf those from unions. KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 816 (2009). Nevertheless, union political expenditures are a significant form of union political activity and have increased substantially in recent years. In the 2012 cycle, labor spent $174.3 million on federal elections, a 95% increase from 2008 and a 229% increase from 1992, the first year that soft money contributions to political parties were publicly disclosed. *Labor: Long-Term Contribution Trends*, CENTER FOR RESPONSIVE POL., http://www.opensecrets.org/industries/totals.php?cycle=2012&ind=P (last visited May 28, 2014).

3. In the 2012 cycle, Democrats received 91% of contributions made by unions. *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, CENTER FOR RESPONSIVE POL., https://www.opensecrets.org/bigpicture/blio.php?cycle=2012 (last visited Apr. 14, 2014).

escalating arms race in political spending by business, which outspent labor by a margin of more than fifteen-to-one[4] and helped propel total spending to $6 billion, shattering previous records.[5]

Political activity is particularly important with regard to the ability of public sector unions to advocate for their members.[6] This is because the employers are government officials, contracts must be approved by legislative bodies, and public sector labor laws severely restrict the forms of economic leverage public workers can use to advance their interests in contract negotiations.[7] Nearly all of the money unions raise, whether for politics or general representational duties, comes from payroll deductions,[8] which workers negotiate with their employers to have automatically deducted from their paychecks along with federal and state taxes, premiums for health and welfare plans, and voluntary donations to charities and other organizations. Unions rely so heavily upon payroll deductions because they are the most efficient method for unions to raise funds.[9] By contrast, payroll deductions play a negligible role for business,[10] which raises nearly all of its political funds[11] and general revenues[12] from the sale of goods or services.

The Supreme Court has repeatedly held that spending money on political campaigns is political speech receiving the highest form of First Amendment protection[13] and restrictions that limit the quantity of political expenditures are unconstitutional.[14] But under a 2009 Supreme Court decision, unions' *political*

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4. *Id.*

5. *2012 Election Spending Will Reach $6 Billion, Center for Responsive Politics Predicts*, CENTER FOR RESPONSIVE POL. (Oct. 31, 2012, 2:33 PM), http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html.

6. *See generally* Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL'Y J. 277 (2013) (summarizing research describing public sector collective bargaining as primarily a political process, and arguing that public sector collective bargaining furthers the democratic process and should be encouraged).

7. *See* Public Sector Bargaining—State Laws, BLOOMBERG BNA (accessed Dec. 29, 2012) (listing restrictions on the right of public workers to strike).

8. George Skelton, *Prop. 32's Real Purpose*, L.A. TIMES, Oct. 18, 2012, at A2, *available at* http://articles.latimes.com/2012/oct/17/local/la-me-cap-prop32-20121018.

9. Bailey v. Callaghan, 873 F. Supp. 2d 879, 881 (E.D. Mich. 2012), *rev'd*, 715 F.3d 956 (6th Cir. 2013).

10. *See id.*; Alex Knott, *PACs Collect Millions From Workers' Paychecks*, ROLL CALL (Oct. 25, 2010), http://www.rollcall.com/issues/56_41/-50973-1.html.

11. Nationwide, only about 800 companies use voluntary deductions to fund corporate PACs, as most contributions come from corporate executives. *See* Knott, *supra* note 10.

12. The one exception is businesses that provide employee benefits, like health insurance companies, which is why such businesses are generally exempted from the scope of laws restricting the use of payroll deductions. *See, e.g.*, Cal. Proposition 32 sec. 2 § 85151(c) (2012) (exempting deductions for employee benefit plans), *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop32.

13. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010); *see also* Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam). The Court has distinguished between campaign contributions, which receive less protection, and campaign expenditures. *See id.* at 19–21, 23.

14. *See Citizens United*, 558 U.S. at 366 (affirming that permissible disclaimer and disclosure requirements cannot place a "ceiling" on campaign-related activities); *Buckley*, 424 U.S. at 39, 58–59

speech receives less constitutional protection than even *hate* speech.[15] In *Ysursa v. Pocatello Education Ass'n*, the Court upheld an Idaho law limiting public sector unions' use of payroll deductions to raise money for political activities.[16] In so doing, the Court carved out a gaping hole in the First Amendment and gave fresh impetus to Republican legislators and conservative activists to pass similar laws throughout the country. As Republican leaders had already discovered, merely placing such measures on the ballot is an effective tactic to temporarily drain unions' political resources and thus eliminate a key source of funding for Democrats. Actually passing such ballot measures threatens to do so on a permanent basis.

The Court's treatment of public sector union payroll deductions adds to a fundamental imbalance in the legal regime governing political speech. In *Citizens United*, the Court held that limitations on independent expenditures by corporations and unions violate the First Amendment and that government may not restrict political speech on the basis of the speaker's identity.[17] In this respect, the Court continued the symmetrical treatment of unions and corporations that had guided its regulation of political spending since the 1940s.[18]

However, Professor Ben Sachs has demonstrated that the symmetrical regulation of how unions and corporations *spend* political money belies a significant disparity in how the law regulates the ability of unions and corporations to *raise* money.[19] Work by Professor Sachs and other scholars focuses on the discrepancy between, on the one hand, federal law providing rights to dissenting employees to withhold their financial support for political and ideological activities by unions, and, on the other hand, federal law failing to extend equal protections to dissenting shareholders to withhold support for political activities by corporations.[20]

(identifying and rejecting regulatory provisions that place restraints on the quantity of political speech).

15. *Compare* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 359 (2009) (applying rational basis review, and upholding a law requiring annual opt-in for public sector union payroll deductions for political purposes, even though the law drew a content-based distinction focusing only on political speech), *and* Wis. Educ. Ass'n Council v. Walker, 824 F. Supp. 2d 856, 874 (W.D. Wis. 2012) (applying *Ysursa* and upholding a law prohibiting payroll deductions for only certain unions), *rev'd in part*, 705 F.3d 640 (7th Cir. 2013), *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (indicating that content-based laws within categories of unprotected speech must meet strict scrutiny, and striking down a law criminalizing fighting words because it drew impermissible content-based distinctions between hate speech based upon race, religion, or gender, and hate speech based upon other characteristics).

16. *Ysursa*, 555 U.S. at 355.

17. *Citizens United*, 558 U.S. at 350.

18. The principle that corporations and unions should be treated similarly undergirds many earlier federal campaign finance laws. These include the War Labor Disputes Act (1943), the Federal Election Campaign Act (FECA) (1971), and the Bipartisan Campaign Reform Act (BCRA) (2002). *See* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 801–03 (2012).

19. *Id.* at 803.

20. *Id.* (demonstrating that symmetrical treatment of unions and corporations in campaign

This Note focuses on another area in which federal law creates a major imbalance between the ability of unions and corporations to raise money for politics: the ability of states to limit union political fundraising, and thus political speech, through so-called paycheck protection laws.[21] Such laws, derided by critics as "paycheck deception," and which I refer to simply as payroll-restriction laws, encumber the way in which unions collect voluntary political contributions from the workers they represent.[22] Payroll-restriction laws pose an even greater threat to union political speech than the enhanced rights for union dissenters to avoid paying for union political activities with which they disagree.[23] This is because payroll-restriction laws generally limit speech not just by nonmembers opposed to the union's political activities, but also by members who support them.[24]

The *Ysursa* Court immunized such laws from heightened scrutiny under the First Amendment by extending the subsidized speech doctrine.[25] Under this doctrine, when the government subsidizes speech—for example, by paying for a payroll system for its own employees—it is able to discriminate based upon the content of that speech even though this is ordinarily forbidden by the First

finance law produces an asymmetrical campaign finance regime, due to asymmetrical rules regarding opt-out rights for dissenting union members and shareholders, and arguing that dissenting shareholders be given the same opt-out rights as dissenting union members); *see also* Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023 (July 2013) (discussing the asymmetry in the rights of dissenting union members and shareholders, and arguing that unions should be given the same broad speech rights to ignore dissenting members as corporations have been given with regard to dissenting shareholders).

21. The term "paycheck protection" is a strongly partisan and value-laden term promoted by advocates of such laws who claim they will "protect" the paychecks of workers represented by unions from the supposed coercive payment of dues and voluntary political action committee (PAC) contributions. Opponents of such laws label them as "paycheck deception" because they view such measures as Trojan Horse legislation, whose purported focus on workers' rights and campaign finance reform is a thinly veiled effort to obscure the true nature of laws cynically aimed at defunding unions and the Democratic candidates and liberal policies they support. *See* Masters et al., *supra* note 1, at 558 & n.1. This Note avoids both partisan labels and adopts the neutral term "payroll-restriction" laws, except when referring to the national "paycheck protection" movement because this is the term employed by those active in such efforts.

22. Both sides of the debate use the "paycheck protection" and "paycheck deception" labels somewhat inconsistently to describe a wide array of legislation. This Note defines "payroll-restriction" legislation as laws that encumber the ability of public sector employees to use payroll deductions specifically to fund political activities. *See id.* at 558.

23. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2295–96 (2012) (requiring unions to use an opt-in system for special assessments on nonmembers); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 191 (2007) (upholding a state law requiring public employees represented by, but not members of, unions to opt-in to make political contributions through payroll deductions); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 780 (1988) (Blackmun, J., dissenting) (noting that the National Labor Relations Act prohibits private sector unions from charging nonmembers for political activities); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977) (declaring unconstitutional a state law requiring public employees represented by, but not members of, unions to pay for union political and ideological activities).

24. *See, e.g.*, WYO. STAT ANN. § 22-25-102(h) (West, Westlaw through 2014 Budget Sess.) (limiting the ability of all unions to obtain political contributions via payroll deductions, regardless of whether the employee is a member or nonmember).

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

Amendment.[26] Lower courts have followed *Ysursa* in upholding state laws passed by Republican-controlled legislatures imposing payroll restrictions on all unions[27] or even laws selectively targeting only those particular unions that were the Republicans' political adversaries.[28] Thus, the Seventh Circuit recently upheld a provision of a Wisconsin law that prohibited any government worker from contributing to a union through payroll deduction *but exempted* all workers whose unions had supported the electoral campaign of Republican Governor Scott Walker.[29]

However, I argue *Ysursa* is not controlling of lower court challenges to payroll-restriction laws, and I propose three means by which courts can strike down many such laws, with each proposal focusing on a distinct branch of First Amendment analysis. First, in cases where states ban payroll deductions only for particular unions, courts can apply a First Amendment analysis because language in *Ysursa* limits its holding to laws enforced evenhandedly. Thus, the case does not control laws that are not applied evenhandedly or that demonstrate viewpoint discrimination.[30] These situations would require the law to withstand heightened scrutiny, whereas courts applying *Ysursa* use only rational basis review.

Second, I argue that payroll deductions to unions are not government subsidies for union or employee political speech. Courts may reach this conclusion in either of two ways. First, in most cases, payroll deductions for union political activities impose no costs on government beyond the costs the payroll system already create in allowing employees to use payroll deductions to pay taxes and make contributions to health insurance, pension plans, and charitable organizations. In *Ysursa*, there was no evidence concerning the cost to the government from allowing unions to use payroll deductions for political purposes, and the Court's analysis rested on the assumption that this specifically defined subset of payroll deductions did in fact cost the government money.[31] District courts can thus distinguish *Ysursa* by making findings of fact that the unions' use of the preexisting government payroll systems for political purposes imposes no additional cost, and therefore the payroll systems are not government subsidies. Payroll systems are used for a wide range of deductions, and the incremental administrative cost of adding one more deduction is miniscule and likely not

26. *See id.* at 358, 361; Utah Educ. Ass'n v. Shurtleff, 565 F.3d 1226, 1230 (10th Cir. 2009).

27. *See Utah Educ. Ass'n*, 565 F.3d at 1228.

28. *See* Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 664–65 (7th Cir. 2013) (Hamilton, J., concurring in the judgment and dissenting in part). Although this case concerned a state law banning the use of payroll deductions for union dues, which includes but is not limited to funds used for political activities, the court analyzed the law under *Ysursa* and upheld it as constitutional. *Id.* at 645–48 (majority opinion). I argue this case was wrongly decided because the law constituted viewpoint discrimination. *See infra* text accompanying notes 395–397.

29. Several public safety unions that did not endorse Governor Walker were also exempted. *See Wis. Educ. Ass'n Council*, 705 F.3d at 667 (Hamilton, J., concurring in the judgment and dissenting in part).

30. *See Ysursa*, 555 U.S. at 361 n.3.

31. *Id.* at 358–59, 363–64.

measurable. Alternatively, even where the facts show that union payroll deductions create some additional cost, lower courts may find a de minimis exception whereby very small government expenditures that private speakers are unable to decline are not government subsidies for the purpose of the government speech doctrine. Like the first proposal, the second proposal would allow courts to strike down payroll-restriction laws because it would take a case outside the ambit of *Ysursa* and its exception to the First Amendment, meaning heightened scrutiny would apply. Unlike the first proposal, the second proposal is applicable even to laws applied evenhandedly to all political speech.

My third proposal addresses a third branch of First Amendment analysis, independent of the viewpoint discrimination and subsidized speech rules that are the focus of my first two proposals. Unions can argue that courts should not apply the subsidized speech doctrine to public employee payroll systems at all, but should instead analyze them as forums. Under the forum doctrine, which the Supreme Court did not address in *Ysursa*, the government's ability to regulate speech on public property depends on how that property is categorized.[32] Specifically, the nature of many states' regulations of public sector payroll systems may support an argument that a payroll system is a designated public forum, in which strict scrutiny applies. Like the second proposal, the third proposal is potentially applicable to any payroll law.

Ultimately, the Court should overrule *Ysursa*. The case creates doctrinal incoherence by obscuring the relationship between the subsidized speech and public forum doctrines. It also creates doctrinal imbalance by producing a highly asymmetric campaign finance regime incompatible with *Citizens United* by allowing states to restrict the principal means by which unions raise political funds while leaving corporate political fundraising undisturbed. Finally, it produces undesirable effects by expanding the government subsidy doctrine to place substantial new categories of speech—those impacted by the myriad situations involving negligible, administrative government expenditures that private speakers are unable to avoid—outside the protections of the First Amendment. But until *Ysursa* is overturned, lower courts should remain cognizant of the limits of its holding and the tools still available to them to protect political speech.

Part I.A of this Note places *Ysursa* in context by describing the mechanics of union payroll deductions, I.B describes the various legal measures that aim to restrict their use, and I.C discusses the major arguments made in support of these laws. Part I.D continues by applying insights gleaned from the field of behavioral economics to analyze the importance of payroll deductions as a method of fundraising and explain why efforts to encumber their use are so harmful to unions' ability to raise political funds. Part I.E then concludes by tracing the evolution of the so-called "paycheck protection" movement, from its origin as a

32. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1165 (4th ed. 2011).

localized effort by conservative Christians to gain influence over public education to its maturation into a coordinated national effort by the Republican party to limit fundraising by Democrats. Part II describes the *Ysursa* case and summarizes the constitutional principles implicated by payroll-restriction laws in general and by *Ysursa* in particular. Part III explores the undesirable implications of *Ysursa* for First Amendment jurisprudence. Part IV proposes three means by which courts may nevertheless strike down many payroll-restriction laws, focusing on the First Amendment doctrines of viewpoint neutrality, subsidized speech, and public forums.

I. PAYROLL DEDUCTIONS

A. How Payroll Deductions Work

Modern employers favor automated payroll systems because they are more efficient and less error prone than manual systems. Payroll deductions are a necessary component of payroll processing. Deductions may be made for a wide range of purposes,[33] including taxes, employee benefit plans, charitable contributions, and union dues.[34] Some deductions are mandatory. For example, federal law requires deduction of federal income and payroll taxes,[35] and states and localities may require employers to make other deductions for items such as state income taxes and court-ordered garnishments.[36] Other deductions are voluntary. State and local governments can regulate the type of payroll deductions they will allow.[37] In addition, federal law allows unions and corporations to automatically deduct money from employees' paychecks and use those funds for political purposes.[38]

Unions collect nearly all of their funds using payroll deductions[39] because this is the easiest and least expensive method available.[40] Manual alternatives to payroll deductions, such as face-to-face solicitation, consume significant time and

33. *See, e.g.*, Aaron Sharockman, *What Does It Cost Governments For Automatic Payroll Deductions?*, POLITIFACT FLA. (Mar. 22, 2011), http://www.politifact.com/florida/statements/2011/mar/22/john-thrasher/what-does-it-cost-governments-automatic-payroll-de/ (citing DED LISTING, http://spreadsheets.google.com/ccc?key=0Ag6LtLEJqtdcdHRKQkxlT2hfMGxWWkhHY3MzSVdGbVE&hl=en&authkey=CM6RnI0P (last visited May 30, 2014) (listing 364 groups or agencies authorized in Florida to take money through automatic payroll deduction)).

34. DED LISTING, *supra* note 33.

35. I.R.C. §§ 3102 (FICA taxes), 3402(a) (income taxes) (2012).

36. *E.g.*, CAL. LAB. CODE § 224 (West 2011); *see also Deductions From Wages*, COLO. DEP'T. LAB. & EMP., https://www.colorado.gov/pacific/cdle/node/20146 (last visited May 31, 2014).

37. *E.g.*, LAB. § 224; *see also* City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 287 n.3 (1976) (listing compulsory and optional payroll deductions for municipal firefighters).

38. 11 C.F.R. § 114.5 (2014).

39. Skelton, *supra* note 8.

40. *See* Pocatello Educ. Ass'n. v. Heideman, No. CV-03-0256-E-BLW, 2005 U.S. Dist. LEXIS 34494, at *12–13 (D. Idaho Nov. 23, 2005), *rev'd on other grounds*, 561 F.3d 1048 (9th Cir. 2009) (reversing in accordance with *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009)).

resources[41] that unions could otherwise spend on representational activities. Even automated alternatives, such as bank drafts, are less effective because employees are less likely to use them.[42] Unions therefore place a high priority on negotiating the right for the workers they represent to use their employer's existing automatic payroll system to pay union dues and fees.[43]

In the absence of payroll-restriction laws, unions and employers have the freedom to negotiate contracts allowing workers to make payments through automatic payroll deductions to the union representing them. Each worker must then provide written authorization allowing the automatic deductions to take place.[44] Thus, at the outset, no deductions take place until unionized workers take at least two affirmative steps: first, collectively negotiating the right to use deductions, and second, individually authorizing them.[45]

Workers' payments to their unions include dues, which fund union collective bargaining activities as well as certain political activities.[46] Federal law and many state laws prohibit unions from using dues to make direct contributions to candidates, political parties, and many types of political action committees (PACs),[47] but dues may still be used to finance many other forms of political activity, such as independent expenditures and membership communications,

41. *Id.* at *12–13.

42. *Id.*; *see also* State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 999 P.2d 602, 606 n.13 (Wash. 2000).

43. *See* ARIZ. REV. STAT. ANN. § 23-361.02(E) (2012), *invalidated by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011); FLA. STAT. § 447.303 (West, Westlaw through 2014 Special "A" Sess.); OHIO REV. CODE ANN. § 3599.031 (West, Westlaw through 2013–2014 General Assemb.); WASH. REV. CODE ANN. § 42.17A.495 (West 2012)).

