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Public Sector Labor Relations: Union Security Agreements in the Public Sector Since Abood

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NOTES

PUBLIC SECTOR LABOR RELATIONS: UNION SECURITY AGREEMENTS IN THE PUBLIC SECTOR SINCE *ABOOD*

I. INTRODUCTION

The growing demand for greater and more comprehensive government services has caused the public workforce to almost double in the last two decades.[1] During these years, public employees intensified their demands for organizational rights enjoyed by private sector workers, including the right to a recognized and exclusive representative of their own choice and the right to bargain collectively for wages, hours, and other terms and conditions of employment.[2] Although no uniform federal legislation protects the bargaining rights of public employees,[3] state and local governments by the mid-1970s demonstrated a growing tendency toward recognition of these demands.[4] By 1976, nearly half of all full-time public workers belonged to some employee organization, and membership figures for teachers and firefighters approached seventy percent.[5]

This dramatic increase in the number of jurisdictions affected by the presence of an actual or potential bargaining entity

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1. U.S. Bureau of the Census, Dep't of Commerce, Report of July 1976, 71 GOV'T EMPL. REL. REP. (BNA) 2001 (Reference file 1979).

2. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. INDUS. COM. L. REV. 993 (1976). Prior to the 1960s, collective bargaining was virtually nonexistent in the public sector and, in most jurisdictions, was affirmatively illegal. *See generally* Blair, *State Legislative Control Over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1 (1973).

3. Government employees are expressly excluded from coverage of the Taft-Hartley Act. 29 U.S.C. § 152(2) (1976).

4. For a list of states with statutes recognizing public sector collective bargaining in 1975, see Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183 n.8 (1975).

5. 71 GOV'T EMPL. REL. REP. (BNA) 2002 (Reference file 1979).

led to concern about the legitimate scope of collective bargaining in the public sector, especially when it raised the question of union security: might a public employer and an exclusive bargaining agent reach an agreement that would require every member of the bargaining unit, as a condition of employment, either to become a union member or to pay a specified amount to the union in return for its representative services? The United States Supreme Court in *Abood v. Detroit Board of Education*[6] indicated that these requirements might be permissible in certain circumstances. This Note will discuss that decision and its effects on the development of union security in the public sector.

II. The Development of Union Security

Several forms of union security have developed, including the closed shop, union shop, agency shop, maintenance of membership, and service fee or fair share agreements.[7] A closed shop permits an employer to hire only union members and conditions employment on continued membership. A union shop allows the employer to hire anyone he chooses but requires all workers to join the union within a specified period of time. The agency shop requires employees who do not wish to become union members to pay the union a sum equal to or less than the amount of regular dues and fees. Maintenance of membership agreements do not demand union membership but require those who voluntarily join to maintain their membership for the term of the union contract. Fair share or service fee arrangements compel nonmembers to pay a fee in the amount of that portion of dues devoted to collective bargaining activities.[8]

In the private sector, the National Labor Relations Act[9] and the Railway Labor Act[10] have long permitted all forms of union security except the closed shop.[11] No uniform federal legislation

6. 431 U.S. 209 (1977). For a discussion of *Abood*, see notes 33-50 and accompanying text *infra*.

7. K. Hanslowe, D. Dunn & J. Erstling, Union Security in Public Employment: Of Free Riding and Free Association 4 (1978).

8. *Id.*

9. 29 U.S.C. § 158(a)(3),(b)(2) (1976).

10. 45 U.S.C. § 152 Eleventh (1976).

11. For a discussion of the development of federal legislation concerning union security, see Blair, *supra* note 4, at 186-87.

governs union security in the public sector, however, and the authority of public employers to enter into union security agreements depends entirely on state law. Although no state except Vermont legislatively authorized union security before the 1970s,[12] public sector agreements commonly contain union security clauses,[13] and their legitimacy has been hotly contested.[14]

Two competing objectives form the basis of the controversy: individual autonomy versus majority welfare. Opponents of union security agreements perceive them as a restraint on the individual freedom of both employers and employees and argue that individual merit—rather than union membership or participation—should determine continued employment.[15] Moreover, the opponents disapprove of the use of a state's coercive power to mandate union association and regard compulsory union affiliation as an infringement on objecting employees' freedom of speech and association under the first and fourteenth amendments, and their right to work under the due process clauses of the fifth and fourteenth amendments.[16] Thus, attempts to expand union security into the public sector have met staunch opposition, and the Right to Work Committee has mounted a national campaign to dismantle all vestiges of compulsory unionism.[17]

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12. Schneider, *Public-Sector Labor Legislation—An Evolutionary Analysis*, in B. AARON, J. GRODIN & J. STERN, PUBLIC-SECTOR BARGAINING 217 (1979). The Vermont statute was passed in 1969. *Id. See* VT. STAT. ANN. tit. 21, §§ 1722, 1726 (1978).