44. *See* § 23-361.02(E); § 447.303; § 3599.031; § 42.17A.495.

45. Generally, workers who join a workforce that is not already unionized must take the additional affirmative step of organizing a union through a majority vote among the workers in their bargaining unit. The general practice among unions is that workers do not pay dues until after the union is recognized and a contract has been negotiated. *See, e.g.*, *Answers to Basic Questions*, JOIN1199SEIU.ORG, http://www.join1199seiu.org/answers-to-basic-questions/ (last visited May 30, 2014) ("When workers join 1199, they do not start paying dues until they have won a first contract . . . ."); *FAQ*, AM. AGENTS, http://american-agents.org/faq/ (last visited May 30, 2014) ("We will not pay dues until we have a contract."); *Northeastern Adjunct Faculty Are Forming a Union: Questions? Ask Us.*, ADJUNCT ACTION, http://media.wix.com/ugd/47f408_944e2c4bf52049b09136362875e2b0d9.pdf (last visited May 30, 2014) ("But no one pays dues until we have: 1) formed our union; 2) bargained our first contract; and 3) voted as a group to approve our contract."); *What Will My Employer Say?*, OFF. & PROF. EMPS. INT'L UNION, http://www.opeiu.org/NeedAUnion/WhatWillMyEmployerSay.aspx (last visited May 30, 2014) ("No one pays any dues until after your union contract is negotiated, voted on and approved by you.").

46. Masters et al., *supra* note 1, at 557.

47. 2 U.S.C. § 441b(a) (2012) (FECA); 11 C.F.R. § 114.5 (2014) (listing federal restrictions on political activity of unions and union separate segregated funds); *see also State Limits on Contributions to Candidates: 2011–2012 Election Cycle*, NAT'L CONF. ST. LEGISLATURES (NCSL), http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012v2.pdf (last updated June 1, 2012) (listing limitations on union contributions to state candidates); *Limits on Contributions to Political Parties*, NCSL, http://www.ncsl.org/legislatures-elections/elections/limits-on-contributions-to-political-parties.aspx (last updated Feb. 5, 2008) (listing limitations on union contributions to state political parties).

which are each protected by the First Amendment.[48] In fact, studies suggest the majority of union political activities are funded through dues.[49]

Workers may also elect to make supplemental voluntary political contributions to their union's PAC.[50] Unlike dues, PAC contributions are not a requirement of membership, are spent only on political activities, and are subjected to fewer restrictions limiting how the money may be spent.[51] PAC contributions may be made through a separate deduction, which workers must authorize independently of their authorization to pay dues.[52] Alternatively, PAC contributions may be made through a "reverse dues check-off," in which workers authorize a single deduction including both dues, which the union keeps, and supplemental political contributions, which the union remits to its PAC.[53] After workers authorize any of these payments, the deductions continue automatically until the worker rescinds her authorization or leaves her job.[54]

B. Laws Restricting the Use of Payroll Deductions

Payroll-restriction laws limit the freedom of unions and employers to contract to allow employees to participate in these voluntary payroll deductions. Payroll-restriction legislation takes a variety of forms regarding the mechanism used to limit political fundraising, the scope of the political activities targeted, and the contributors and recipients covered.[55] With regard to the mechanism, some legislation imposes new burdens on the use of payroll deductions that may discourage their use, such as new disclosure requirements for workers[56] or

48. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding limitation on independent expenditures by corporations and unions violate the First Amendment); United States v. CIO, 335 U.S. 106, 121–22 (1948) (employing constitutional avoidance to interpret the Taft-Hartley Act as permitting a union to publish a periodical urging its members to vote for a political candidate).

49. Between 2005 and 2011, unions' spending on politics totaled $1.1 billion, according to reports filed with the Federal Election Commission (FEC). But these figures significantly understate unions' total political activities, because FEC filings do not include spending on local and state campaigns, or internal communications with their own members. Spending on these activities totaled an additional $3.3 billion over this period, according to a *Wall Street Journal* analysis of disclosure reports filed with the United States Department of Labor. Although FEC data suffers from the same limitations with regard to corporate spending on politics, there is no comparable source for capturing corporations' state and local political activities because only unions are subjected to such detailed disclosure requirements, which include line items for expenditures as specific as the amount spent on bratwursts purchased to feed workers protesting Wisconsin Governor Scott Walker's drive to repeal union rights in 2010. Tom McGinty & Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, WALL ST. J., July 10, 2012, at A1.

50. Masters et al., *supra* note 1, at 563–64.

51. *See id.*

52. *See id.*

53. *See* State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 999 P.2d 602, 605 & n.12 (Wash. 2000) (describing "reverse dues check-off" system employed by the WEA prior to the passage of Initiative 134); Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin., 677 F.2d 1125, 1127–28 (6th Cir. 1982) (describing reverse check-off system).

54. *See State ex rel. Evergreen Freedom Found.*, 999 P.2d at 605 & n.12.

55. *See, e.g.*, Masters et al., *supra* note 1, at 572 tbl.6.

56. *E.g.*, Maryland H.D. 694, 2012 Leg., 430th Sess. (Md. 2012); S.B. 763, 2012 Leg., 430th

unions.[57] Most legislation, however, erects more substantial barriers. Some legislation replaces a one-time opt-in with an annual opt-in requirement.[58] More restrictive legislation categorically bans the use of payroll deduction to contribute funds for various political activities, even for workers who would otherwise choose to opt-in every year.[59] The most onerous measures combine both mechanisms: they ban the use of payroll deductions *and* require annual reauthorization for any alternative form of automatic payment.[60] Some laws do not impose direct limitations on the use of payroll deductions for political activities but instead prohibit any negotiations on the topic,[61] thus allowing employers to unilaterally set terms or even prohibit their use outright.

Payroll-restriction laws also vary considerably with regard to the political activities they target. Some legislation applies only to voluntary contributions to union PACs or separate segregated funds.[62] As noted, PAC contributions are made in addition to union dues and are used only for political purposes. Other legislation takes the opposite approach and applies to political activities paid for with general treasury funds but exempts donations to PACs.[63] More restrictive legislation applies to both PAC contributions and to certain political activities unions may finance using general dues revenue.[64] And there are even proposals for model legislation targeting all union activities not germane to collective bargaining, including social, ideological, and charitable causes.[65] Some legislation applies only to payments to be used for political activities,[66] while other legislation

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Sess. (Md. 2012) (requiring disclosure of the names and addresses of each contributor to a campaign finance entity using payroll deduction).

57. *E.g.*, ARIZ. REV. STAT. ANN. § 23-361.02(B) (2012) (requiring organizations using payroll deduction to fund their political activity to disclose to their members' employers the maximum percent of the amount deducted that will be used for political activities), *invalidated by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118, 1128 (D. Ariz. 2011).

58. *E.g.*, WASH. REV. CODE ANN. § 42.17A.495 (West 2012).

59. *E.g.*, IDAHO CODE ANN. § 44-2004(2) (West 2006).

60. *E.g.*, Cal. Sec'y of State, *Proposition 32: Analysis by the Legislative Analyst*, OFFICIAL VOTER INFO. GUIDE, http://voterguide.sos.ca.gov/past/2012/general/propositions/32/analysis.htm (last visited Feb. 6, 2014) [hereinafter *Proposition 32: Analysis*].

61. TENN. CODE ANN. § 49-5-608(b)(6) (West, Westlaw through 2014 2d Legis. Sess.) (prohibiting collaborative conferencing between the board of education and professional employees on payroll deduction for political activities).

62. *E.g.*, § 42.17A.495.

63. *E.g.*, ARIZ. REV. STAT. ANN. § 23-361.02(E) (2012), *invalidated by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 23 1118 (D. Ariz. 2011).

64. *E.g.*, UTAH CODE ANN. § 34-32-1.1 (West, Westlaw through 2014 General Sess.).

65. ROBERT P. HUNTER, MACKINAC CTR. FOR PUB. POLICY, PAYCHECK PROTECTION IN MICHIGAN 10–12 (1998) (proposing restrictions on payroll deductions for all activities not germane to contract administration, collective bargaining, or grievance handling under *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 507 (1991)). Many payroll deduction laws include myriad additional provisions to further limit the ability of unions to raise funds for political activities. For example, some laws limit the people from whom unions may solicit political contributions, the manner in which those contributions may be made, etc. This Note, however, focuses specifically on the use of payroll deductions.

66. *E.g.*, IDAHO CODE ANN. § 44-2004(2) (West 2006).

prohibits the use of payroll deductions to make *any* payments to an organization if any part of the payment is used for political activity.[67] Legislation also varies with regard to how it defines "political activities," and unions have challenged provisions of statutes they contend use definitions that are vague or overbroad under the First Amendment.[68]

Another way in which legislation varies is with regard to the contributors and recipients it covers. Some legislation covers only contributions by public sector employees,[69] while some covers contributions by both public and private sector employees.[70] Most legislation applies equally to contributions by union members and nonmembers, although some legislation applies only to nonmembers.[71] Legislation also varies in terms of who may receive funds collected through payroll deduction. Some legislation applies only to contributions to unions,[72] while other legislation applies to contributions to unions and corporations but exempts contributions to employee health and welfare plans and charities.[73] There is also legislation that is facially neutral, proscribing all contributions by public employees to any recipient.[74]

C. Arguments Made in Support of Payroll-Restriction Legislation

Proponents of payroll-restriction laws make several arguments to justify their

67. ALA. CODE § 17-17-5 (West, Westlaw through 2014 Legis. Sess.), *enjoined by* Ala. Educ. Ass'n v. Bentley, 788 F. Supp. 2d 1283 (N.D. Ala. 2011), *rev'd sub nom.* Ala. Educ. Ass'n v. State Superintendent of Educ., 746 F.3d 1135 (11th Cir. 2014).

68. *Bently*, 788 F. Supp. 2d at 1324 (granting preliminary injunction on overbreadth and vagueness grounds), *rev'd sub nom. Ala. Educ. Ass'n*, 746 F.3d 1135 (reversing based upon the Alabama Supreme Court's construction of the statute in response to two questions certified by the Eleventh Circuit); *see also* Defendants' Memorandum in Support of Motion for Summary Judgment at 2, Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 WL 3241745 (D. Idaho July 15, 2005) (conceding that the Idaho Voluntary Contribution Act's definition of "political activities" in Idaho Code § 44-2602(e) is unconstitutionally overbroad), *rev'd on other grounds*, 561 F.3d 1048 (9th Cir. 2009) (reversing in accordance with *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009)).

69. *E.g.*, § 34-32-1.1.

70. *E.g.*, WASH. REV. CODE ANN. § 42.17A.495 (West 2012); WYO. STAT. ANN. § 22-25-102 (West, Westlaw through 2014 Budget Sess.). Laws restricting the ability of private sector workers to make political contributions using payroll deductions are likely preempted by the NLRA and unconstitutional under the First Amendment. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 154 (1976) (holding state law regulating conduct that federal law intended to leave unregulated is preempted by the NLRA).

71. *See* State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 999 P.2d 602, 637 & n.92, 638–40 (Wash. 2000) (holding that RCW 42.17.760, enacted by Washington's I-134, required unions to obtain individual authorization to use nonmembers' agency fees for political purposes, but did not similarly require unions to obtain individual authorization to use members' dues for political purposes).

72. *E.g.*, IDAHO CODE ANN. § 44-2004(2) (West 2006); Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 371 (2009) (Stevens, J., dissenting) (arguing that section 44-2004(2) was intended to specifically target union fundraising).

73. *E.g.*, ARIZ. REV. STAT. ANN. § 23-361.02(E) (2012), *invalidated by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011); Cal. Proposition 32 sec. 2 § 85150(c) (2012).

74. *E.g.*, § 34-32-1.1.

efforts as desirable social policy and not an effort to silence specific political voices.[75] However, none of these arguments withstand scrutiny, suggesting they are mere pretext for efforts to defund unions' political activities.

First, proponents argue that these laws will save taxpayers money because they will free government from paying the cost of administering payroll deductions for union political contributions.[76] However, common sense and evidence from various states suggest the cost is miniscule and likely too small to measure. For example, in 2011 the Florida legislature considered legislation to eliminate payroll deductions for public employee unions and conducted three analyses of the bill's fiscal impact.[77] One analysis found the impact might be "positive, but insignificant," another found it would be "neutral," and a third found it "indeterminate."[78] Also in 2011, a Michigan legislative analysis of H.B. 4929, a bill to prohibit public school employees from using payroll deductions to pay union dues, concluded the measure "would have no significant fiscal impact on school districts" because the process "is largely automated."[79] In addition, many states have statutes that allow them to negotiate with unions over paying the administrative costs[80] or simply require the unions to pay these costs.[81] In fact, independent analyses in some states have concluded that implementing payroll restrictions will actually *add to* the government's administrative costs by requiring government to implement and enforce the new requirements.[82]

Second, and closely related, proponents argue that these laws will avoid the appearance of government favoritism or entanglement in partisan politics.[83]

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75. *See generally* GORDON LAFER, ECON. POLICY INST., THE "PAYCHECK PROTECTION" RACKET (2013) (summarizing arguments).

76. *Id.* at 10 (citing the Michigan Chamber of Commerce); *see also* Sharockman, *supra* note 33.

77. Sharockman, *supra* note 33.

78. *Id.*

79. H.R. 2011-4929, 1st Sess. (Mich. 2011) (legislative analysis as reported from committee), *available at* http://www.legislature.mi.gov/documents/2011-2012/billanalysis/house/pdf/2011-HLA-4929-3.PDF.

80. *E.g.*, FLA. STAT. § 447.303 (West, Westlaw through 2014 Special "A" Sess.).

81. *E.g.*, OHIO REV. CODE ANN. § 3599.031 (West, Westlaw through 2013–2014 General Assemb.).

82. *E.g.*, Cal. Sec'y of State, *supra* note 60 (last visited Feb. 6, 2014) (concluding the measure would create increased costs to state and local government possibly exceeding $1 million annually); Letter from Elizabeth G. Hill, Legislative Analyst, Legislative Analyst's Office, to Bill Lockyer, Att'y Gen., Cal. Dep't of Justice (Feb 11, 2005), http://www.lao.ca.gov/ballot/2005/050027.pdf; Cal. Sec'y of State, *Proposition 226: Analysis by the Legislative Analyst*, OFFICIAL VOTER INFO. GUIDE, http://primary98.sos.ca.gov/VoterGuide/Propositions/226analysis.htm (last visited Feb. 6, 2014) (concluding the measure would generate annual administrative costs of $2 million); *2011 Initiative Analysis: Stop Special Interest Money Now Act*, LEGIS. ANALYST'S OFF. (May 6, 2011), http://www.lao.ca.gov/ballot/2011/110309.aspx; *see also* Elizabeth G. Hill, *California's Legislative Analyst's Office: An Isle of Independence*, SPECTRUM: J. ST. GOV'T, Fall 2003, at 26, *available at* http://www.lao.ca.gov/IsleOfIndependence (describing the Legislative Analyst's independence).

83. LAFER, *supra* note 75, at 13 (citing American Legislative Exchange Council). This reason was also the rational basis the Supreme Court used to uphold an Idaho law banning the use of payroll deductions by state and local government employees to make political contributions to their unions. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009).

However, it is unclear how the entanglement argument survives the observation that the payroll deductions do not actually involve any measurable expenditure of government resources. Nor does the government favoritism argument withstand scrutiny in light of the overwhelmingly lopsided impact that payroll-restriction laws exert on one voice (unions, but not corporations) and on one political party (Democrats, which receive nearly all union political contributions identifiable with a political party), and the broad exemptions many payroll-restriction laws provide for contributions that finance political activities by organizations other than unions.[84] Thus, when judged by their effect, payroll-restriction laws appear to deeply entangle the government in a highly partisan political struggle.

Third, proponents argue that payroll-restriction laws provide workers greater control over how their wages are spent. This is necessary, the argument continues, because many workers do not share their unions' political priorities and contribute only due to coercion. Proponents of this argument cite the decline in political contributions following the implementation of such laws as evidence supporting this proposition.[85] It is true that evidence does indicate political donations decline following the enactment of such laws.[86] For example, one report by a conservative think tank concluded that payroll-restriction laws are associated with reductions in public sector union political expenditures of more than fifty percent.[87] Other anecdotes point to dramatic declines in the percentage of union members making political contributions following the implementation of such laws.[88] After Idaho passed legislation requiring public employee PACs to obtain annual written consent from workers wishing to make contributions using payroll deduction, the percentage of unionized workers contributing fell by seventy-eight percent.[89] And for one Utah employee association, the percentage of workers contributing to its PAC fell even more precipitously, from 68% to just 6.8% in one year.[90]

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84. *See* ARIZ. REV. STAT. ANN. § 23-361.02(E) (2012), *invalidated by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011); Cal. Proposition 32 sec 2. § 85150(c) (2012); WASH. REV. CODE ANN. § 42.17A.495 (West 2012).

85. *See* HUNTER, *supra* note 65, at 7; JAMES SHERK, THE HERITAGE FOUND., WHAT DO UNION MEMBERS WANT? WHAT PAYCHECK PROTECTION LAWS SHOW ABOUT HOW WELL UNIONS REFLECT THEIR MEMBERS' PRIORITIES 4 (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.

86. *Infra* note 87.

87. SHERK, *supra* note 85, at 7. The study measures union contributions to candidates for state office but does not include soft money expenditures, nor does it measure actual union fundraising. *Id.* at 5, 10. The study includes a regression analysis the study's author concludes demonstrates a causal relationship. *Id.* at 9.

88. *Infra* note 89.

89. After Washington voters passed I–134, the number of contributors to the union's PAC fell from a high of 44,785 to a low of 9756 as of September 1995. Total contributions fell by $455,364. State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 999 P.2d 602, 606 n.13 (Wash. 2000).

90. Figures are for the Utah Education Association. Larry Sand, *Prop 32 Protects Paychecks, Ends Payroll Deductions for Political Contributions*, CAL. POL. REV. (Oct. 4, 2012), *available at*

There are two major problems with this argument. First, workers already maintain control over their unions' political activities by electing (or voting out) their union's leadership, and through the option to vote to disband their union entirely.[91] Second, the coercion metaphor does not fit. This argument appropriates the language of what I will call the "dissenters' rights" movement against compelled union speech. This refers to efforts to facilitate and encourage nonmembers to withhold payment for their union's political activities with which they disagree (through opt-out procedures permitted by *Davenport* and required by *Abood* and *Knox*), and to eliminate the requirement for nonmembers to make *any* compulsory payments to their unions through so-called "right to work" laws.[92] However, payroll restrictions are distinguishable from all efforts to enhance the rights of dissenters to withhold payments because they apply to the activities of union *members* who have already taken the affirmative step to voluntarily associate themselves with the union and who continue to maintain that relationship.

D. Why Do Restrictions on Payroll Deductions Matter? Insights from Behavioral Economics

Empirical evidence demonstrating a relationship between payroll-restriction laws and declines in workers' financial support for their union's political activities[93] nevertheless raises two questions. First, if this is not evidence that workers do not agree with their union's political activities, how else can it be explained? And second, if workers do in fact support their union's political activities, why do these laws even matter? After all, payroll-restriction laws do not actually prohibit workers from making political contributions to either their union or their union's PAC; they merely restrict or eliminate one method of doing so. Union workers are still free to contribute money through other means—for example, by sending a monthly or annual check or even setting up alternative means of automated recurring contributions such as bank drafts.

Insights gleaned from research in the field of behavioral economics suggest answers to both questions. First, research suggests that declining participation rates in union political contributions after payroll-restriction laws are enacted actually tell us very little about workers' underlying motivations and the depth of their support for their unions' political activities.[94] And second, research also

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http://www.capoliticalreview.com/top-stories/prop-32-protects-paychecks-ends-payroll-deductions-for-political-contributions/.

91. LAFER, *supra* note 75, at 6.

92. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2295–96 (2012); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 191 (2007); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977). In fact, every state with active payroll-restriction laws is a so-called "right to work" state, in which workers represented by unions may withhold *all* payments to the union that represents them even though the union is still required to provide representational services equivalent to those provided to its paying members. *See Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., INC., http://www.nrtw.org/rtws.htm (last visited May 13, 2013) (listing so-called "right to work" states).

93. *Supra* notes 87, 89–90.

94. *Infra* Part I.D.1.

demonstrates that payroll-restriction laws change behavior simply by altering the default setting or by eliminating the ability to use payroll deductions altogether.[95] Numerous studies demonstrate that across a wide range of voluntary activities, most people do not change the default option when choosing whether to participate in a given activity, and the use of payroll deductions has a significant and positive effect on contribution rates and levels.[96] A wide range of studies provides both a theoretical and empirical foundation for these arguments.

Behavioral economists focus on descriptive theories of how people *actually* behave, taking into account psychological and cognitive factors, rather than on normative theories of how people *should* behave, based on the premise that people are unfailingly rational actors who make decisions only in their own economic self-interest.[97] This research rests on a simple and straightforward premise: even minor adjustments in placing or removing obstacles to action can produce enormous changes in human behavior.[98] This premise thus cautions against inferring a direct relationship between behavioral outcomes and the motivations and values supposedly underlying them.

Although little research exists specifically focusing on payroll-restriction laws, there is considerable research on the impact produced in other settings by the two primary mechanisms payroll-restriction laws utilize: default settings and the availability of payroll deductions.

1. Default Settings

Scholars have identified several behavioral phenomena that help explain why individuals disproportionately stick with the default setting or status quo. One phenomena is "procrastination," defined as the tendency to irrationally defer actions one realizes to be in her own best interest due to a breakdown in self-control.[99] A common example experienced by many people is the recurring failure to cancel an automatically renewing subscription to a magazine we no longer read or want; we defer cancelling it now, although we plan to do so later. A second and

95. *Infra* Part I.D.

96. *Infra* notes 102–114, 107–110, 112, 121–127.

97. *See* BILL MORGAN ET AL., CHARTERED INST. OF PAYROLL PROFESSIONALS, PAYROLL DEDUCTION AND PROPENSITY TO SAVE: A LITERATURE REVIEW 5 (2008). *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2008); Melissa A.Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans' Retirement Savings Decisions*, 70 SOC. SECURITY BULL. 1 (2010) (both works summarizing research in behavioral economics and arguing policymakers should utilize insights derived from this research to craft interventions that influence behavior in socially desirable ways).

98. THALER & SUNSTEIN, *supra* note 97, at 3.

99. James Surowiecki, *Later: What Does Procrastination Tell Us About Ourselves?*, NEW YORKER (Oct. 11, 2010), *available at* http://www.newyorker.com/arts/critics/books/2010/10/11/101011crbo_books_surowiecki. This definition is utilized by behavioral economists and contrasts with the way traditional economists use the term to refer to rational choices made in response to transaction costs for the purpose of timing decisions to optimize costs and benefits. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149, 1150, 1177–80 (2001).

closely related phenomenon is the "status quo bias," which is the tendency to choose inaction over action when both are options.[100] A third phenomenon is the perception by many people that the default option is a tacit endorsement of that option by the sponsoring entity.[101]

Numerous studies have documented effects of equivalent magnitude to those observed in the union political contributions context from the transition between opt-out and opt-in regimes in areas as diverse as organ donation and retirement savings.[102] A study of organ donor consent rates among eleven European countries revealed striking differences between countries with opt-in or "explicit-consent" policies, where people are not organ donors unless they register to be, and countries with opt-out or "presumed-consent" policies, where people are donors unless they register not to be.[103] Consent rates in the explicit-consent countries ranged from 4.25% in Denmark to 27.5% in the Netherlands, while consent rates in presumed-consent countries ranged from 85.9% in Sweden to 99.97% in France and were at least 98% in every other country studied.[104]

The powerful effects defaults exert on behavior, moreover, appear to move in only one direction. Specifically, while it does not appear that opt-outs lead people to make choices they would not otherwise make, opt-ins lead many people to forego choices they would otherwise make. One study on organ donation rates used a laboratory test to compare the impact of an opt-in default setting, an opt-out default setting, and a third option which included no default but required participants to choose whether to become donors.[105] Only forty-two percent of participants agreed to be organ donors if required to opt-in, compared to eighty-two percent of participants required to opt-out and seventy-nine percent of participants presented with no default setting.[106] Thus, participation increased only slightly when moving from no default setting to an opt-out setting, while participation was cut nearly in half when moving from no default setting to an opt-in setting.

Research on the impact of default settings on participation rates in retirement savings plans provides a second example. Thus, one study found the percentage of workers participating in a defined-contribution plan after three

100. *See* Knoll, *supra* note 97, at 19; William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1998).

101. *See* Madrian & Shea, *supra* note 99, at 1149, 1150, 1176–86.

102. A third example is the purchase of auto insurance. *See* Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338 (2003) (reporting that seventy-five percent of consumers purchased automobile insurance with an unrestricted right to sue in Pennsylvania, where this was the default choice, compared to just twenty percent of consumers in New Jersey, where the default choice was a restricted right to sue).

103. *Id.* at 1338–39.

104. *Id.* at 1338.

105. *Id.*

106. *Id.*

months of employment increased from twenty percent under an opt-in system to ninety percent after the employer adopted an opt-out system.[107]

Even more striking is that the influence of these behavioral explanations persists even when the default option is objectively a poor choice.[108] For example, a review in the United Kingdom of twenty-five defined-benefit retirement plans, which are fully employer-paid and require no employee contribution, revealed that nearly half (forty-nine percent) failed to sign up, the equivalent of throwing away compensation by not bothering to cash a paycheck.[109] Another study found that many employees participating in a defined-contribution plan remain in the default savings rate and investment option, which results in a savings rate of just three percent and a highly conservative investment choice of a money market account.[110] Many specialists agree that these are poor choices because they will result in insufficient savings and a destitute retirement.[111] Similarly, the tendency to remain with the status quo may explain why many people near retirement age suffered heavy losses when the stock market declined sharply in 2008: they had a very large percentage of their retirement assets in equities, despite the advice of financial experts to redistribute retirement investments toward less-risky assets as retirement age nears.[112]

All of these studies demonstrate the tendency for people to remain with the default option, across a wide range of activities and even in cases where the default option is objectively a poor choice. It should thus come as no surprise that the percentage of union workers contributing to their union's political activities declines following the implementation of laws imposing annual authorization requirements to make contributions via payroll deductions,[113] because such laws change the default option to "no contribution" by requiring workers to opt-in—not once, but every year.

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107. THALER & SUNSTEIN, *supra* note 97, at 109 (citing Madrian & Shea, *supra* note 99, at 1149–225). The difference in participation rates after thirty-six months of employment was less dramatic but still significant: sixty-five percent under the opt-in system compared to ninety-eight percent under the opt-out system.

108. Although increasing the rate of organ donation will produce desirable social effects by increasing the number of lives that may be saved, some individuals may decide against donating their own organs for a variety of reasons, and this Note takes no position on the merit of those decisions. However, traditional economic theory teaches that choices providing people with more money are objectively rational and examples of choices impacting retirement savings are therefore used to illustrate the premise that default bias persists even when the default is objectively a bad choice.

109. *See* THALER & SUNSTEIN, *supra* note 97, at 108.

110. Madrian & Shea, *supra* note 99, at 1153.

111. THALER & SUNSTEIN, *supra* note 97, at 110, 129; Knoll, *supra* note 97, at 3–4.

112. Knoll, *supra* note 97, at 3. This phenomenon was identified in an earlier study that found nearly three-quarters (seventy-two percent) of Harvard University employees, who were participants in the TIAA-CREF pension plan, never changed the way their contributions were being allocated between funds, despite large differences in rates of return. Samuelson & Zeckhauser, *supra* note 100, at 31–33.

113. *Supra* notes 89–90.

2. Payroll Deductions

Laws that eliminate altogether the availability of payroll deductions for union political contributions impair fundraising for additional reasons. Researchers have identified behavioral phenomena that interfere specifically with efforts to put aside money for the purpose of long-term goals. These include loss aversion, reference dependence, and hyperbolic discounting. "Loss aversion" refers to the phenomenon that people do not experience losses and gains equally, and studies show that people dislike losses about twice as much as they like equivalent gains.[114] "Reference dependence," also called "anchoring around the default," is the tendency to evaluate wealth relative to a status quo reference point rather than in absolute terms.[115] Thus, where the reference point is set will determine whether a change is perceived as a loss, and consequently whether it triggers the powerful negative reaction predicted by loss aversion.

"Hyperbolic discounting" refers to the phenomenon whereby peoples' preference for smaller, short-term gains over larger, long-term gains increases as a decision nears.[116] For example, suppose that a person is given the option of waiting twenty-five days to receive ten dollars or waiting thirty days to receive twenty dollars. Experiments show that although this person may choose the second option while the rewards are twenty-five and thirty days away, she will likely reverse her preference and select the first option when the delays are reduced to one day and six days, even though both scenarios involve differences of ten dollars and five days.

Imagine how these concepts might apply to a hypothetical worker who desires to save money to fund a long-term goal such as a secure retirement.[117] She realizes that achieving her goal requires foregoing an immediate benefit by giving up some money now in exchange for the long-term benefit of a more comfortable retirement. However, due to reference dependence, she experiences each contribution to her retirement account as a loss because her income has been reduced below the reference point of her precontribution take home pay. Even though the current loss is offset by the future gain of a more comfortable retirement, loss aversion amplifies her sensation of loss and makes this appear to be an unequal exchange. And, due to hyperbolic discounting, her preference for

114. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039 (1991).

115. Knoll, *supra* note 97, at 11; Madrian & Shea, *supra* note 99, at 1150.

116. This phenomenon is attributed to the insight that people discount future benefits at a hyperbolic rather than at an exponential rate. *See* Kris N. Kirby & R.J. Herrnstein, *Preference Reversals Due to Myopic Discounting of Delayed Reward*, 6 PSYCHOL. SCI. 83, 83 (1995). Construal level theory (CLT) provides a cognitive theory for this behavior. CLT posits that people perceive events that are in the near future more in terms of the means required to achieve them, and perceive events in the distant future more in terms of the goals they represent. *See* Yaacov Trope & Nira Liberman, *Temporal Construal*, 110 PSYCHOL. REV. 403, 409 (2003).

117. Unfortunately, this situation is hardly hypothetical. A 2001 study found that eighty-two percent of respondents desired to save money, but sixty percent felt they were not saving enough for the future. Knoll, *supra* note 97, at 2.

the long-term benefit over the short-term benefit will likely reverse as the moment of making her contribution approaches, and she may ultimately decide she prefers to spend the money today. It is certainly possible to overcome each of these factors; recall that our hypothetical worker *wants* to save for retirement. But doing so requires self-control that studies suggest many people do not have.

Scholars have identified payroll deductions as an effective tool for neutralizing each of these factors by reducing the need for self-control.[118] First, payroll deductions help mitigate loss aversion by changing the reference point. A worker's reference point for income is typically not her gross earnings but rather her take-home pay after deductions for taxes, employee benefits, and other items are made.[119] Because the reference point already incorporates the payroll deduction, the deduction—unlike contributions made from take-home pay—will not be perceived as a loss. Second, payroll deductions also function as a "precommitment device," a term used to refer to voluntary arrangements to restrict one's future options in order to overcome the tendency to forsake long-term goals for instant gratification.[120] This helps the worker bypass the effects of hyperbolic discounting by locking in a decision to choose long-term benefits over short-term benefits at a time when such a tradeoff looks like a good decision because it is not imminent. Thus, scholars recognize the efficacy of payroll deductions in facilitating many voluntary activities including savings by low-income households,[121] workplace charitable giving,[122] retirement savings,[123] and

118. *Infra* notes 119–120.

119. Knoll, *supra* note 97, at 11.

120. *Id.* at 9–10.

121. Sondra G. Beverly & Michael Sherraden, *Institutional Determinants of Saving: Implications for Low-Income Households and Public Policy*, 28 J. SOCIO-ECON. 457, 465 & n.20 (1999) (identifying payroll deduction as a primary method of "facilitation" which promotes higher savings rates through precommitment constraints that make it difficult to choose current pleasure at the expense of future pleasure, and citing a study of community development credit union members in which forty-eight percent of survey respondents said that direct payroll deposit into savings would make it easier for them to save); *see also* Michael Sherraden et al., *Income, Institutions, and Saving Performance in Individual Development Accounts*, 17 ECON. DEV. Q. 95, 97–98 (2003) (discussing, inter alia, the common practice of using the income tax withholding system as a kind of automatic saving plan); *id.* at 107 (noting that ninety percent of participants in a low-income saving program favored rules that limited their ability to withdraw funds for unapproved purposes).

122. AMERICA'S CHARITIES, EMPLOYEE WORKPLACE CAMPAIGNS AT THE CROSSROADS: RECOMMENDATIONS FOR REVITALIZATION 9 (2000) (describing payroll deductions as "the highest yielding and the lowest cost method of fund raising for nonprofit[s]"); Karen Wright, *Generosity vs. Altruism: Philanthropy and Charity in the United States and United Kingdom*, 12 INT'L J. VOLUNTARY & NONPROFIT ORGS. 399, 414 (2001) (observing that "[p]robably the most powerful and efficient institutional mechanism for generating significant giving across income levels in the United States is payroll giving").

123. Knoll, *supra* note 97, at 9–11 (describing the ways in which payroll deductions overcome cognitive biases against retirement saving). *See generally* BILL MORGAN ET AL., PAYROLL DEDUCTION AND PROPENSITY TO SAVE (2008) (summarizing research into behavioral biases that inhibit retirement saving, and recommending the use of payroll deductions as a central plank in an effort to encourage greater savings).

college savings plans,[124] and for this reason frequently recommend their use to increase contributions.[125]

Numerous studies provide empirical evidence supporting these theories. One study of workplace charitable-giving campaigns found that the use of payroll deductions increases the likelihood that employees will contribute, and that contributions made through payroll deductions are four to six times greater than gifts made through other means.[126] Another study found a positive relationship between the use of automated deposits, including payroll deductions, and more regular and larger deposits and larger total savings in a college savings plan.[127]

Insights provided by research on the behavioral obstacles to long-term saving, and the role of payroll deductions in overcoming them, are directly applicable to political contributions by union workers. Like saving for retirement and other long-term goals requiring voluntary contributions, political contributions require a trade-off between less money today in exchange for a future benefit, in this case an amplified voice in the political process with the goal of securing material benefits such as greater wages, benefits, and job security. In fact, because the relationship between the quantity of political expenditures and the favorability of political outcomes is—thankfully, for the sake of our political system—more attenuated than the relationship between the amount of retirement savings and the eventual size of one's retirement nest egg, factors such as loss aversion and hyperbolic discounting are even more powerful deterrents to participation, and the benefit of payroll deductions are therefore even more pronounced.

E. The Right's Attack on Unions' Use of Payroll Deductions

Given the effectiveness of payroll-restriction laws as a tool to limit union political fundraising, it may be unsurprising that unions' political opponents have seized so aggressively on this tactic. However, the origin of efforts to pass these laws is more complicated. Paycheck restriction laws were initially developed as a weapon in the culture wars between the Religious Right and the teachers' unions in their fight for control over public education.[128] Efforts to pass these laws

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124. MARGARET CLANCY ET AL., WASH. UNIV. IN ST. LOUIS, INCLUSION IN COLLEGE SAVINGS PLANS: PARTICIPATION AND SAVING IN MAINE'S MATCHING GRANT PROGRAM 18, 25–26, 42 (2006), *available at* http://csd.wustl.edu/Publications/Documents/RP06-03.pdf.

125. *Supra* notes 121, 123–124.

126. AMERICA'S CHARITIES, *supra* note 122, at 9.

127. CLANCY ET AL., *supra* note 124, at 25–27.

128. Elizabeth Shogren & Douglas Frantz, *School Boards Become the Religious Right's New Pulpit*, L.A. TIMES, Dec. 10, 1993, at A1, *available at* http://articles latimes.com/1993-12-10/news/mn -255_1_school-board [hereinafter Shogren & Frantz, *Religious Right's New Pulpit*] (describing the efforts of Christian conservatives to overcome union opposition and gain control of local school boards in order to influence public school curriculum and services); Elizabeth Shogren & Douglas Frantz, *Conservative Fire Spreads with School Board Sparks*, L.A. TIMES, Dec. 11, 1993, at A1, *available at* http://articles.latimes.com/print/1993-12-11/news/mn-602_1_school-board [hereinafter Shogren & Frantz, *Conservative Fire Spreads*] (describing the efforts of Christian conservatives to overcome union

quickly grew into a national movement after Republican leaders seized on this legislation as an effective tactic to defund Democrats by preventing unions, a key funder for Democrats, from raising political funds.

In the early-1990s, the Religious Right waged a national effort to gain control over local school districts by competing for seats on local school boards.[129] Its goals included changes to the school curriculum, in some cases requiring the teaching of creationism while banning topics deemed immoral or overly secular like sex education, homosexuality, cultural diversity, and tolerance.[130] The Right also sought to terminate social service programs that school districts provided for low-income families, such as Head Start and free school lunches.[131] Some Christian conservatives believed such programs undermined the role of families because families, and not schools, should be providing these functions,[132] presumably even families too poor to afford to do so. The Right's opponents included the teachers' unions, which provided money and organization to mount effective challenges to the Right's candidates in local school board races, and a coalition of liberal and moderate parents and like-minded organizations.[133]

A second front in this battle formed along the Right's legislative efforts to expand the use of school vouchers, which avoided the need to gain control over public school districts by allowing parents to bypass them entirely.[134] Here, too, the teachers' unions opposed the Right's efforts, which the unions argued would undermine public schools by diverting public funds to private institutions. In 1993, teachers' unions spent millions to help defeat a ballot measure in California that would have expanded the use of vouchers.[135]

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opposition and gain control of local school boards in order to influence public school curriculum and services); Robert Dreyfuss, *Paycheck Protection Racket*, MOTHER JONES (Apr. 30, 1998), http://www.motherjones.com/politics/1998/05/paycheck-protection-racket (discussing the origins of the modern paycheck protection movement). *See generally* NAT'L EDUC. ASS'N, THE REAL STORY BEHIND PAYCHECK PROTECTION: THE HIDDEN LINK BETWEEN ANTI-WORKER AND ANTI-PUBLIC EDUCATION INITIATIVES (1998) (describing the coordinated national network of conservative Christian organizations and conservative advocacy groups behind efforts to expand the use of school vouchers and reduce the political influence of unions, and noting that "'paycheck protection' may well have been a fight over the future of public education").