13. Schneider, *supra* note 12, at 217. In 1972, the Michigan Education Association stated that almost one-half of its 530 contracts contained agency shop provisions. *Id.* at 217 n.84.

14. *See generally* H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 2 (1971); Clark, *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. CIN. L. REV. 680, 681 (1975); Zwerdling, *supra* note 2, at 1009-13. One author noted that a mere list of articles on the topic occupied over twenty-three typed pages. Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233, 234 n.6 (1959).

15. See Blair, *supra* note 4, at 187-89, in which the author advances the proposition that in most civil service systems "merit" principles have always been subordinated to other legitimate public policy goals.

16. *See generally* T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS 271-84 (1977); Levinson, *After* Abood: *Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 AM. U.L. REV. 1, 2 (1977).

17. The March 1981 CONSERVATIVE DIGEST portrays Right to Work Committee president Reed Larson as a "David astride Goliath," and recounts the story of his twenty-five year " 'orchestrated' " fight against compulsory unionism. " 'Time and again the Right to Work Committee has gone to the mat with union moguls and their Congressional allies,'

Proponents of union security maintain that collective employee strength is necessary to counter the economic power of employers and that financial and organizational stability are essential to the meaningful exercise of that strength.[18] Moreover, because an exclusive representative is charged with the legal duty of fairly representing all members of the bargaining unit,[19] simple reciprocity dictates that those who receive the benefits of union representation should contribute their fair share of its cost.[20] So long as union security agreements require no more than financial support, the conflict centers not on "a unique issue of freedom" but rather on "one of union power and labor stability."[21]

The United States Supreme Court has construed the congressional intent behind federal labor law as embodying the latter policy. In *Railway Employees' Department v. Hanson*,[22] the Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments,"[23] but noted in dictum that the financial support it found unobjectionable related only to the work of the union in collective bargaining.[24]

The constitutionality of using compulsory dues to support political causes that are contrary to the views of dissenting employees was challenged in *International Association of Machinists v. Street*.[25] The Supreme Court skirted the constitutional

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. . . 'and time and again its supporters have come away with their heads held high, displaying the spirit of individual freedom that made America great.' " National Right to Work Newsletter, March 31, 1981, at 3, col. 1 (quoting CONSERVATIVE DIGEST, Mar. 1981, at 15).

18. *See* Zwerdling, *supra* note 2, at 1012-13.

19. Steele v. Louisville & N. R.R., 323 U.S. 192, 202 (1944).

20. The union's traditional attitude toward "free riders" was eloquently expressed by former American Federation of Labor president Samuel Gompers: "Nonunionists who reap the rewards of union efforts, without contributing a dollar or risking the loss of a day, are parasites. They are reaping the benefits of union spirit, while they themselves are debasing genuine manhood." 12 AMERICAN FEDERATIONISTS 221 (1905), *cited in* Comment, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 WIS. L. REV. 134 n.6.

21. H. WELLINGTON & R. WINTER, *supra* note 14, at 96.

22. 351 U.S. 225 (1956).

23. *Id.* at 238.

24. *Id.* at 235.