129. As one leader of the religious right observed: "Once you have a majority on a school board, you control the money, you control the books." Shogren & Frantz, *Religious Right's New Pulpit*, *supra* note 128; *see also* Shogren & Frantz, *Conservative Fire Spreads*, *supra* note 128. *See generally* ROBERT L. SIMONDS, HOW TO ELECT CHRISTIANS TO PUBLIC OFFICE (1985).

130. Shogren & Frantz, *Religious Right's New Pulpit*, *supra* note 128.

131. *See id.*

132. *See id.*

133. *See id. See generally* MATTHEW FREEMAN, THE SAN DIEGO MODEL: A COMMUNITY BATTLES THE RELIGIOUS RIGHT (1993); DAVID C. JOHNSON & LEONARD M. SALLE, RESPONDING TO THE ATTACK ON PUBLIC EDUCATION & TEACHER UNIONS (2004), *available at* http://www.commonwealinstitute.org/cw/files/Responding_Ed_Report%20from%20CI%20website_0.pdf.

134. *See generally* NAT'L EDUC. ASS'N, *supra* note 128.

135. Dan Morain, *Teachers Union Shows Clout in Fight Against Prop. 174*, L.A. TIMES, Oct. 25, 1993, at A3, *available at* http://articles.latimes.com/1993-10-25/news/mn-49658_1_public-school (describing political expenditures by teachers unions); *Cal. Proposition 174, School Vouchers*

In the wake of their defeat, three veterans of the failed 1993 school voucher measure from Orange County, California, began looking for a way to defund the political activity of the teachers' unions. They founded the Education Alliance, a pro-school-voucher PAC that focused on electing conservative Christians to local school board positions and terminating the provision of many social services in public schools.[136] One founder was also a former school board member who lost his seat after the California Teachers Association spent seventy thousand dollars to defeat him.[137] The activists found inspiration in Washington's Initiative 134 (I-134), a comprehensive 1992 campaign finance reform ballot measure that passed with overwhelming support and established the state's first contribution limits to candidates for statewide office.

I-134 included among its many provisions an annual opt-in requirement for public or private sector workers wishing to use payroll deductions for political purposes.[138] The following year the state's Public Disclosure Commission issued a rule[139] interpreting the law as applying only to PAC contributions, and not to political spending paid for with members' dues.[140] Two seemingly contradictory developments followed. First, the annual opt-in requirement had an enormous impact on participation rates, which for one union's PAC declined from sixty-nine percent of membership to just fifteen percent of membership.[141] But second, the law had only a minimal impact on workers' overall political participation, as measured by total union political expenditures, because many workers retained their membership status and continued supporting their union's political activities

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(1993), BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/California_Proposition_174,_School_Vouchers_(1993) (last updated Nov. 12, 2012) (describing defeat of the measure).

136. Paul F. Clark, *Using Members' Dues for Political Purposes: The "Paycheck Protection" Movement*, 20 J. LAB. RES. 329, 334–35 (1999); *see also* NAT'L EDUC. ASS'N, *supra* note 128, at 50; Dreyfuss, *supra* note 128 (discussing the origins of the modern paycheck protection movement). The Education Alliance's platform included expanding charter schools and voucher programs, and ending the "socialistic idea that schools should become miniature welfare states which serve as distribution points for social services" such as school health clinics and breakfast programs for low-income children. *Platform,* EDUC. ALLIANCE, http://web.archive.org/web/20070630130352/http://www.education-alliance.org/index.cfm/about_us_platform.htm (archived July 2, 2007); *see also School Breakfast Program (SBP)*, U.S. DEP'T AGRIC., http://www.fns.usda.gov/sbp/school-breakfast-program (last modified Mar. 5, 2014) (describing the USDA's school breakfast program).

137. Frank Ury lost his seat as a member of the Saddleback Unified School Board in 1996. NAT'L EDUC. ASS'N, *supra* note 128, at 47.

138. Wash. Initiative Measure No. 134 (1992) (repealed 2002). The initiative was subsequently replaced by an annual notification requirement. 2002 Wash. Sess. Laws 622 (codified at WASH. REV. CODE ANN. §§ 42.17A.495.1(2)–(3) (West 2012)). The initiative also required nonmembers to opt-in each year to allow their agency fees to be used for political purposes, which the Supreme Court upheld as constitutional in 2007. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 191–92 (2007) (holding Washington Revised Code section 42.17.760 does not violate the First Amendment).

139. 93-16 Wash. Reg. 064 (Aug. 30, 1993) (codified at WASH. ADMIN. CODE § 390-17-100 (West, Westlaw through 14-16 Wash. State Reg., Aug. 20, 2014)).

140. In 2000, the Washington Supreme Court upheld the agency's rule. State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 999 P.2d 602, 616 (2000).

141. The union was the Washington Education Association, the state affiliate of the National Education Association. *Id.* at 620 n.13.

by paying dues.[142] Thus, although political contributions by unions declined forty-three percent in 1994, by the 1996 cycle they had rebounded to within thirteen percent of their pre-reform level.[143]

In California, the voucher activists crafted a measure specifically focusing on union political fundraising that aimed at disabling a wider range of union political activities by expressly applying an annual opt-in requirement to political activities paid for with dues.[144] Initial efforts to qualify the measure for the 1998 ballot foundered.[145] But the campaign then caught the attention of House Republican Speaker Newt Gingrich and antitax lobbyist Grover Norquist, both of whom saw the legislation as a potential tactic to weaken unions nationally and as payback for unions' thirty-five million dollar advertising blitz targeting freshman House Republicans in the 1996 election cycle, which had threatened the Republican House majority.[146] Gingrich and Norquist helped channel out-of-state funding to support the California effort[147] and launched drives to pass similar legislation in thirty states[148] and in Congress,[149] in many cases based on model legislation drafted by the American Legislative Exchange Council (ALEC) in 1998.[150] In just a few years, payroll-restriction laws had thus migrated from the political fringe to the conservative mainstream, and in 2000 the Republican Party added "Paycheck Protection" to its national platform.[151]

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142. *Infra* note 143.

143. Samantha Sanchez & Linda Casey, *Impact of Campaign Reform (I-134) on Money in Washington State Politics*, NAT'L INST. ON MONEY ST. POL. (Oct. 25, 1998), http://www.followthemoney.org/research/institute-reports/impact-of-campaign-reform-i-134-on-money-in-washington-state-politics.

144. *See Proposition 226—Full Text of the Proposed Law*, CAL. SECRETARY ST., http://primary98.sos.ca.gov/VoterGuide/Propositions/226text.htm (last visited May 30, 2014).

145. David S. Broder, *Calif. GOP's Bid to Curb Union Funds Is Faltering*, WASH. POST, May 26, 1998, at A1.

146. David S. Broder, *Union Dues Initiative Causing Divisions for Nevada GOP*, WASH. POST, May 5, 1998, at A4.

147. NAT'L EDUC. ASS'N, *supra* note 128, at 47.

148. In several states, including Arizona, Colorado, Florida, Michigan, Mississippi, Missouri, and Ohio, legislation was introduced in addition to efforts to qualify a measure for the ballot. MICHAEL KAMBUROWSKI, AMS. FOR TAX REFORM, PAYCHECK PROTECTION: GIVING WORKERS A VOICE IN POLITICAL SPENDING 8, 29 (1998).

149. In 1997, Senator Don Nickles (R-OK) introduced the Paycheck Protection Act (S. 9) and Congressman Harris Fawell (R-IL) introduced the Worker Paycheck Fairness Act (H.R. 1625). Both bills would have required unions to obtain annual written authorization from members before spending any portion of their dues for purposes other than on collective bargaining. *Id.* at 17.

150. Broder, *supra* note 145 (describing efforts by Norquist and Gingrich); *see also* KAMBUROWSKI, *supra* note 148, at 22 (describing the role of ALEC). The American Legislative Exchange Council (ALEC) is a national association of conservative state legislators and corporations, is funded by corporations, and produces model legislation to advance conservative public policies. *See What is ALEC?*, ALEC EXPOSED, http://www.alecexposed.org/wiki/What_is_ALEC%3F (last modified Jan. 23, 2014).

151. *Republican Party Platform of 2000*, AM. PRESIDENCY PROJECT (July 31, 2000), http://www.presidency.ucsb.edu/ws/index.php?pid=25849.

Proponents pursued four strategies to enact such laws using popular initiatives, legislatures, executive orders, and agency rulemaking. First, they made a major push in the late 1990s to follow the Washington model and qualify measures for the ballot.[152] As measured by electoral success, these efforts resoundingly failed. Campaigns to qualify ballot measures failed in Colorado,[153] Arizona, Florida, Michigan (to expand the scope of prior legislation passed in 1994), Mississippi, Missouri, Nebraska, Ohio, and Oklahoma,[154] and a Nevada measure was removed from the ballot on First Amendment and other grounds.[155] Ballot measures qualified for the ballot in California and Oregon but were both defeated following heavy spending by unions.[156] Nevertheless, these efforts continued. Between 1992 and 2012 at least twenty efforts were made in thirteen states to qualify ballot measures limiting unions' use of payroll deductions for political purposes.[157] Measures qualified for the ballot nine times in four states[158] and eleven additional efforts failed to qualify.[159]

The persistent efforts to pass payroll restrictions by popular initiative in states with strong labor movements, such as California and Oregon, may be explained by an early insight by national Republican leaders that they did not actually need to win at the ballot to accomplish their objective of defunding union political activity. These leaders realized that even comparatively minor investments to qualify such measures for the ballot forced unions to spend huge sums in highly lopsided campaigns to defeat them. As Norquist boasted following the defeat of Proposition 226, a 1998 California initiative to impose payroll restrictions, "Even

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152. KAMBUROWSKI, *infra* note 148, at 8.

153. David S. Broder, *Oregon May Decide Epic Struggle Over Union Dues for Campaigns*, WASH. POST, Oct. 12, 1998, at A13 (describing the failed effort to qualify a measure for the ballot in Colorado).

154. KAMBUROWSKI, *supra* note 148, at 8; *see also* AMS. FOR TAX REFORM, PAYCHECK PROTECTION: THE STATES UPDATE OF LEGISLATION AND INITIATIVES IN PARTICIPATING STATES (1998), *available at* http://legacy library.ucsf.edu/tid/jiq26b00.

155. NAT'L EDUC. ASS'N, *supra* note 128, at 59; SHERK, *supra* note 85, at 8 n.29.

156. SHERK, *supra* note 85, at 8 n.29.

157. *Id.*

158. As noted, one measure qualified in Nevada, but was then removed from the ballot by the courts. NAT'L EDUC. ASS'N, *supra* note 128, at 59; SHERK, *supra* note 85, at 8 n.29. The other measures were Washington Initiative 134 (1992); Oregon Measures 59 (1998), 92 (2000), 98 (2000), and 64 (2008); and California Propositions 226 (1998), 75 (2005), and 32 (2012). In addition, in Colorado, one statewide measure, Amendment 49 (2008), and three municipal measures, Centennial 200 (2007), Englewood 200 (2007), and Greeley 200 (2007), qualified for the ballot. These measures would have prohibited the use of payroll deductions for all union payments, including funds for political purposes as well as union dues. All of the measures failed except for Washington's I-134 (1992), and Colorado's Centennial 200 (2007). *Paycheck Protection on the Ballot*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Paycheck_protection#tab=By_state (last updated June 15, 2012).

159. Measures in Colorado, Arizona, Florida, Michigan (to expand the scope of the 1994 legislation), Mississippi, Missouri, Nebraska, Ohio, and Oklahoma all failed to qualify for the ballot in 1998. KAMBUROWSKI, *supra* note 148, at 8; Broder, *supra* note 153. In addition, the "Protect Arizona Employee Checks" initiative in Arizona measured failed to qualify in 2008, and the "California Paycheck Protection Act" failed to qualify in 2010. *Paycheck Protection on the Ballot*, *supra* note 158.

when you lose, you force the other team to drain resources for no apparent reason."[160] In California, spending to defeat Proposition 75 in 2005 topped $54 million, nearly all of it from unions, compared to just $5.8 million spent in support of the measure.[161] Such sums, multiplied by numerous campaigns, represent a staggering opportunity cost to labor's affirmative legislative agenda.[162] For example, in 2012, unions contributed nearly all of the seventy-six million dollars spent to defeat California's Proposition 32, limiting their ability to support another ballot measure on the 2012 ballot to temporarily raise taxes in order to prevent billions in cuts to public schools, for which they also provided the lion's share of funding.[163]

A second strategy focused on passing laws in state legislatures.[164] 1998 marked the campaign's first high water mark, when twenty-four states introduced legislation.[165] States introduced a second wave of legislation in the wake of the Great Recession. The Recession added fresh momentum to the national movement in two ways. First, it opened yawning deficits in many states' budgets, providing Republicans a pretext for an all-out assault on public employee unions.[166] Second, it gave Republicans new ability to promote partisan legislation after the party gained complete control of state legislatures across the country in the 2010 cycle.[167] Between 2009 and 2013 alone, at least forty-three payroll

160. DANIEL A. SMITH & CAROLINE J. TOLBERT, CAMPAIGNS & ELECTIONS, EDUCATED BY INITIATIVE 31 (2003); *see also* NAT'L EDUC. ASS'N, *supra* note 128, at 9.

161. *Ballot Measure Summary: Proposition 75*, NAT'L INST. ON MONEY ST. POL., http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=258 (last visited May 30, 2014).

162. Although unions consistently outspent their opponents in campaigns to defeat these ballot measures, not every campaign was as lopsided as Proposition 75. *See* DANIEL DISALVO, MANHATTAN INST., THE NAYS HAVE IT: WHEN PUBLIC SECTOR UNIONS WIN IN CALIFORNIA 7–9 (2012), *available at* http://www.manhattan-institute.org/pdf/cr_72.pdf.

163. Chris Megerian, *Labor's Big-Money Focus on Prop. 32 May Hurt Chances of Prop. 30,* L.A. TIMES, Oct. 17, 2012, at AA1; *Ballot Measure Summary: Proposition 32*, NAT'L INST. ON MONEY ST. POL., http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=918.

164. Unlike political donations made to support or defeat ballot measures, there is no single metric available to quantify the comparative efforts to pass and defeat payroll laws in state legislatures, which are measured as much in political capital as in campaign dollars. But given the ease of introducing bills in many state legislatures and the existential threat such laws may pose to unions' political speech, it is likely these bills attract similarly lopsided expenditures of resources.

165. These states were Alaska (SB 151), Arizona (HB 1412), Colorado (HB 1302), Connecticut (HB 5327), Florida (SB 1552), Georgia (SB 497), Kansas (HB 2346), Maryland (HB 577), Massachusetts (HB 5402), Michigan (SB 650 and SB 651), Minnesota (SB 2840), Mississippi (HB 1126 and HB 1598), Missouri (SB 814), New Mexico (HB 408), Ohio (HB 225), South Carolina (S 1029), South Dakota (SB 185), Tennessee (SB 2493), Utah (SB 182), Vermont (HB 695), Washington (HB 2484, to expand I-134), West Virginia (HB 4430), Wisconsin (AB 624), and Wyoming (HB 162). Of these, only Wyoming's bill passed. KAMBUROWSKI, *supra* note 148, at 10.

166. *See* Catherine Fisk & Brian Olney, *Labor and the States' Fiscal Problems*, *in* WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 253 (Peter Conti-Brown & David A. Skeel, Jr. eds., 2012) (rebutting arguments that public employees were the cause of states' budget crises following the Great Recession).

167. Republicans gained control of twenty-two state legislative chambers, providing them with majorities in fifty-seven chambers compared to just thirty-nine for Democrats, with two tied. More significantly, Republicans took control of the entire legislature in twenty-five states, the most since

restriction bills were introduced in seventeen states.[168] Measures passed in Alabama and Arizona; both were enjoined by courts on First Amendment grounds, although the Eleventh Circuit subsequently reversed the district court's preliminary injunction of the Alabama law.[169] Although Washington remains the

1952. Tim Storey, Commentary, *GOP Makes Historic State Legislative Gains in 2010*, RASMUSSEN REP. (Dec. 20, 2010), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_tim_storey/gop_makes_historic_state_legislative_gains_in_2010. In addition, many states allow voters to directly qualify measures for the ballot, allowing proponents of paycheck protection to circumvent state legislatures under Democratic control. *See Paycheck Protection on the Ballot*, *supra* note 158 (listing paycheck protection ballot measures).

168. In 2010, bills were introduced in Alabama (Act 761, passed but temporarily enjoined, Ala. Educ. Ass'n v. Bentley, 788 F. Supp. 2d 1283 (N.D. Ala. 2011), *rev'd sub nom.* Ala. Educ. Ass'n v. State Superintendent of Educ., 746 F.3d 1135 (11th Cir. 2014)), Georgia (SB 242, failed), New Jersey (A1382, carried over), Pennsylvania (HB 1220, failed), and Tennessee (HB 820, failed). One state, Michigan, introduced measures to expand the use of payroll deductions for political purposes (HB 4245, HB 2484, HB 4997, and SB 830, all of which failed).

In 2011, measures were introduced in Arizona (HCR 2032, SB 1325, and SCR 1028, all failed, and SB 1365, which passed, but was then enjoined, United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011)), California (AB 1179, carried over), Florida (SB 830 and HB 1021, both failed), Indiana (SB 542, failed), Kansas (HB 2130, carried over), Michigan (HB 4052 and HB 4064, both failed), Mississippi (SB 2044, failed), Missouri (HB 466, HB 492, and SB 202, carried over), New Hampshire (LSR 2248, failed), Pennsylvania (HB 942, failed), South Dakota (HB 1160, failed), and Tennessee (HB 159, HB 594, HB 599, SB 136, SB 401, and SB 784, all were carried over, and SB 113 and HB 130, which passed). One state, Texas, introduced legislation to expand the rights of deputy sheriffs to use payroll deductions for political purposes (HB 3494, failed).

In 2012, measures were introduced in Louisiana (HB 88, HB 1023), Maryland (HB 694 and SB 763, both passed) (requiring disclosure of the names and addresses of each contributor to a campaign finance entity using payroll deduction), New Jersey (A 1491), Michigan (HB 5085 and HB 5086, both passed), and Missouri (S 435 and H 1230, both failed).

As of February 5, 2013, measures had already been introduced in Missouri (HB 64, SB 29, and SB 71). This list treats companion bills in bicameral legislatures as separate bills.

This list includes only measures specifically targeting the use of payroll deductions by public sector workers to make political contributions to unions or their political committees. Other measures were introduced in many states that would encumber union political activity, but which did not specifically target payroll deductions for political purposes. *See*, *e.g.*, Michigan Act 53 (enacted 2012, *enjoined by* Bailey v. Callaghan, 873 F. Supp. 2d 879 (E.D. Mich. 2012), *rev'd*, 715 F.3d 956 (6th Cir. 2013)); North Carolina Senate Bill 727 (enacted 2012); Arizona SB 1555 (introduced 2011); Wisconsin Act 10 (enacted 2011, enjoined by Wis. Educ. Ass'n Council v. Walker, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *rev'd in part*, 705 F.3d 640 (7th Cir. 2013)); Arizona HB 2103 (introduced 2012); Florida Senate Bill 1555 (introduced 2011) (all banning use of payroll deductions for union dues); *see also* Tennessee HB 160; SB 139 (introduced 2011) (prohibiting unions from contributing to political candidates); Illinois HB 4651 (introduced 2012) (limiting annual contributions to a PAC by any natural person, corporation, labor organization, or association).

Data taken from http://www.ncsl.org/legislatures-elections/elections/database-of-campaign-finance-legislation.aspx (2010 through 2013; last visited Feb. 5, 2013); http://www.ncsl.org/issues-research/labor/2011-wage-and-hour-legislation.aspx (last visited Feb. 5, 2013); http://www.ncsl.org/issues–research/labor/collective-bargaining-legislation-database.aspx (last visited Feb. 5, 2013); and state legislature websites.

169. Ala. Educ. Ass'n v. Bentley, 788 F. Supp. 2d 1283, 1328 (N.D. Ala. 2011) (enjoining statute due to vagueness and overbreadth), *rev'd sub nom.* Ala. Educ. Ass'n v. State Superintendent of Educ., 746 F.3d 1135 (11th Cir. 2014); United Food and Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118, 1128 (D. Ariz. 2011) (enjoining statute due to underinclusiveness and viewpoint discrimination).

only state to pass payroll deduction legislation by voter initiative,[170] eight states have passed legislation: Michigan (1994),[171] Ohio (1995) (invalidated on First Amendment grounds),[172] Idaho (1997),[173] Wyoming (1998),[174] Utah (2001),[175] Alabama (2010),[176] Arizona (2011),[177] and Tennessee (2011).[178]

Republicans also sought to achieve by executive action what they were unable to accomplish through legislation. Thus, a third strategy focused on executive orders. In September 1998, on the heels of the defeat of Proposition 226, California Governor Pete Wilson issued an executive order requiring state agencies and school districts to notify workers of their existing right to prohibit expenditure of their dues for political or ideological causes.[179] At the federal level, two Republican presidents issued executive orders, later rescinded by two Democratic presidents, requiring federal contractors to notify their employees of their constitutional rights to withhold payment for union political and ideological activities.[180]

A fourth strategy focused on agency rulemaking. Over the years, state election officials in several states sought to enact payroll restrictions by interpreting existing statutes to limit or even prevent the use of payroll deductions for political contributions or union dues.[181] Courts have overturned most of these measures.

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170. Wash. Initiative Measure No. 134 (1992) (codified at WASH. REV. CODE ANN. § 42.17A.500 (West 2012)).

171. MICH. COMP. LAWS § 169.255(6) (West, Westlaw through 2014 Legis. Sess.); *see also* Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1253 (6th Cir. 1997) (upholding annual opt-in requirement for deductions to fund separate segregated fund or PAC).

172. OHIO REV. CODE ANN. § 3599.031(H) (West, Westlaw through 2013–2014 General Assemb.), *invalidated by* UAW Local Union 1112 v. Philomena, 700 N.E. 2d 936 (Ohio Ct. App. 1998).

173. IDAHO CODE ANN. § 67-6605 (West 2006) (amended 2003).

174. 1998 Wyo. Sess. Sp. Laws ch. 100, § 2 (codified at WYO. STAT. ANN. § 22-25-102(h) (West, Westlaw through 2014 Budget Sess.) (amended 2013)).

175. UTAH CODE ANN. § 34-32-1.1 (West, Westlaw through 2014 General Sess.) (amended 2012).

176. ALA. CODE § 17-17-5 (West, Westlaw through 2014 Legis. Sess.), *enjoined by* Ala. Educ. Ass'n v. Bentley, 788 F. Supp. 2d 1283, 1328 (N.D. Ala. 2011), *rev'd sub nom.* Ala. Educ. Ass'n v. State Superintendent of Educ., 746 F.3d 1135 (11th Cir. 2014).

177. ARIZ. REV. STAT. § 23-361.02 (2012), *enjoined by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011).

178. TENN. CODE ANN. § 49-5-608(b)(6) (West, Westlaw through 2014 2d Legis. Sess.) (prohibiting collaborative conferencing between the board of education and professional employees on payroll deduction for political activities).

179. Clark, *supra* note 136, at 339.

180. In 1992, President George H.W. Bush issued Executive Order (E.O.) 12,800, requiring federal contractors to notify their employees of their *Beck* rights. Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (Apr. 14, 1992). In 1993, President Clinton rescinded E.O. 12,800 by issuing E.O. 12,836. Exec. Order No. 12,836, 58 Fed. Reg. 7045 (Feb. 3, 1993). In 2001, President George W. Bush reinstated E.O. 12,800 by issuing E.O. 13,201. Exec. Order No. 13,201, 66 Fed. Reg. 11,221 (Feb. 22, 2001). In 2009, President Obama revoked E.O. 13,201 by issuing E.O. 13,496. Exec. Order No. 13,496, 74 Fed. Reg. 6107 (Feb. 4, 2009).

181. In 1977, the Kentucky Registry of Election Finance notified the state Attorney General that a union's use of a "reverse check-off" system which included an opt-out system for payroll

Unions and their allies have fought these measures through the political process and challenged the constitutionality of the most far-reaching measures in courts. The latter strategy, however, was significantly set back by the 2009 Supreme Court decision in *Ysursa v. Pocatello Education District*.

II. THE FIRST AMENDMENT AND THE LAW OF PAYROLL DEDUCTIONS

Unions have been litigating the constitutionality of payroll-restriction laws since Washington passed the first such law in 1992.[182] In 2009, the issue finally reached the Supreme Court. In *Ysursa v. Pocatello Education Association*, the Supreme Court declared constitutional an Idaho law prohibiting the use of payroll deductions for political purposes.[183] The Court held that the law did not infringe upon the First Amendment because the payroll system was an example of government-subsidized speech, a doctrine which the Court had previously held allows the government to selectively subsidize certain instances of private conduct.[184] However, *Ysursa* vastly expands the reach of the subsidized speech doctrine and thus raises troubling questions about possible new limits on First Amendment protections.

Part II.A of this section describes the *Ysursa* case. Part II.B describes the two tenets of the First Amendment implicated by payroll-restriction laws, political speech (II.B.1) and content neutrality (II.B.2). Part II.B.3 discusses three general exceptions to the general rule requiring content neutrality: the unconstitutional conditions doctrine (II.B.3.a), the subsidized speech doctrine (II.B.3.b), and public forums (II.B.3.c). Part II concludes by reviewing the case law distinguishing between subsidized speech and public forums (II.B.3.d).

A. Ysursa v. Pocatello Education Ass'n

In *Ysursa*, the Court considered the constitutionality of Idaho's 2003 Voluntary Contributions Act (VCA), which prohibited the use of payroll

deductions to the union's PAC was "coercive" and violated the state's corrupt practices act. The Sixth Circuit held the reverse check-off system was not coercive. Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin., 677 F.2d 1125, 1134 (6th Cir. 1982). In 2006, the Colorado Secretary of State promulgated rules requiring unions to obtain annual permission from their members before using dues or contributions to fund political campaigns. A state appeals court upheld a lower court's preliminary injunction upon finding a reasonable probability the Secretary exceeded her rulemaking authority and that the rule violated the First Amendment. Sanger v. Dennis, 148 P.3d 404, 409 (Colo. App. 2006). Also in 2006, the Michigan Secretary of State issued a declaratory ruling interpreting an existing statute as prohibiting use of a school district's payroll system by employees to make contributions to their union's PAC, because it would constitute both a "contribution" and "expenditure" prohibited by state campaign finance law even though the union PAC paid in advance all costs attributable to its use of payroll deductions. The state Supreme Court upheld the ruling. Mich. Educ. Ass'n v. Sec'y of State, 801 N.W.2d 35, 55–56 (Mich. 2011).

182. *See* Wash. Fed'n of State Emps. v. State, 901 P.2d 1028, 1031 (Wash. 1995).

183. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 364 (2009).

184. *Id.* at 358.

deductions for public and private sector unions' "political activities."[185] Several unions challenged the law as violating the First Amendment.[186] The district court upheld the law as applied to state employees, reasoning that the First Amendment creates no right to have the government subsidize the exercise of First Amendment rights.[187] According to the district court, when the state agreed with the union representing its employees to allow employees to make contributions to the union through payroll deductions, the state was subsidizing union political speech because it was paying to administer the payroll system.[188] The court noted, however, that the record was devoid of any evidence of the state's actual cost of providing the prohibited political deductions.[189] Thus, on the record, there was no evidence that the payroll deduction system actually constituted a public subsidy of employee political activity.[190] The court found, however, that as applied to private sector and local government workers, the law implicated the First Amendment because no state funds were used to pay for the payroll systems[191] and the unions had offered to pay the entire cost of the payroll program.[192] The court classified the law as a content-based restriction because it applied only to political speech, triggering strict scrutiny,[193] and struck down the law as applied to private sector and local government workers.[194]

Idaho appealed the district court's holding that the law was unconstitutional as applied to local government employees, although the unions did not appeal the holding that the law was constitutional as applied to state employees.[195] The Ninth Circuit affirmed.[196] In the Ninth Circuit, the state invoked a different strand of First Amendment law to defend the limitation on payroll deductions, which it raised for the first time on appeal.[197] The state argued that the local government payroll systems are a nonpublic forum of the state and thus a lower level of scrutiny should apply.[198] In a nonpublic forum, as in a limited public forum,

185. *Id.* at 356–57.

186. *Id.* at 358 (discussing arguments made by the union plaintiffs).

187. Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 U.S. Dist. LEXIS 34494, at *7–8 (D. Idaho 2005), *rev'd on other grounds*, 561 F.3d 1048 (9th Cir. 2009) (reversing in accordance with *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009)).

188. *Id.* at *8–9.

189. *Id.* at *16.

190. *See* Case Commentary, *Government Subsidies of Political Speech*, 123 HARV. L. REV. 242, 251 (2009) (observing that the state in *Ysursa* did not demonstrate it would incur much if any cost).

191. *Pocatello*, 2005 U.S. Dist. LEXIS 34494, at *8–9.

192. *Id.*

193. *Id.* at *12.

194. *Id.* at *18.

195. Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053 (9th Cir. 2007), *rev'd on other grounds sub nom.* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).

196. *Id.* at 1068.

197. *Id.* at 1060 n.5.

198. *Id.* at 1059–60. Although it is unclear whether the nonpublic forum continues to exist as a distinct category following *Martinez*, the rules applied to nonpublic forums are identical to the rules applied to limited public forums. *See* Christian Legal Soc'y of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661 (2010).

government may restrict speech based on speaker or subject matter, provided the distinctions are viewpoint neutral and reasonable in light of the purpose served by the forum.[199] The Ninth Circuit rejected the state's argument, concluding that even though the state had ultimate control over local governments, the state was acting more as a regulator than a proprietor[200] because it did not actually operate or control the local government payroll systems and therefore forum analysis did not apply.[201]

The Supreme Court reversed. Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito.[202] The Court concluded that the government subsidy took the case outside the First Amendment's protections against content-based regulations, stating, "Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities."[203] The Court then applied the subsidized speech doctrine to payroll systems operated by state *and* local governments.[204] The Court reasoned that even though no state funds subsidized local government payroll systems, state political subdivisions are merely departments of the state from which it "may withhold, grant or withdraw powers and privileges as it sees fit."[205] Because the First Amendment did not apply, the Court applied only rational basis review and found the law satisfied the state's interest in avoiding the appearance of partisan political activity by both the state and its local governments.[206]

Justice Ginsburg concurred in part and concurred in the judgment.[207] She found the majority's subsidized speech analysis unnecessary.[208] Instead, Justice Ginsburg focused only on whether local government employees were more like state employees, for whom the parties had agreed the law was constitutional, or private sector employees, for whom the parties had agreed the law was unconstitutional, and opted for the former.[209]

Justice Breyer concurred in part and dissented in the judgment.[210] Like Justice Ginsburg, he agreed that local government employees were more like state employees.[211] He disagreed, however, with the majority's subsidized speech

199. *Pocatello Educ. Ass'n*, 504 F.3d at 1059–60; *see also Christian Legal Soc'y*, 561 U.S. at 679 n.11 (describing the rules for regulating speech in a limited public forum).

200. *Pocatello Educ. Ass'n*, 504 F.3d at 1063.

201. *Id.* at 1068.

202. Justice Ginsburg joined in Parts I and III and concurred in the judgment. *Ysura*, 555 U.S. at 354.

203. *Id.* at 361.

204. *Id.* at 362.

205. *Id.* (quoting Trenton v. New Jersey, 262 U.S. 182, 187 (1923)).

206. *Id.* at 359.

207. *Id.* at 364.

208. *Id.* at 364–65 (Ginsburg, J., concurring).

209. *Id.*

210. *Id.* at 365 (Breyer, J., dissenting).

211. *Id.*

analysis, stating that the majority's distinction between characterizing the VCA as "abridging" the freedom of speech versus merely "declining to promote" speech was neither practical nor likely to prove determinative.[212] Justice Breyer suggested that a balancing test would provide a more useful analysis to determine "whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve."[213] Applying this test, Justice Breyer stated that he would find the VCA constitutional but only if it applied even handedly among similar politically related contributions.[214] He would have remanded the case to address this question, because although the VCA appears facially evenhanded, it may nevertheless have an uneven effect on labor-related deductions.[215]

Justice Stevens dissented.[216] He would have found the VCA unconstitutional in all its applications because he concluded that the law discriminated against labor unions and was intended to make it more difficult for unions to finance political speech.[217] Justice Stevens reasoned that the law was both overinclusive and underinclusive with regard to Idaho's asserted interest in avoiding the appearance or actuality of public employer involvement in partisan politics.[218] The law was overinclusive because it applied to private employers, and underinclusive because it did not restrict contributions by public employees for charitable activities, which creates a risk of the appearance of political involvement similar to the risk posed by deductions for purely political activities.[219]

Justice Souter wrote a separate dissent.[220] He noted that although the government may impose reasonable subject-matter distinctions affecting speech on certain public property, it may not discriminate according to viewpoint.[221] Justice Souter then suggested that the VCA raised a reasonable suspicion of viewpoint discrimination because "a reader of the statute may fairly suspect that Idaho's legislative object was not efficient, clean government, but that unions' political viewpoints were its target, selected out of all the politics the State might filter from its public workplaces."[222] He observed, however, that the issue of viewpoint discrimination was not even before the Court, because the unions had not focused on this argument.[223] Remanding the case to address this question would be problematic, he added, because a finding of viewpoint discrimination would leave the law undisturbed with regard to state employees, for whom the

212. *Id.* at 365–66 (emphasis omitted) (quoting majority opinion at 355).
213. *Id.* at 367.
214. *Id.* at 368–69.
215. *Id.* at 369–70.
216. *Id.* at 370 (Stevens, J., dissenting).
217. *Id.*
218. *Id.* at 371.
219. *Id.* at 372.
220. *Id.* at 375 (Souter, J., dissenting).
221. *Id.* at 376.
222. *Id.* at 377.
223. *Id.*

unions had not challenged the VCA's application.[224] Justice Souter concluded that, for these reasons, the case made a poor vehicle to refine First Amendment doctrine and thus the writ of certiorari had been improvidently granted.[225]

B. First Amendment Analysis

Ysursa did more than merely uphold a payroll-restriction law. It also changed, or at least muddied, First Amendment law with regard to the subsidized speech and public forum doctrines. To appreciate the weakness in the Court's reasoning and the potential impact of the case, it is helpful to first review the First Amendment principles implicated by payroll-restriction laws and the lines of cases the Court drew on—and, in some cases, extended or simply ignored.

Payroll-restriction laws implicate two fundamental tenets of the First Amendment. First, they limit the amount of money available to spend on political campaigns, which the Court has held is political speech entitled to the highest level of First Amendment protection.[226] Second, they regulate speech based in all cases on the speech's subject matter, in some cases on the speaker, and arguably in many cases even on the viewpoint of the speech.[227]

1. Political Speech

The first tenet implicated by payroll-restriction laws is that spending money on political campaigns is political speech, which occupies "an area of the most fundamental First Amendment activities" where protections are "at their zenith."[228] Thus, the Court has repeatedly applied strict scrutiny to regulations that diminish the quantum of political speech and declared them unconstitutional.[229] Laws that directly limit the amount of money people may spend on political campaigns[230] or the timing during which people may spend it[231] violate the First Amendment.

Even laws that do not prohibit political speech outright, but merely encumber or eliminate the most effective vehicle for speech while leaving alternative vehicles open, infringe upon the First Amendment and trigger strict scrutiny.[232] In *Meyer v. Grant*, the Court declared unconstitutional a Colorado law

224. *Id.* at 378.

225. *Id.*

226. *See infra* Part II.B.1.

227. *See infra* Part II.B.2.

228. Meyer v. Grant, 486 U.S. 414, 425 (1988).

229. *See* Citizens United v. FEC, 558 U.S. 310, 340–41 (2010); *Meyer*, 486 U.S. at 423–24; Buckley v. Valeo, 424 U.S. 1, 14–23, 44–45 (1976) (per curiam). The Court has drawn a distinction between expenditures, which may not be limited, and contributions to candidates, which may be limited, reasoning that contribution limits have little direct effect on speech and are justified by preventing the actuality or appearance of corruption.

230. *See Buckley*, 424 U.S. at 1.

231. *See Citizens United*, 558 U.S. at 377.

232. *See id.* (stating the option to form PACs exempt from the ban on corporate speech "does not alleviate the First Amendment problems" because "PACs are burdensome alternatives; they are

prohibiting the use of paid petition circulators to gather signatures to qualify initiatives for the ballot.[233] The Court observed that the law restricted the most efficient and economical vehicle for speech, and rejected the argument that the law's burden on speech was permissible simply because other avenues of expression remained open.[234] The Court explained, "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."[235] The Court also expressly rejected the argument that Colorado's power to ban voter initiatives entirely included within it the lesser power to limit political speech raised in initiative petitions.[236]

Moreover, the selective provision of benefits that assist the speech of only certain speakers, whether through supplemental funding or the removal of fundraising restrictions, imposes a substantial burden on the speech of speakers who do not receive the preferential treatment and thus triggers strict scrutiny. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court declared unconstitutional an Arizona law providing supplemental public funding to political candidates who accept public financing and whose privately financed opponents, and the independent groups supporting them, spend beyond a certain limit.[237] And in *Davis v. Federal Election Commission*, the Court declared unconstitutional the "Millionaire's Amendment," a federal law increasing contribution limits for candidates whose self-financed opponents donate to their own campaigns beyond a certain limit.[238]

Payroll-restriction laws appear to violate the core protection for political speech because they encumber or eliminate the most effective vehicle for unions' political speech and thus significantly reduce the quantum of that speech. Like the paid circulator ban in *Meyer*, payroll-restriction laws eliminate the most efficient method for unions to raise political funds.[239] Courts should find that under *Meyer*, such laws present an impermissible burden on speech notwithstanding the existence of alternative avenues for raising funds, such as cash payments or bank drafts. And courts should reject arguments that the power of states to eliminate payroll deductions for public employees entirely includes the lesser power to restrict their availability because the Court expressly rejected an analogous argument in *Meyer*.[240] Nor should denominating the selective availability of payroll

expensive to administer and subject to extensive regulations"); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) (declaring unconstitutional a Colorado law that, inter alia, required people circulating petitions to gather signatures for ballot initiatives be registered voters); *cf. Meyer*, 486 U.S. at 420 (applying exacting scrutiny).