25. 367 U.S. 740 (1961). The Right to Work Committee has vehemently protested

issue that such a use violated the first amendment rights of dissenters by construing the Railway Labor Act as prohibiting the union's use of exacted funds for political purposes over an employee's objection.[26] Because the majority refused to "delineate the precise limits" of a prohibited political expenditure, the scope of the holding is not entirely clear.[27] Justice Douglas, in a concurring opinion, indicated that membership in a group could not be conditioned on an individual's acceptance of that group's philosophy without substantial infringement of his first amendment rights.[28] Douglas implied, however, that a union could use an objector's money for purposes of a political nature if the use related to the reasons for which the union was organized: "[t]he furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy."[29]

The failure of the court in *Street* to define adequately the parameters of its political prohibition within the private sector left even less certain the constitutionality of public sector union security.[30] In the public sector, not only are the negotiators gov-

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this type of expenditure: "Compulsory union contracts covering government employees can become the most reprehensible form of 'sweetheart agreement' . . . in which incumbent office holders obtain union campaign support in exchange for forcing all employees to hand over dues to union treasuries." Larson, *Compulsory Unionism is not the Way, Federalist Times* (Jan. 2, 1974) cited in Nelson, *Union Security in the Public Sector*, 27 LAB. L.J. 334, 340 (1976).

26. 367 U.S. at 768-69. In *Street*, the record did reveal that the union had financed the campaigns of federal and state political candidates whom the plaintiff opposed and had promoted "political and economic doctrines, concepts, and ideologies with which he disagreed." *Id.* at 744. Justice Frankfurter, joined by Justice Harlan in a dissenting opinion, found no violation of first amendment rights. *Id.* at 806 (Frankfurter, J., dissenting). Justice Black, dissenting, reached the opposition conclusion. *Id.* at 789-91 (Black, J., dissenting).

27. *Id.* at 768.

28. *Id.* at 777 (Douglas, J. concurring). Citing *Hanson*, Douglas noted that certain restrictions by a union could not be supported by state or federal governments: disqualification from membership for political views or associations; limitations on certain kinds of speech or activity; or the required use of union funds "for purposes other than collective bargaining." *Id.* at 777 n.3. The use of union dues for broad ideological purposes such as promoting birth control or foreign policy positions or financing the campaigns of particular political candidates clearly falls within Douglas' prohibited category. *Id.* at 777-78.

29. *Id.* at 778.

30. Blair, *supra* note 4, at 194-99. "[T]he lack of federal legislation susceptible of an

ernment officials, but they bargain over subject matter that is almost always directly affected by some prior political decision. Moreover, many collective bargaining contracts are subject to final approval or rejection by a legislative body. Viewed from a broad perspective, the entire public sector collective bargaining process is essentially political, and *any* compulsory financial contribution from objecting employees might be challenged as falling within the *Street* proscription.[31]

III. THE *Abood* DECISION

The Supreme Court did not again address the proper scope of union security provisions until May 1977.[32] In *Abood v. Detroit Board of Education,*[33] dissident teachers alleging deprivation of their freedom of association under the first and fourteenth amendments challenged a Michigan statute[34] authorizing an agency shop agreement with a local government employer.[35] After the Michigan Court of Appeals upheld the statute under *Hanson,*[36] the United States Supreme Court acknowledged that compulsory support of a collective bargaining representative affected the employees' first amendment interests[37] but held, on the authority of the private sector decisions in *Hanson* and *Street,* that "such interference as exists is constitutionally justified by the legislative assessment" that union security agreements contribute to labor peace and stability[38] and equitably

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interpretation like the one placed on the RLA . . ." made unavoidable a first amendment challenge and ruling. *Id.* at 194.

31. *Id.* at 194-96. For a discussion of the inherently political nature of public sector bargaining, see H. WELLINGTON & R. WINTER, *supra* note 14, at 29-32, 60-65; Summers, *Public Sector Bargaining: Problems of Governmental Decision-Making,* 44 U. CIN. L. REV. 669 (1975).

32. One commentator has suggested that the lack of litigation during this period may indicate that the issue is more academic than real. Comment, *supra* note 20, at 141 n.43.

33. 431 U.S. 209 (1977).

34. MICH. COMP. LAWS ANN. § 423. 210(1)(c) (1978).

35. The complaint alleged that the union spent a substantial portion of the agency shop fees for social activities not available to nonmembers and for the support of various "economic, political, professional, scientific, and religious" activities to which the plaintiffs objected. 431 U.S. at 213.

36. Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 230 N.W.2d 322 (1975). The Supreme Court of Michigan denied review. 431 U.S. at 216.

37. 431 U.S. at 222.