233. *Meyer*, 486 U.S. at 428.
234. *Id.* at 424.
235. *Id.*
236. *Id.* at 424–25.
237. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2829 (2011).
238. Davis v. FEC, 554 U.S. 724, 743–44 (2008).
239. *See supra* note 9.
240. *Meyer*, 486 U.S. at 424–25.

deductions as a benefit for those receiving it, rather than a penalty on those not receiving it, change a court's analysis because the Court likewise rejected the selective provision of benefits aiding political speech in both *Arizona Free Enterprise Club* and *Davis*.[241] The burden on speech payroll-restriction laws create should be sufficient to trigger the heightened scrutiny the Court has employed to strike down numerous campaign finance laws limiting the ability of corporations and unions to spend money on politics.[242] In *Ysursa*, however, the Court sidestepped altogether the issue of whether the VCA could withstand heightened scrutiny by holding that the payroll system constituted a subsidy for speech to which the unions had no constitutional right, and that the law accordingly effected no First Amendment infringement at all.[243]

2. Content Neutrality

Payroll-restriction laws also implicate a second tenet of the First Amendment, which is that at bottom the First Amendment prohibits the government from regulating speech based on its content.[244] Content-based regulations are "presumptively invalid" and must satisfy the most exacting scrutiny[245] because they "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[246] Content-based restrictions include regulations based upon the viewpoint of the speaker[247] as well as regulations based upon the subject matter of the speech.[248] More recently, the Court has emphasized that speaker-based regulations are similarly prohibited, particularly with regard to political speech, because they are simply another means to regulate content.[249] However, even

241. *Ariz. Free Enter. Club's*, 131 S. Ct. at 2829; *Davis*, 554 U.S. at 743–44.

242. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

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

244. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

245. *Ysursa*, 555 U.S. at 358 ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." (citation omitted)).

246. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

247. *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397, 412–20 (1989) (applying strict scrutiny and striking down a state law prohibiting the desecration of the American Flag as impermissibly viewpoint based).

248. *See*, *e.g.*, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (applying strict scrutiny and striking down a state law prohibiting candidates for elected judicial office from making statements about disputed legal issues or the political process as impermissibly based upon the subject matter of the speech).

249. Citizens United v. FEC, 558 U.S. 310, 340–41 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content. . . . We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."); *see also* Sorrell v. IMS Health

regulations of speech that are content neutral, meaning they apply to all speech regardless of its message, must still withstand the heightened review of intermediate scrutiny.[250] By contrast, regulations falling outside the First Amendment receive only the highly deferential rational basis review.[251]

Payroll-restriction laws appear to infringe the content neutrality principle for three reasons. First, because all payroll laws single out political speech, they are clear examples of facial subject matter restrictions.[252] The laws regulate speech based on its topic: speech is restricted if it is political, but not if it is nonpolitical.[253] Second, some payroll laws apply on their face only to unions.[254] These laws are thus a form of speaker-based regulation as well. However, as discussed above, in *Ysursa* the Court held the First Amendment was not implicated and thus such content-based regulations based upon subject matter and speaker did not trigger heightened scrutiny.[255]

Third, arguably many payroll-restriction laws discriminate according to viewpoint. The *Ysursa* Court did not reach the issue of whether the Idaho law constituted viewpoint discrimination. This is highly significant because the Court considers viewpoint discrimination to be so invidious that it is prohibited even in instances of subsidized speech, where other forms of content-based restrictions are permissible.[256] However, the analysis of whether facially neutral payroll-restriction laws, whose provisions apply to all employee political contributions irrespective of the recipient, represent viewpoint discrimination is more complicated than analyses of other forms of content-based discrimination. This is because the Court has not been entirely consistent in its willingness to consider a

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Inc., 131 S. Ct. 2653, 2667 (2011) (applying "heightened scrutiny" because the challenged law imposes a speaker- and content-based burden on protected expression).

250. Such laws must meet intermediate scrutiny, meaning the law must further an important governmental interest without burdening substantially more speech than is necessary. *See Turner*, 512 U.S. at 623 (holding a federal law requiring cable companies to carry local broadcast stations is content neutral because it applied to all stations regardless of their programming, and remanding for the application of intermediate scrutiny); Ward v. Rock Against Racism, 491 U.S. 781 (1989).

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

252. *E.g.*, Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053, 1058 (9th Cir. 2007) (noting union's argument that the law is a content-based restriction, but holding the law does not implicate the First Amendment because it involves a public subsidy), *rev'd on other grounds sub nom.* Ysursa, 555 U.S. at 358.

253. *See, e.g.*, *id.*

254. *E.g.*, *Ysursa*, 555 U.S. at 371 (Stevens, J., dissenting) (identifying provisions of Idaho's Voluntary Contribution Act that pertain exclusively to unions); S.B. 29, 97th General Assemb., First Reg. Sess. (Mo. 2013).

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

256. *Compare* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983), *with* Cammarano v. United States, 358 U.S. 498, 513 (1959). The Court uses the phrases "aim[ed] at the suppression of dangerous ideas" and "viewpoint discrimination" interchangeably. Bailey v. Callaghan, 715 F.3d 956, 962 n.2 (6th Cir. 2013) (alteration in original) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998)).

law's purpose to prove content-based discrimination, as opposed to focusing only upon whether its text is facially neutral.[257]

The Court has stated that the government's purpose is not simply relevant but dispositive to an analysis of content neutrality. In *Ward v. Rock Against Racism*, the Court explained that "[t]he government's purpose is the controlling consideration" in determining whether a law is content neutral.[258]

The Court approved the use of purpose, albeit in less categorical terms, in two other cases in which it articulated contradictory uses to which purpose could be put. In *Renton v. Playtime Theaters, Inc.*, the Court embraced the use of purpose to prove that facially content-based laws are in fact content neutral.[259] The Court rejected a First Amendment challenge to a zoning ordinance limiting the places where adult motion picture theaters could be located.[260] Even though the law was facially content based because it singled out only those movie theaters showing films with sexual content, the Court analyzed the law as content neutral because it found the law was motivated by the City Council's desire to regulate the secondary effects adult theaters produce, such as crime and the depression of property values.[261] Thus, *Renton* stands for the proposition that laws that are facially content based may be analyzed under the more deferential scrutiny required by content-neutral laws if they have the content-neutral purpose and effect of regulating the undesirable secondary effects of speech. Although the Court did not expressly address when facially neutral laws will be found to be content based because of their purpose or impact, scholars have argued there is no reason why this analysis should be relevant only when analyzing laws that are facially discriminatory.[262]

The Court affirmed the use of purpose to prove a law is content based in *Turner Broadcasting System, Inc. v. Federal Communications Commission*. The Court stated that "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based," although "it is not necessary to such a showing in all cases."[263] However, the Court then added a qualifier that presented precisely the opposite view articulated in *Renton* as to what uses purpose could be put.[264] Under *Turner*, purpose is effectively a one way ratchet that can be used to prove content-based discrimination, but not to prove that a facially discriminatory law is in fact content neutral: "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content."[265]

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257. CHEMERINSKY, *supra* note 32, at 967 & n.49–50; *see infra* notes 258–274 and accompanying text.

258. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

259. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986).

260. *Id.* at 43.

261. *Id.* at 47–48.

262. CHEMERINSKY, *supra* note 32, at 967 & n.49–50 (describing *Renton* and citing scholars arguing laws should be treated as content based if their purpose is to restrict certain messages or if their effect is to discriminate against specific topics or views).

263. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

264. *Id.* at 642–43.

265. *Id.*

The Court then appeared to abandon the use of purpose to prove discrimination based on content in *Hill v. Colorado*.[266] In *Hill*, the Court upheld a Colorado statute that prohibited approaching a person near a health care facility, without consent, for the purpose of oral protest, education, or counseling.[267] The Court treated the law as content neutral[268] because it applied on its face to an extremely broad category of communications,[269] even though it was adopted with the purpose of singling out speech by antiabortion protesters.[270] The Court noted in dicta that facially neutral laws do not become content based simply because they are motivated by a desire to limit speech on one side of a partisan debate, nor just because they are applied to only a specific location where that discourse occurs.[271]

In *Sorrell v. IMS Health Inc.*, the pendulum swung back again toward allowing the use of purpose to prove content-based discrimination. The Court made no reference to *Hill* and reasserted the principle that a facially neutral law with a discriminatory purpose is not content neutral.[272] The Court offered the hypothetical case of "[a] government bent on frustrating an impending demonstration [that] might pass a law demanding two years' notice before the issuance of parade permits."[273] In such a case, the Court explained, "[e]ven if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech . . . would render it unconstitutional."[274]

Ultimately, it is difficult to reconcile the Court's cases with regard to whether and when a court may use the purpose and effect of a facially neutral law to prove viewpoint discrimination, but there is certainly authority suggesting it can. *Ward*, *Turner*, and *Sorrell* suggest that facially neutral laws passed with the purpose of discriminating against certain speech because of its message are unconstitutional.

There is direct evidence that many payroll-restriction laws are motivated by a desire to discriminate against union political speech. For example, in Michigan the state defended House Bill 4929, which banned the use of payroll deduction for union dues, by arguing the law was a "check on union power."[275] And during the effort to pass Act 10 in Wisconsin, which included a ban on the payroll deduction of union dues, the Republican Senate Majority Leader argued that "[i]f we win this battle, 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

266. Hill v. Colorado, 530 U.S. 703 (2000).
267. *Id.* at 735.
268. *Id.* at 725–26.
269. *Id.* at 723–24.
270. *Id.* at 715; *id.* at 741, 744 (Scalia, J., dissenting).
271. *Id.* at 724–25 (majority opinion).
272. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663 (2011).
273. *Id.* at 2664.
274. *Id.*
275. *See* Bailey v. Callaghan, 715 F.3d 956, 961 (6th Cir. 2013) (Stranch, J., dissenting).

time getting elected and winning the state of Wisconsin."[276] Moreover, the effect of payroll-restriction laws falls almost entirely on unions, and not corporations. While evidence of the purpose of the Michigan and Wisconsin laws and the effect of all payroll-restriction laws is inadequate to prove viewpoint-based discrimination under *Hill*, such evidence could be sufficient under *Sorrell* and possibly even under a broad reading of *Renton*.

Even without a showing of viewpoint discrimination, all payroll-restriction laws should trigger strict scrutiny because they discriminate based on subject matter and, in some cases, on speaker identity as well. However, as discussed in greater detail below, the issue of viewpoint-neutrality is especially important in the context of various doctrines permitting at least some forms of content discrimination.

3. When Do Exceptions to Content Neutrality Apply?

To understand why courts have allowed payroll-restriction laws to stand thus requires a review of some of the doctrines determining when exceptions to the general content-neutrality rule prohibiting discrimination by subject matter, viewpoint, and speaker apply to government benefits implicating speech. These doctrines include the unconstitutional conditions doctrine, which limits the government's ability to place conditions on the provision of benefits it is not constitutionally required to provide in the first place;[277] the subsidized speech doctrine, which allows the government to selectively provide benefits that support private speech;[278] the government speech doctrine, which provides the government even greater latitude to discriminate when the government and not a private party is the speaker;[279] and the public forum doctrine, which limits the government's ability to regulate speech on government property.[280] Although these doctrines frequently overlap, demarcating the boundaries separating each doctrine is crucial because each carries very different levels of protection for speech. *Ysursa* upends this delicate architecture by collapsing the distinctions even further and providing the government unprecedented latitude to regulate speech in discriminatory ways.[281]

a. Unconstitutional Conditions

Payroll-restriction laws do not prevent public employees from engaging in

276. Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 652 (7th. Cir. 2013) (alteration in original) (citation omitted). Even though both the Michigan and Wisconsin laws targeted only specific unions, in each case the court found the law facially neutral. I argue that the court in each case reached the wrong result, and present these cases as illustrations of the competing approaches to proving content-based discrimination.

277. *See infra* Part II.B.3.a.

278. *See infra* notes 311–318 and accompanying text.

279. *See infra* notes 319–324 and accompanying text.

280. *See infra* Part II.B.3.c.

281. *See infra* Part III.B.

political speech; they merely make a payroll system unavailable (or less available) for that purpose. Nevertheless, the Court has held that the selective provision of government benefits may represent an unconstitutional condition that infringes the First Amendment.[282]

The unconstitutional conditions doctrine limits the government's ability to restrict access to benefits in ways that interfere with constitutional rights.[283] It thus broadens the content-neutrality rule by preventing the government from using its benefits to "produce a result which (it) could not command directly."[284] The doctrine stands for the principle that the "[government] may not deny a benefit to a person" because he exercises a constitutional right[285] and thus may not condition a benefit on the relinquishment of that right. Accordingly, the unconstitutional conditions doctrine operates as a general rule prohibiting the infringement of constitutional rights through the selective provision of benefits or subsidies. The Court, however, has nevertheless carved out a gaping exception,[286] which it applied in *Ysursa*.[287]

The Court has used the unconstitutional conditions doctrine to declare unconstitutional laws permitting the government to condition the receipt of benefits on the recipient's relinquishment of his First Amendment rights, even though the government could have chosen not to provide the benefit at all. In *Speiser v. Randall*, the Court struck down a California law conditioning the receipt of a veterans' property tax exemption on a requirement that the recipient sign a declaration stating he did not advocate the forcible overthrow of the government.[288] The Court again applied the doctrine in *Federal Communication Commission v. League of Women Voters* to strike down a content-based law conditioning the receipt of federal funds by noncommercial educational broadcasting stations on the stations relinquishing their right to editorialize.[289]

However, the Court found no unconstitutional condition existed in a trio of cases where benefits were clearly conditioned on foregoing protected speech. In *Cammarano v. United States*, the Court upheld a treasury regulation denying tax deductions for lobbying expenditures.[290] The case concerned sizable contributions

282. *See infra* notes 288–289.

283. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

284. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

285. *Id.*

286. *See* Rust v. Sullivan, 500 U.S. 173 (1991); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); Cammarano v. United States, 358 U.S. 498 (1959) (each limiting the application of the unconstitutional conditions doctrine). Professor Cass Sunstein argues the narrow reach and inconsistent application of the unconstitutional conditions doctrine is explained by the fact that it is ill equipped to safeguard constitutional rights in the modern regulatory state and accordingly should be abandoned. Cass R. Sunstein, *Why The Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

287. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) (citing *Regan*, 461 U.S. at 549).

288. *Speiser*, 357 U.S. at 529.

289. FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984).

290. *Cammarano*, 358 U.S. at 498.

by liquor distributors to political campaigns urging the defeat of two laws that would have put them out of business, either by placing all sales in the hands of the state or by implementing prohibition.[291] The distributors challenged the regulation excluding such expenditures from those expenditures deductible for income tax purposes as "ordinary and necessary" business expenses.[292] The Court distinguished *Speiser*, explaining that the distributors "are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets."[293] Justice Douglas concurred, explaining that an unconstitutional condition would have resulted only if the regulation had denied deductions for all otherwise qualifying expenditures to taxpayers making any political expenditures, and not simply denied deductions only for the political expenditures themselves.[294]

The Court followed *Cammarano* in upholding another law denying a tax subsidy for political expenditures in *Regan v. Taxation With Representation*.[295] Taxation With Representation (TWR), a nonprofit designated as a 501(c)(4) and engaged in lobbying on tax policy issues, challenged its denial of 501(c)(3) status, which is unavailable to nonprofits engaged in substantial lobbying activities.[296] Although neither 501(c)(3)s nor 501(c)(4)s pay taxes, donations are tax deductible for donors only when made to 501(c)(3)s.[297] However, this valuable subsidy was nevertheless made available to donors to veterans' groups that engaged in lobbying.[298] The Court once again distinguished *Speiser* by reasoning that the government was not denying TWR a benefit on account of its lobbying, but simply refusing to subsidize its lobbying activities.[299] Justice Blackmun concurred, reasoning that the rule was constitutional only because nonprofits were permitted to maintain dual structures consisting of a 501(c)(3) to fund all nonlobbying activities and a 501(c)(4) to fund lobbying.[300] The denial of the subsidy was thus limited to only the proscribed activity, and was not imposed as a general penalty.

In *Rust v. Sullivan*, the Court extended *Regan* to uphold a federal regulation interpreting Title X of the Public Health Services Act.[301] Title X is a federal grant program that funds community clinics for the purpose of expanding family planning services to low-income families.[302] The challenged regulation prohibited

291. *Id.* at 500–03.
292. *Id.*
293. *Id.* at 513.
294. *Id.* at 515 (Douglas, J., concurring).
295. Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).
296. *Id.* at 542.
297. *Id.* at 543.
298. *Id.* at 546.
299. *Id.* at 544–45.
300. *Id.* at 552–53 (Blackmun, J., concurring); *see also* Rust v. Sullivan, 500 U.S. 173, 197–98 (1991) (discussing *Regan*).
301. *Rust*, 500 U.S. at 177–78.
302. *Id.* at 178.

Title X recipients from counseling or providing referrals for abortion.[303] The Court distinguished *League of Women Voters* by reasoning that that case involved conditions on the recipient of the subsidy rather than on a particular program or service, "thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[304] The Court contrasted *League of Women Voters* with the restrictions on Title X, which applied only to the use of Title X funds and thus left Title X recipients free to spend their non-Title X funds however they chose.[305] Thus, the Court reasoned, the prohibitions Congress included in Title X were not infringing constitutionally protected speech, but merely selectively subsidizing certain speech.[306] The Court explained, "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[307]

Cammarano, *Regan*, and *Rust* severely limit the scope of the unconstitutional conditions doctrine and the protection for speech that it provides. In each of these cases the Court cognized a government benefit as a government subsidy and upheld the conditioning of the subsidy on the recipient's relinquishment of a constitutional right. These cases thus stand for the proposition that government may condition the provision of subsidies on the relinquishment of First Amendment rights so long as the condition does not limit protected speech falling outside the scope of the benefit.[308] As a result, lower courts have rejected arguments that payroll-restriction laws are unconstitutional conditions.[309] In *Ysursa*, the Court implicitly invoked this rule by quoting *Regan*'s holding that a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[310] Thus, even though payroll-restriction laws prohibit or limit the use of the payroll system to engage in political speech, courts have held they are not an unconstitutional condition because they do not limit the ability of public employees to engage in political speech outside the scope of the payroll system.

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303. *Id.* at 177–78.

304. *Id.* at 197.

305. *Id.* at 198 & n.5.

306. *Id.* at 193.