38. *Id.* at 222-23 (citing the Douglas concurrence in *Street*). See notes 28 & 29 and

distribute the costs of fair representation.[39] Moreover, the same important government interests that justified interference with the rights of private workers were deemed to "presumptively support" impingement upon the associational freedoms of government employees.[40]

The Court agreed that the first amendment prohibited the use of compulsory fees for purely political or ideological purposes but rejected the plaintiff's assertion that, because public bargaining was by its very nature "political," *Hanson* precluded *any* forced use of fees.[41] The majority acknowledged that identifying activities essential to effective bargaining for which contributions may be compelled is much more difficult in the public sector than in the private sector. It further recognized that the process of reaching a collective bargaining agreement may require approval at several levels of government and that activities traditionally viewed as political—such as legislative appropriations and budget decisions—may thus become an integral part of the bargaining process. Although the Court suggested that union expenditures for these activities might be permissible, it declined to define a "dividing line."[42] The Court also expressly refused to rule on the propriety of expenditures for social or other activities that benefit only union members and are clearly unrelated to the representative function.[43]

Finally, the Court indicated that the remedy it had fashioned for private sector employees' rights in *Railway Clerks v. Allen*[44] was equally applicable in the public sector.[45] Under *Allen,* only those employees who object to political use of their dues are entitled to relief,[46] and a declaration of opposition to

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accompanying text *supra.*

39. 431 U.S. at 222-23.

40. *Id.* at 225.

41. *Id.* at 235-36.

42. *Id.* at 236. The case reached the Supreme Court after a judgment on the pleadings with no evidentiary record. Because neither party had briefed or argued the issue of which specific union activities could properly be considered germane to the bargaining process, the Court held only that the general allegations of the complaint, if proved, established a cause of action under the first and fourteenth amendments. *Id.* at 236-37.

43. *Id.* at 236 n.33. "Without greater specificity . . . and the benefit of adversary argument, we leave those questions . . . to the Michigan courts." *Id.*

44. 373 U.S. 113 (1963).

45. *See* 431 U.S. at 241-42.

46. This requirement was initially set forth in *Street,* 367 U.S. at 774.

any sort of ideological expenditure is sufficient.[47] Furthermore, because only the union possesses the necessary documentation, it has the burden of proving that compulsory dues have been allocated for permissible expenditures.[48] The Court in *Allen* then specified the appropriate remedy as, first, a partial refund of extracted fees in the same proportion that the union's political expenditures bore to its total outlays and, second, the reduction of future exactions by the same percentage.[49] The Court also found that the most desirable solution, in terms of economical judicial administration, would be the union's voluntary development of internal procedures that embody the enumerated features.[50]

IV. State Law Since *Abood*

A. *Absence of Statutory Authorization of Union Security*

Because no uniform federal legislation governs union security in the public sector,[51] the authority of public employers to enter into union security agreements depends entirely upon state law. In those states whose law is silent on the question of public sector bargaining, the majority view denies the existence of a com-

47. 373 U.S. at 118.

48. *Id.* at 122. To require identification of specific expenditures would force the employee either to relinquish his right to withhold his support from objectionable ideological causes or to relinquish his freedom to maintain his own beliefs without public disclosure. 431 U.S. at 241.

49. 373 U.S. at 122.

50. *Id.* at 122.

51. The National Labor Relations Act (NLRA) expressly excludes state and local government workers. Federal employees were guaranteed the right to refrain from union activity under President Kennedy's Executive Order. Exec. Order No. 10,988 § (1)(a) 3 C.F.R. 521 (1959-1963 compilation). In 1969, President Nixon revised the rules governing federal labor relations to make it clear that no form of union security could be negotiated: "nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money . . . except pursuant to a voluntary written authorization . . . ." Exec. Order No. 11,491, § 12(c) 3 C.F.R. 861 (1966-70 compilation) (1969).

Both the Postal Reorganization Act of 1970 and the Civil Service Reform Act of 1978 permit only voluntary checkoffs; however, once authorized, the dues deductions are irrevocable for the period of one year. 39 U.S.C. § 1205(a); 5 U.S.C. § 7115(a). Attempts to expand union security in the federal sector have been consistently defeated, due largely to the efforts of the National Right to Work Committee and conservative lobbies. See note 17 *supra*.

mon-law right to negotiate.[52] For various policy reasons,[53] many other states have enacted broad right-to-work guarantees either legislatively or by constitutional mandate.[54] All of these states expressly forbid compulsory union membership as a condition of employment, and several also prohibit the exaction of agency or service fees.[55] Application of these restraints to public and private employers proscribes the negotiation of union security provisions.[56]

A third group of states have bargaining laws that are silent on the subject of union security, and a different problem arises. Most public bargaining legislation defines the scope of negotiations in language similar to that of the National Labor Relations Act—"wages, hours, and other terms and conditions of employment."[57] Although this language is flexible enough to encompass all forms of union security, it is usually accompanied by a provision that either guarantees employees the right to refrain from

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52. *E.g.*, Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); Churchill v. S.A.D. No. 49 Teachers' Ass'n, 380 A.2d 186 (Me. 1977).

53. *See generally* T. HAGGARD, *supra* note 16, at 172-90.

54. See ALA. CODE §§ 25-7-30 to -36 (1975); ARIZ. CONST. amend. 34; ARIZ. REV. STAT. ANN. § 23-1301 to -1307 (1971); ARK. CONST. amend. 34; ARK. STAT. ANN. §§ 81-202 to -205 (1960); FLA. CONST. art. I, § 6; FLA. STAT. § 447.17 (Supp. 1979); GA. CODE ANN. §§ 54-901 to -909 (1974); IOWA REV. STAT. §§ 731.4, .5 (1979); KAN. CONST. art. 15, § 12; LA. REV. STAT. ANN. §§ 23:981 to 987 (West Supp. 1981); MISS. CONST. art. 7, § 198-A; MISS. CODE ANN. § 71-1-47 (1972); NEB. CONST. art. 15, §§ 13-15; NEB. REV. STAT. §§ 48-217 to -219 (1974); NEV. REV. STAT. §§ 613.230 to -300 (1979); N.C. GEN. STAT. §§ 95-78 to -84 (1965); N.D. CENT. CODE §§ 34-01-14, -08-02 (1980); S.C. CODE ANN. § 41-7-10 to 7-90 (1976); S.D. CONST. art. VI, § 2; S.D. CODIFIED LAWS ANN. §§ 60-8-3 to -8 (1978); TENN. CODE ANN. §§ 50-208 to -212 (1955); TEX. REV. CIV. STAT. ANN. arts. 5154 a, 5154 g, 5207 a (Vernon 1971); UTAH CODE ANN. §§ 34-34-1 to 17 (1974); VA. CODE §§ 40.1-58 to -69 (1981); WYO. STAT. §§ 27-7-108 to -115 (1977).

55. Statutory prohibitions exist in Alabama, Arkansas, Georgia, Iowa, Louisiana, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Utah, Virginia, Wyoming. ALA. CODE § 25-7-34 (1975); ARK. STAT. ANN. § 81-202 (1960); GA. CODE ANN. §§ 54-903 to -907 (1974); IOWA REV. STAT. §§ 731.4, .5 (1979); LA. REV. STAT. ANN. § 23: 983 (West Supp. 1981); MISS. CODE ANN. § 71-1-47(d) (1972); NEB. REV. STAT. § 48-217 (1974); N.C. GEN. STAT. § 95-82 (1965); S.C. CODE ANN. § 41-7-30(3) (1976); TENN. CODE. ANN. § 50-210 (1955); UTAH CODE ANN. § 34-34-10 (1974); VA. CODE §§ 40.1-62 (1981); WYO. STAT. § 27-7-111 (1977). The remaining states generally have prohibited agency fees by attorney general or judicial construction of their statutes. The power of states to create such restrictions under § 14(b) of the NLRA was acknowledged by the Supreme Court in Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963). *See* T. HAGGARD, *supra* note 16, at 173.

56. *See, e.g.*, Florida Educ. Ass'n v. Public Employees Relations Comm'n., 346 So.2d 551 (Fla. App. 1977); State Employees Ass'n v. Mills, 115 N.H. 473, 344 A.2d 6 (1974).