307. *Id.*

308. *Cf.* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 538, 549 (2001) (striking down conditions on a subsidy provided by the Legal Services Corporation (LSC) because "[t]he prohibitions apply to all of the activities of an LSC grantee, including those paid for by non-LSC funds").

309. Ala. Educ. Ass'n v. Bentley, 788 F. Supp. 2d 1283, 1310 (N.D. Ala. 2011), *rev'd sub nom.* Ala. Educ. Ass'n v. State Superintendent of Educ., 746 F.3d 1135 (11th Cir. 2014). The courts have resolved other challenges to payroll-restriction laws without even discussing the unconstitutional conditions doctrine. *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).

310. *Ysursa*, 555 U.S. at 358 (quoting Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983)).

b. Subsidized Speech

As *Cammarano*, *Regan*, and *Rust* make clear, when the government conditions the provision of benefits on the abridgment of constitutional rights but limits the scope of the abridgments to the scope of the benefit, courts analyze the constitutionality of the conditions under the subsidized speech doctrine rather than the unconstitutional conditions doctrine.[311] The subsidized speech doctrine thus diminishes the reach of the content-neutrality rule and permits at least some forms of content discrimination. In *Ysursa*, the Court applied the subsidized speech doctrine to uphold Idaho's payroll-restriction law.[312] The Court's holding substantially broadened the reach of the doctrine because of important differences between a payroll system and the subsidies analyzed in the precedent cases.[313] However, the Court failed to even acknowledge this development and provided no reasoning to indicate the new reach of the doctrine or its remaining limits.

The Court's holding is significant because of the extent to which the subsidized speech doctrine weakens First Amendment protections against content-based discrimination. First, the subsidized speech doctrine permits subject-matter distinctions. In *Cammarano* and *Regan*, the subsidies were selectively applied based on subject matter, because they were available for nonpolitical expenditures but not for political or lobbying expenditures.[314] In each case, the Court upheld the distinctions by reasoning that the denial of the subsidy was simply Congress's decision not to subsidize certain activity out of the public fisc.[315]

Second, the subsidized speech doctrine permits speaker-based distinctions. In *Regan*, the subsidy was selectively applied in a second manner, based on speaker: the subsidy was available for all nonprofit activities by veterans, but only for nonlobbying activities by nonveterans.[316]

Third, viewpoint discrimination is forbidden in subsidy cases involving private speech, but permitted in subsidy cases involving the government's own speech. In both *Cammarano* and *Regan*, the Court upheld the challenged laws because they were viewpoint neutral; that is, they were not "aimed at the suppression of dangerous ideas."[317] Both cases involved speech by the private organizations seeking access to the subsidy.[318]

311. *See* Cammarano v. United States, 358 U.S. 498, 501–04 (1959); *see also Rust*, 500 U.S. at 176; *Regan*, 461 U.S. at 547.

312. *See Ysursa*, 555 U.S. at 362–65.

313. *Id.* at 364.

314. *Regan*, 461 U.S. at 541–46; *Cammarano*, 358 U.S. at 505–09.

315. *Regan*, 461 U.S. at 547–50; *Cammarano*, 358 U.S. at 510–13.

316. *See Regan*, 461 U.S. at 551–52. Although both 501(c)(3)s and 501(c)(4)s receive at least some subsidies in the form of an exemption from paying income taxes, this statement refers to the specific subsidy at issue in *Regan*, which is the ability of donors to claim a tax deduction for their contributions to the nonprofit. Even though only the donor receives this subsidy, the nonprofit also derives a substantial benefit because the subsidy lowers the cost of the donations it receives and thus facilitates larger donations.

317. *See id.* at 548; *Cammarano*, 358 U.S. at 513. As noted, the Court uses the phrases "aimed at

However, viewpoint discrimination is permitted in subsidy cases involving government speech. In its most basic formulation, the government speech doctrine allows the government to selectively apply subsidies to advance its public policy objectives without the need to satisfy heightened scrutiny under the First Amendment, which would render many of its policy goals unattainable.[319] As the Court explained in *Rust*, "[W]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[320] In *Rust*, the Court upheld a viewpoint-based restriction on speech favoring abortion as an option in family planning. As the Court explained in a later opinion, "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.'"[321] Thus, by upholding a gag order prohibiting abortion referrals or counseling by doctors working in private clinics receiving federal Title X funds, *Rust* extends the government speech doctrine to include even some speech by private speakers receiving government subsidies.[322]

Notably, the Court in *Ysursa* never suggested that Idaho's public sector payroll systems should be considered government speech. Nor should it have. Unlike the Title X program in *Rust*, Idaho's electronic payroll systems and the automatic deductions they enable include no programmatic elements.[323] Stated

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the suppression of dangerous ideas" and "viewpoint discrimination" interchangeably. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998); Bailey v. Callaghan, 715 F.3d 956, 962 n.2 (6th Cir. 2013) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)); *supra* note 256. One may question, however, why subsidizing the lobbying activities of veterans, but not nonveterans, in *Regan* is not viewpoint discrimination. After all, veterans groups presumably take "pro-veteran" positions such as increased funding for veterans' services, while nonveterans groups denied the lobbying subsidy under *Regan* likely include fiscally conservative organizations opposed to any increase in government spending, including for military programs.

318. *Regan*, 461 U.S. at 542–45; *Cammarano*, 358 U.S. at 504–06;

319. *See* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992).

320. Rust v. Sullivan, 500 U.S. 173, 194 (1991) (citation omitted).

321. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (citations omitted) (quoting *Rosenberger*, 515 U.S. at 833) (explaining the rationale in *Rust*). Although the Court in *Rust* disclaimed the government was engaging in viewpoint discrimination, *Rust*, 500 U.S. at 193, in *Velazquez* the Court acknowledged that the restrictions on Title X funding did in fact constitute viewpoint discrimination, but were nevertheless permissible because they involved the government's own speech transmitted through private speakers, *Velazquez*, 531 U.S. at 541.

322. *See Rust*, 500 U.S. 173. *But see Velazquez*, 531 U.S. at 541–42 (declaring unconstitutional a prohibition against challenges to welfare laws by lawyers receiving federal funding from the LSC, and distinguishing *Rust* as a situation "in which the government 'used private speakers to transmit specific information pertaining to its own program,'" unlike the LSC which was "designed to facilitate private speech" of the LSC-funded attorneys' indigent clients (citation omitted)). The significance of this distinction has been roundly criticized. *See, e.g.*, *Velazquez*, 531 U.S. at 550 (Scalia, J., dissenting); CHEMERINSKY, *supra* note 32, at 1013.

323. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 359–60 (2009).

differently, government support for the payroll system provides a vehicle for speech but includes no message. Unlike *Rust*, which concerns a government program requiring employees of Title X grantees to engage in certain speech—by providing family planning counseling while refraining from abortion-related counseling—*Ysursa* concerns a government payroll system that does not require government employees to engage in any speech whatsoever.[324]

Thus, by holding that a government payroll system is subsidized speech, the Court in *Ysursa* permitted content-based discrimination based on both subject matter and speaker, but not on viewpoint. As a result, it upheld a law denying payroll deductions only to speech concerning politics, and only to speakers wishing to make contributions to unions.

c. Public Forums

Public forums are an important exception to the subsidized speech doctrine. Courts traditionally apply forum analysis "to determine when a governmental entity, in regulating property in its charge, may place limitations on speech."[325] This is because the forum doctrine exempts certain government properties from the general rule requiring content-based regulations to survive strict scrutiny.[326] In the subsidized speech context, however, where most content-based regulations are permitted, forum analysis serves the opposite purpose by determining those areas in which the general rule permitting content-based regulation does *not* apply.[327] Although the Ninth Circuit analyzed whether Idaho's local government payroll systems constituted a forum, the Supreme Court in *Ysursa* ignored the doctrine entirely and thus gave no indication when and where it should apply with regard to public payroll systems or other similar public sector administrative functions.[328]

The Court has identified several types of forums, each with different rules limiting the extent to which government may regulate the speech allowed in that particular forum. The classification is thus frequently determinative as to whether a law regulating speech in a particular forum violates the First Amendment. In *Christian Legal Society v. Martinez*, the Court identified three types of forums and described the rules governing each.[329] The first type is the "traditional public forum," which includes places that have traditionally been available for speech, such as streets and parks. Any content-based restriction must satisfy strict scrutiny.[330] Second is the "designated public forum," which arises when "government property that has not traditionally been regarded as a public forum is

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324. *Id.* at 356–58.

325. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 679 (2010).

326. *Id.* at 678–80.

327. *Rust*, 500 U.S. at 199–200.

328. *See Ysursa*, 555 U.S. at 358–62.

329. *See Christian Legal Soc'y*, 561 U.S. at 679–83.

330. *Id.* at 679 n.11; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

intentionally opened up for that purpose."[331] As in the traditional public forum, content-based restriction in designated public forums must satisfy strict scrutiny.[332] The third type of forum is the "limited public forum," which the government creates when it opens public property "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[333] Unlike the public and designated public forums, in a limited public forum, speaker-based and subject matter based restrictions are permissible so long as they are reasonable and viewpoint neutral.[334]

Forum analysis is relevant to the subsidized speech doctrine because a forum need not be a physical place, but can include "metaphysical" forms of government property[335] such as a university's student activities fund,[336] a workplace charity drive,[337] or public school mailing facilities.[338] Thus, any government subsidy could potentially qualify as a forum. The ability to apply forum analysis to public payroll systems is critical to the Court's First Amendment jurisprudence because although the rules governing a limited public forum appear to be identical to those governing subsidized speech that is not government speech, the rules governing public forums and designated public forums provide far greater protections for speech.[339]

d. When is a subsidy a forum?

A threshold question in forum analysis is when to apply forum analysis at all. The Court has never articulated criteria for determining when a subsidy should be treated as a forum and when it should be treated as a subsidy. However, criteria

331. *Christian Legal Soc'y*, 561 U.S. at 679 n.11 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)).

332. *Id.* (quoting *Pleasant Grove*, 555 U.S. at 470).

333. *Id.*

334. *Id.* This typology does not mention the nonpublic forum, to which the same rules apply as in a limited public forum. *See, e.g.*, Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053, 1059 (9th Cir. 2007) (rejecting the argument that Idaho's local government payroll systems are a nonpublic forum), *rev'd on other grounds sub nom.* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985) (holding the Combined Federal Campaign (CFC) is a nonpublic forum).

335. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995).

336. *Id.*

337. *See Cornelius*, 473 U.S. at 809 (finding the CFC to be a forum).

338. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (finding that mailing facilities are forum).

339. Subsidized speech and limited public forums both permit subject matter and speaker based distinctions but prohibit viewpoint discrimination. *Rosenberger*, 515 U.S. at 833–36. Content-based restrictions in limited public forums must be "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. In subsidized speech cases, content-based restrictions must survive rational basis review and be reasonable. *See Ysursa*, 555 U.S. at 359–60; *Cornelius*, 473 U.S. at 808–09 (rejecting a heightened reasonableness inquiry for a nonpublic forum and stating that "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation"). The Court has not expressly held that the reasonableness standard is identical in both contexts. *See Rosenberger*, 515 U.S. at 893 n.12 (Souter, J., dissenting). But neither has it indicated it is not identical in both contexts.

are discernible from the Court's subsidized speech cases, which fall into four discrete categories.

First, the Court has applied the subsidized speech doctrine to uphold laws involving government speech. In *Rust*, the Court analyzed a federal grant as a subsidy involving the government's own speech and upheld the grant's restrictions on abortion services and counseling.[340] Second, the Court has applied the subsidized speech doctrine to uphold tax subsidies. In *Cammarano* and again in *Regan*, the Court analyzed tax subsidies as instances of subsidized speech and upheld laws restricting the availability of the subsidy for political speech.[341] A third area in which the Court has applied the doctrine is to uphold programs allocating competitive funding in which content-based decisions are unavoidable.[342] In *National Endowment for the Arts*, the Court upheld federal restrictions on a competitive grant program providing funding to artists that involved decisions based on subject matter but not on viewpoint.[343]

The fourth application of the doctrine is to analyze as subsidized speech the content-based provision of subsidies to the press, but unlike in the other subsidy cases, the Court has not permitted content-based restrictions.[344] In *Hannegan v. Esquire*, the Court engaged in constitutional avoidance and construed a statute as denying the United States Postmaster General the authority to revoke a magazine's second-class postage permit, which subsidizes postage rates for certain classes of publications, on the basis of the magazine's content.[345] In *Arkansas Writers' Project, Inc. v. Ragland*, the Court reached the constitutional issue it had avoided in *Hannegan* and held that the government cannot provide subsidies that discriminate among different publications.[346] The case concerned a challenge to an Arkansas law that provided a tax subsidy to magazines on the basis of their subject matter, so that religious, profession, trade, and sports magazines received the subsidy while general interest magazines did not.[347] Significantly, the Court applied strict scrutiny even though it concluded the subsidy discriminated only on the basis of subject matter and not viewpoint.[348]

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340. Rust v. Sullivan, 500 U.S. 173, 188 (1991).

341. Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983) (reaching the same conclusion as the court did in *Cammarano*).

342. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 584–85 (1998); CHEMERINSKY, *supra* note 32 at 968.

343. *Nat'l Endowment for the Arts*, 524 U.S. at 585–88.

344. Cole, *supra* note 319, at 731–32.

345. Hannegan v. Esquire, Inc., 327 U.S. 146, 151, 156 (1946).

346. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

347. *Id.* at 223, 229–30.

348. *Id.* at 230–31, 234. The Court applied similar reasoning to strike down the rescission of a press subsidy through the imposition of a tax that had the effect of singling out specific newspapers. Minneapolis Star & Tribute Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585, 591 (1983) (applying strict scrutiny and declaring unconstitutional a Minnesota tax on ink and paper in publications in which the first $100,000 of ink and paper used were exempted). However, the Court upheld a tax that distinguishes not among individual publications, but rather among different

In contrast, the Court treated subsidies as fora in several other cases. Specifically, the Court analyzed a subsidy as a forum in three cases concerning the funding of student organizations at public universities. In *Christian Legal Society*, the Court analyzed a public law school's provision of school funds and facilities to registered student organizations as a forum.[349] Similarly, in *Rosenberger v. Rector*, the Court treated a student activity fund (SAF) as a forum, and held that the state university violated the First Amendment when it refused to provide SAF funding to a Christian student group that published a religious magazine.[350] And in *University of Wisconsin v. Southworth*, the Court considered the "antecedent" question left unresolved in *Rosenberger*, which was whether a public university's imposition of a mandatory student fee to fund its student activities fund violates the First Amendment.[351] The Court analogized to its public forum cases and implicitly invoked the limited public forum doctrine by holding that viewpoint neutrality was the controlling standard.[352]

A fourth forum case is *Cornelius v. NAACP*, in which the Court analyzed the Combined Federal Campaign (CFC) as a forum.[353] The CFC is a workplace charity for federal employees in which employees have the option of using payroll deductions to donate to participating organizations.[354] The Court rejected a First Amendment challenge by organizations excluded from the CFC, and held the CFC was a nonpublic forum in which reasonable subject-matter and speaker-based distinctions were permissible.[355]

A fifth case, *Velazquez*, is more difficult to categorize. On the one hand, the Court stated that the Legal Services Corporation (LSC) funding was a subsidy and not a forum.[356] On the other hand, the Court cited to its forum cases as authority for its reasoning that the restriction violated the First Amendment. The Court held the restriction unconstitutional because it "distorts the legal system by altering the traditional role of the attorneys in much the same way" as the ordinary functioning of the forums was disrupted by conditions the Court had previously held were unconstitutional.[357]

Although there may be no unifying theory underlying all of the Court's subsidy cases, they nevertheless fall into discrete categories in which the Court has determined that content-based decisions are either necessary or desirable. First, the Court has placed government speech outside the First Amendment entirely

branches of the media. Leathers v. Medlock, 499 U.S. 439 (1991) (upholding a gross receipts tax that exempted newspapers and magazine but not cable television).

349. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 669 (2010).

350. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 844–45 (1995).

351. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000).

352. *Id.* at 229–30.

353. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, at 801–04 (1985).

354. *Id.* at 791.

355. *Id.*

356. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544–49 (2001).

357. *Id.* at 543–44.

per its recognition that the political branches could not function if they were unable to express any viewpoint without meeting strict scrutiny.[358] Similar justifications undergird a second category of cases involving tax subsidies, which implicate one of Congress's broadest powers[359] and an area of plenary authority for the states.[360] Even this power, however, is cabined in several respects. Tax subsidies that restrict speech beyond the scope of the subsidy violate the unconstitutional conditions doctrine.[361] In addition, content-based tax subsidies directed at the press trigger strict scrutiny,[362] which is required by the critical role the press plays in a free society.[363] Third, treating merit-based competitive grant programs as subsidized speech is necessary because such programs cannot be disbursed without reference to the content of the applications.[364] Thus, application of the subsidized speech doctrine to each of these areas may be necessary to provide the government the ability to govern and to administer socially beneficial programs such as funding for the arts. Extending the subsidized speech doctrine beyond these narrow categories is undesirable, however, because this would erode constitutional rights with no obvious justification.

Payroll-restriction laws fit none of the precedents for the subsidized speech doctrine. Payroll-restriction laws obviously do not involve government speech: unlike the Title X program in *Rust*, they include no programmatic or substantive elements and do not require any speech. Instead, they are more similar to the LSC funding in *Velazquez*, the SAF funding in *Rosenberger* and *Southworth*, and the federal workplace charity drive in *Cornelius* because they are simply vehicles to facilitate private speech via automatic deductions to various recipients. Nor do they implicate the government's taxation power. And unlike the grant program in *Finley*, which required the allocation of a finite amount of grant money to a large pool of potential recipients, making payroll deductions available to employees is not a zero sum game. Stated differently, modern technology does not limit the capacity of electronic payroll systems to accommodate deductions for additional recipients, and adding one deduction does not require eliminating another. Because it is possible to accommodate any number of payroll deductions, payroll administrators need not pick and choose which deductions to offer, and content-based exclusions are therefore unnecessary. Content-based exclusions are also undesirable because they conflict with the Court's general political speech

358. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

359. *See* Regan v. Taxation with Representation, 461 U.S. 540, 547–48 (1983); *see also* United States v. Butler, 297 U.S. 1, at 65–69. (1936).

360. Madden v. Kentucky, 309 U.S. 83, 93 (1940).

361. Speiser v. Randall, 357 U.S. 513 (1958).

362. Ark. Writers Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987).

363. *See* Cole, *supra* note 319 (arguing for a "spheres of neutrality" approach to the First Amendment requiring that public institutions such as the press and public universities that are central to free expression operate with some independence from government control).

364. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–89 (1998).

jurisprudence prohibiting limitations on political speech and in particular the Court's strong rejection in *Citizens United* of speaker-based regulations.

In conclusion, payroll-restriction laws appear to violate two fundamental tenets of the First Amendment because they limit political speech and furthermore discriminate based upon the content of speech. Although payroll-restriction laws do not prohibit speech directly, and instead simply condition the availability of a government benefit (the payroll system),[365] such indirect regulation of speech nevertheless triggers heightened First Amendment protection if the regulation constitutes an unconstitutional condition that makes a benefit unavailable to people who refuse to relinquish their constitutional rights.[366] However, the Court has held that government may decline to subsidize speech, and the Court cognizes restrictions on government benefits as lawful instances of subsidized speech, and not unconstitutional conditions, when the conditions are limited to the scope of the activities subsidized by the benefit.[367] Nevertheless, the Court has also held that government subsidies may constitute forums in which the government's ability to enforce content-based regulations may be more limited, depending upon how a court categorizes the particular forum.[368] Although the Court has never clarified when it will apply forum analysis and when it will analyze conditions on benefits as subsidized speech, the Court's subsidized speech cases are inapposite to payroll-restriction laws.[369] This final point is especially significant because *Ysursa*'s extension of the subsidized speech doctrine to encompass payroll-restriction laws has implications that reach beyond the payroll deductions context in ways that are deeply troubling.

III. IMPLICATIONS OF YSURSA

There are two important implications of *Ysursa*, each of which muddy existing doctrine and have the undesirable effect of eroding First Amendment protections without any countervailing benefit. First, the case breaks new ground for the subsidized speech doctrine by extending the doctrine to a novel context not cabined by any obvious limiting principle. Second, *Ysursa* collapses any distinction between the subsidized speech and forum doctrines and provides no guidance as to when, if ever, courts should treat a nonphysical subsidy as a forum rather than as an instance of subsidized speech.

365. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 367–68 (2009) (differentiating direct prohibitions of speech and indirect benefit conditioning).

366. *See id.* at 581–82 (conditioning granting of benefits on type of artistic expression).

367. *See id.* at 585–86 (emphasizing the scope of the subsidy).

368. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837 (1995).

369. *See Nat'l Endowment for the Arts*, 524 U.S. at 588 (defining subsidized speech as the government choosing to promote certain speech); *see also Ysursa*, 555 U.S. at 355 (defining payroll restriction cases as the government's refusal to promote certain speech).

A. Expanding the Subsidized Speech Doctrine

Ysursa stands apart from the Court's other subsidized speech cases in two important respects. First, never before had the Court applied the doctrine to a subsidy this small. Although the district court in *Ysursa* made no findings regarding the actual cost to the state of including political contributions among the many other possible deductions available to its employees, common sense and evidence from other states suggest the cost is miniscule and possibly too small to measure. In addition, many states have laws allowing the government to recoup from their employees' unions any costs actually incurred from providing the payroll deductions.[370] In fact, independent analyses suggest payroll-restriction laws may actually *increase* government's costs due to new enforcement requirements.[371]

There are three possible readings of this aspect of *Ysursa's* treatment of subsidies. The first is that *Ysursa* stands for the proposition that *any* amount of subsidy is sufficient to trigger the subsidized speech doctrine, even if the subsidy actually saves the state money.[372] This reading would create a gaping exception to the First Amendment in light of the government's pervasive activities and wide-ranging administrative functions. A second reading of *Ysursa*, already adopted by one lower court, is that the case simply stands for the narrower proposition that "the use of a state payroll system to collect union dues from public sector employees is a state subsidy of speech."[373] Under this reading, *Ysursa* creates a *per se* rule that state payroll systems are subsidies irrespective of how much they cost the state to provide or whether they actually cost the state any money at all. Although this reading appears to apply only to government payroll systems, such a limitation appears to rest on arbitrary line drawing. This rule contains no obvious limiting principle as to why courts would not extend *Ysursa* to other settings involving negligible government spending and analyze them, as under the first reading, as instances of subsidized speech allowing content-based regulation.

However, a third possible reading of *Ysursa* is that the Court merely assumed the Idaho payroll systems were a subsidy because it was presented with no evidence to the contrary, and lower courts may therefore distinguish *Ysursa* by making findings of fact that the particular payroll systems in question are not subsidies. In the absence of such factual findings, lower courts might distinguish *Ysursa* by finding a *de mininis* exception to the subsidy doctrine that includes the incremental cost of adding a new deduction to a pre-established payroll system. Although the Supreme Court has offered no guidance on how much a state must spend on a payroll system to trigger the subsidized speech doctrine, the Court has nevertheless severely limited what constitutes government expenditures in other

370. *See supra* notes 80–81.
371. *See supra* note 82.
372. *See Proposition 32: Analysis*, *supra* note 60.
373. Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 652 (7th Cir. 2013).

First Amendment contexts in order to limit the exceptions such spending creates.[374]

The second way in which *Ysursa* stands alone as a subsidized speech case is that, unlike any of the Court's other subsidized speech cases, the plaintiffs in *Ysursa* did not want the subsidy.[375] In *Cammarano*, *Regan*, *Rust*, and *Finley*, the plaintiffs challenging the laws actively pursued the government subsidy.[376] In contrast, in *Ysursa* the unions sought access to the payroll system but took pains to avoid accepting any subsidy and even offered to reimburse the government for the cost of their payroll deductions.[377] The significance of this distinction is whether the government may use subsidies not only as a shield permitting it to make subject-matter and speaker-based choices necessary to implement its programs, and even viewpoint-based choices in the context of government speech, but also as a sword to disable the First Amendment protections of private speakers who do not want the subsidy and thus restrict speech in ways the First Amendment would never allow.

B. Collapsing the Distinction Between Subsidized Speech and Forums

The second troubling implication of *Ysursa* is that it appears to collapse any distinction between when courts should analyze government spending under the subsidized speech doctrine versus the forum doctrine. As discussed, state payroll systems do not fit into any of the categories in which the Court has found permissible subsidies.[378] Payroll systems are not government speech because, unlike the Title X program in *Rust*, they contain no programmatic content aimed at dealing with a particular problem in a particular way.[379] They are simply a vehicle for the speech of private speakers and contain no independent government message. Nor do payroll deductions implicate the government's

374. *See*, *e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2010) (holding tax credits are not a government expenditure pursuant to a statute for the purpose of creating taxpayer standing to raise establishment clause challengers under *Flast v. Cohen*); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007) (executive expenditures); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (giving of government property).

375. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 357 (2009).

376. *See*, *e.g.*, Rust v. Sullivan, 500 U.S. 173, 199 n.5 (1991) ("The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy. . . . By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.").

377. Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 U.S. Dist. LEXIS 34494, at *8–9 (D. Idaho Nov. 23, 2005), *rev'd on other grounds*, 561 F.3d 1048 (9th Cir. 2009) (reversing in accordance with *Ysursa*, 555 U.S. at 358).

378. *Id.*

379. *Rust*, 500 U.S. at 184–87 (specifying what the family planning regulations cover).

taxing powers or any other power of comparable reach. And unlike the grant program for the arts in *Finely*, payroll systems do not involve a scarce resource allocated through a competitive process requiring the government to make choices based upon content.[380]

Instead, cases involving state payroll systems should be controlled on their facts by *Cornelius*, in which the Court applied forum analysis to a payroll deduction program.[381] Payroll deductions also share similarities to the student activity funds the Court analyzed as forums in *Rosenberger* and *Southworth*, because their primary purpose is to facilitate and expand private speech.[382] But by treating Idaho's payroll system—a context in which content-based restrictions are neither necessary nor desirable—as subsidized speech, the *Ysursa* Court leaves no clear direction for lower courts to treat *any* nonphysical subsidy as a forum.

The implications of this development are troubling in an age when nonphysical forums are acquiring increasing significance due to evolving technologies and shifting modes of communication. If the government funds an Internet forum or chat room open to everyone, is it free to exclude particular speakers and topics? What if the government provides an indirect and de minimis subsidy for a privately operated Internet forum, perhaps because a subsidized public utility provides the electricity or fiber optic cables? Under forum analysis, the government would have no *de facto* right to restrict speech in these situations and any content-based restrictions would require a showing that the forum had not been intentionally opened up for free expression such that it had become a designated public forum. Under the subsidized speech doctrine, however, no such analysis is required and content-based restrictions are permissible so long as they are reasonable.

IV. WHY PAYROLL DEDUCTION LAWS VIOLATE THE FIRST AMENDMENT

While deeply problematic, *Ysursa* nevertheless leaves open several options for lower courts to strike down laws restricting payroll deductions. Such laws may be challenged as viewpoint discrimination; they may be distinguished from *Ysursa* through factual findings that the payroll system is not a subsidy; and they may be analyzed as designated public forums in which content-based restrictions targeting political speech or union speakers are impermissible.

380. Even if a public employer utilized a technologically archaic payroll system that was limited with regard to the number of deduction recipients it could accommodate, the First Amendment would still require it to allocate those spaces in a neutral and nondiscriminatory fashion. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995).

381. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985).

382. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233–34 (2000) (finding the student's speech was extracurricular); *Rosenberger*, 515 U.S. at 834 (categorizing student speech as private because the student groups eligible for the University's funding are not university agents).

A. Viewpoint Discrimination

Unions may successfully challenge any payroll restriction if they can prove it discriminates according to viewpoint. This argument will prevail regardless of the analysis a court applies because viewpoint discrimination is impermissible whether a court applies the subsidized speech doctrine[383] or forum analysis.[384] As discussed, the one context in which viewpoint-based restrictions are permissible is inapposite because government-operated payroll systems are not government speech.[385] Several iterations of payroll-restriction laws may thus be challenged as discriminating based upon viewpoint.

First, laws that apply only to unions may be challenged as viewpoint discrimination. Significantly, the *Ysursa* plaintiffs acknowledged before the Ninth Circuit that they had not attempted to establish viewpoint discrimination and the issue was not presented to the Supreme Court.[386] Thus, *Ysursa* is not controlling authority for the proposition that a payroll-restriction law that singles out unions does not discriminate according to viewpoint.

This is significant because many payroll-restriction laws are not truly facially neutral, but specifically exempt contributions to employee benefit plans and charities,[387] and these organizations often use funds obtained through payroll deductions for political purposes.[388] Many insurance companies exempted from payroll-restriction laws spend considerable sums on lobbying and campaign contributions.[389] Even nonprofits designated as 501(c)(3)s under the tax code are permitted to spend funds on politics so long as this does not comprise a "substantial part" of their overall activities.[390] And charities making a 501(h) election may spend up to $1 million on lobbying, a sum that does not even include political expenditures falling outside the IRS's definition of "lobbying."[391]

As discussed, the Court's precedents provide authority for considering the purpose and effect of laws to prove they are content based, although the cases are not entirely consistent on this point. One method of determining viewpoint discrimination is whether the justifications that a state claims for its law are underinclusive.[392] This line of analysis would appear to invalidate the most

383. *See*, *e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983).

384. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 679 (2010).

385. *Id.*

386. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 361 n.3 (2009).

387. *E.g.*, ARIZ. REV. STAT. ANN. § 23-361.02(E) (2012), *invalidated by* United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011); Cal. Proposition 32 sec 2. § 85150(c) (2012).

388. § 23–361.02(E); § 85150(c) (2012).

389. LAFER, *supra* note 75, at 8–9.

390. 26 U.S.C. § 501(c)(3) (2012); *United Food & Commercial Workers*, 817 F. Supp. 2d at 1118 n.1 (citing cases holding that less than 5% of an organization's activity is not substantial, while over 16.6% is substantial).

391. 26 U.S.C. § 501(h); *id.* § 4911.

392. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2740 (2011).

common justifications for such laws. For example, a state's claim that its law is aimed at "avoiding the appearance that carrying out the public's business is tainted by partisan political activity"[393] appears substantially underinclusive if the law permits organizations other than unions to make political contributions using money received through payroll deductions. The justification that the law would save the state money[394] is even more underinclusive in light of the negligible incremental costs associated with specific payroll deductions and the myriad other line items consuming far greater shares of state budgets.

Second, several states, notably Wisconsin and Michigan, have passed laws targeting only *particular* unions.[395] In fact, both laws targeted only unions that had recently waged high-profile campaigns opposing Republican officials campaigning for statewide office.[396] These laws are readily distinguishable from the Idaho law upheld in *Ysursa* because it applied equally to *all* unions.[397]

B. Payroll Deductions Are Not a Subsidy

District courts may also distinguish *Ysursa* by making findings of fact that the payroll system in question is not a government subsidy. As discussed, the record in *Ysursa* was devoid of any evidence of the state's actual cost of providing the prohibited political deductions and thus there was no evidence that the payroll system actually constituted a public subsidy of employee political activity.[398] In addition, as noted, many states have laws allowing them to recover from unions any costs of providing them payroll deductions.[399] Even if evidence is presented that the addition of deductions to a preexisting payroll system does impose an incremental cost upon the government, a court could nevertheless find a de minimis exception to the subsidized speech doctrine for very small subsidies.

C. Payroll Systems Are Designated Public Forums

A third way lower courts can preserve First Amendment protections for union members targeted by payroll-restriction laws is to apply forum analysis to

393. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009).

394. Bailey v. Callaghan, 715 F.3d 956, 967 (6th Cir. 2013).

395. *Id.* at 957–58 (upholding a law eliminating dues deduction for public school employees); Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640 (7th Cir. 2013) (upholding a law eliminating dues deduction for only certain public employees). Although both cases concerned laws banning the use of payroll deductions for all union dues, and not merely payments used for political purposes, both courts applied *Ysursa* and found it controlling.

396. *See Bailey*, 715 F.3d at 966–67; *Wis. Educ. Ass'n Council*, 705 F.3d at 664–65.

397. *Ysursa*, 555 U.S. at 361 n.3 (noting the law applies to all organizations and stating that "[i]f the ban is not enforced evenhandedly, plaintiffs are free to bring an as applied challenge"). *But see Bailey*, 715 F.3d at 968; *Wis. Educ. Ass'n Council*, 705 F.3d at 642 (each holding laws singling out only certain unions do not discriminate based upon viewpoint).

398. Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 U.S. Dist. LEXIS 34494, at *16 (D. Idaho Nov. 23, 2005), *rev'd on other grounds*, 561 F.3d 1048 (9th Cir. 2009) (reversing in accordance with *Ysursa*, 555 U.S. at 358).

399. *See supra* notes 80–81.

the payroll systems. As discussed, the Court's subsidized speech and forum cases strongly indicate that this is the approach most consistent with the Court's precedents.[400]

Once a court determines a payroll system is a forum, it must then determine what *type* of forum. The Supreme Court has never articulated clear criteria for determining which type of forum applies to a particular place.[401] Nevertheless, its cases implicitly suggest criteria including, first, the tradition of the availability of the forum for speech; second, whether the speech is incompatible with the forum;[402] and, most important, third, whether the government places limits on the speakers that may use the forum for speech or the subjects they may discuss.[403]

First, many government payroll systems are made available for a wide range of mandatory and voluntary uses, ranging from income taxes, to health and welfare plans, to charities, to union dues.[404] For example, a 2011 report provided by the Florida Chief Financial Officer's office identified 364 groups and agencies approved to receive payments via payroll deductions.[405] In Missouri, the approved list exceeds 450 recipients.[406]

Second, payroll systems are compatible with speech. The Court has held that institutional settings such as prisons[407] and military bases[408] are incompatible with speech. In contrast, the use of payroll systems to make automatic deductions does not implicate public safety concerns or undermine the nation's military readiness.

Third, many states impose very minimal front end limitations on the uses to which their payroll systems may be put, requiring only that the employer and employee agree to the deduction, that the employee authorize the deduction, and

400. *See supra* Part II.B.3.d. The Sixth Circuit rejected the use of forum analysis for a government payroll system, reasoning that forums are limited to "places where 'some form of communicative activity occurs,'" while "the ministerial act of deducting a particular sum from an employee's paycheck" is not expressive activity. *Bailey*, 715 F.3d at 958–59 (citation omitted). However, the Sixth Circuit majority opinion failed to acknowledge either *Martinez* or *Rosenburger*, each of which analyzed a nonphysical subsidy (funding for student organizations) as a forum. Even more troubling, it also ignored the Court's political speech cases that hold that spending money on politics is protected speech. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 323 (2009); Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam).

401. *See* CHEMERINSKY, *supra* note 32, at 1186.

402. *See id.*

403. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 679 n.11 (2010). This reasoning is somewhat circular. If the government places front end restrictions on the speakers or subjects that may access a forum, courts may label it a limited public forum and those restrictions will be upheld, provided they are viewpoint-neutral and reasonable. But if the government makes a forum widely available, and then imposes identical restrictions later on, courts may label the forum a designated public forum and invalidate those restrictions under strict scrutiny. *See* CHEMERINSKY, *supra* note 32, at 1177–78.

404. *See infra* notes 405–406.

405. Data available at *supra* note 34; *see also* Sharockman, *supra* note 33 (citing the data).

406. LAFER, *supra* note 75, at 8.

407. Adderly v. Florida, 385 U.S. 39, 47–48 (1966).

408. Greer v. Spock, 424 U.S. 828, 839–44 (1976).

that the deduction not violate any law.[409] For example, in California public employees may make contributions using payroll deductions to, inter alia, unions, charities, credit unions, state government programs, employee benefit programs, and any "bona fide association," which needs only register with the state and have at least fifty employees making contributions via payroll deductions.[410]

Ultimately, forum analysis is highly fact specific and will turn on the particular use and history of a state's payroll system. Nevertheless, these criteria may provide a starting point for a court to conclude that a public payroll system is a designated public forum and that strict scrutiny accordingly applies.

CONCLUSION

Although access to payroll deductions for government employees may appear to be an unlikely political battleground, efforts to restrict their use to achieve partisan ends date back to the early 1990s and continue to this day. This is because the use of mechanisms such as automated deductions and opt-out systems have enormously powerful effects on behavior with regard to union political contributions, just as they do for a wide range of other applications. While policymakers are beginning to recognize the potential these mechanisms hold for shaping public policy in socially desirable ways, the political opponents of unions and the candidates they support have already harnessed these insights to limit union political fundraising. Moreover, because the stakes of passing payroll-restriction laws are so high, unions' opponents can divert significant union resources by simply qualifying such measures for the state ballot, even if they never succeed in passing them.

Although the Court in *Ysursa* recently upheld Idaho's payroll-restriction law,[411] it is difficult to reconcile *Ysursa* with many of the Court's First Amendment precedents. The case is perhaps in greatest dissonance with *Citizens United* because it appears to greenlight efforts by Republican-controlled legislatures to pass partisan legislation aimed at silencing one voice in the political conversation. Moreover, *Ysursa* raises but does not answer serious questions about the extent to which the First Amendment will continue to protect against government efforts to single out certain forms of speech through the conditional provision of benefits. Ultimately, the Court should overrule *Ysursa* for these reasons. Nevertheless, until it does, lower courts retain several doctrinal tools that may allow them to strike down other paycheck restriction laws.

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409. *See generally Wage Deduction Laws*, SOC'Y FOR HUM. RESOURCE MGMT., https://www.shrm.org/legalissues/stateandlocalresources/stateandlocalstatutesandregulations/documents/deductionlaw.pdf (revised Oct. 2013) (listing state wage deduction laws).

410. CAL. GOV'T CODE §§ 1150(c)–(d), 1151, 1152 (West 2010 & Supp. 2014); STATE OF CAL., DEDUCTION PROGRAM HANDBOOK 10, 14 (n.d.), *available at* http://www.sco.ca.gov/Files-PPSD/dedinfo_particip_misc-ftp.pdf.

411. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 364 (2009).