57. *E.g.*, VT. STAT. ANN. tit. 21, § 1722(4) (1959).

union participation[58] or forbids employers from coercing employees to exercise their organizational rights.[59] In states with such a provision, the prevailing view is that union security provisions violate the plain meaning of existing bargaining laws.[60]

Typical is the position of the Michigan Supreme Court in *Smigel v. Southgate Community School District*,[61] in which the majority noted that the legislature, in modeling the Michigan Public Employment Relations Act[62] after federal private-sector law, had deliberately omitted a provision permitting union shop agreements.[63] The court inferred from this omission a legislative intent to prohibit union security commitments in government employment relations. Comparable interpretations have been given to similar statutes in Maine[64] and California.[65] Courts in these states, focusing on express statutory authorization of union security for other employment categories,[66] have construed "right to refrain" language as prohibiting any exaction of dues or their equivalent as a condition of employment. Absence of express authorization, therefore, is generally dispositive of the issue.[67]

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58. *E.g.*, CONN. GEN. STAT. § 10-153a(a) (Supp. 1980); N.Y. CIV. SERV. LAW § 202 (McKinney 1973).

59. *E.g.*, MICH. COMP. LAWS ANN. § 423.210 (1978); MONT. REV. CODES ANN. § 39-31-401(1) (1979).

60. *See, e.g.*, City of Hayward v. United Pub. Employees, 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976); Farrigan v. Helsby, 42 A.D.2d 265, 346 N.Y.S.2d 39 (1973).

61. 388 Mich. 531, 202 N.W.2d 305 (1972).

62. MICH. COMP. LAWS ANN. § 423.210 (1978).

63. 388 Mich. at 539-43, 202 N.W.2d at 306-08.

64. *Churchill*, 380 A.2d at 186.

65. *City of Hayward*, 54 Cal. App. 3d 761, 126 Cal. Rptr. 710.

66. *Id.* at 767; 126 Cal. Rptr. at 713; *Churchill*, 380 A.2d at 189.

67. When the New York Legislature amended the Taylor Law to permit agency shop agreements, it expressly provided that the amendment would apply notwithstanding other provisions of law. This amendment included a "right to refrain" section that had been interpreted by the New York courts to preclude union security clauses. Note, *New York's Legislative Response to* Abood v. Detroit Board of Education: *Agency Shop and Public Employee Right to Freedom of Association*, 43 ALB. L. REV. 567, 577 n.70 (1979).

One unusual exception to the general rule is an early New Hampshire decision, Tremblay v. Berlin Police Union, 108 N.H. 416, 237 A.2d 668 (1968), which concerned a municipal police department that had entered into a union shop contract. The court upheld the agreement in the absence of express statutory approval. The determinative consideration appears to have been the court's failure to perceive any directly conflicting state laws or overriding contrary policies. *See id.* at 422-23, 237 A.2d at 672-73.

B. Express Statutory Authorization of Union Security

A minority of seventeen states now have laws affirmatively authorizing some type of union security provision for public employees.[68] The forms of union security authorized include union shops,[69] maintenance of membership agreements,[70] agency shops,[71] and service or fair share arrangements.[72] Only a few states provide automatic grants of union security to the certified exclusive representative.[73]

An important question raised by statutes authorizing union security is the impact of these laws on preexisting statutory rights. The majority view apparently holds that prior provisions are subordinate to the more recent bargaining laws. The Dela-

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68. ALASKA STAT. § 23.40.110(b) (1972) (all public employees); CAL. GOV'T CODE § 3540.1(i) (West 1980) (public school employees), § 3515 (West 1980) (state employees); CONN. GEN. STAT. § 5-280 (Supp. 1981) (state employees); HAWAII REV. STAT. § 89-4 (1976) (all public employees); KY. REV. STAT. § 345.050(1)(c) (1977) (firefighters); ME. REV. ANN. tit. 26, § 1027(3) (Supp. 1981) (university employees); MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981) (all public employees); MICH. COMP. LAWS ANN. § 423.210(1)(c) (1978) (all public employees); MINN. STAT. ANN. § 179.65(2) (West Supp. 1981) (all public employees); MONT. REV. CODES ANN. § 59-1605(1)(c) (Supp. 1977) (all public employees); N.J. STAT. ANN. § 34:13 A-5.5 (West Supp. 1981) (all public employees); N.Y. CIV. SERV. LAW § 208(3) (McKinney Supp. 1980) (state and municipal employees); OR. REV. STAT. § 243.672(c) (1979) (all public employees); PA. STAT. ANN. tit. 43, § 1101.705 (Purdon Supp. 1980) (all public employees); R.I. GEN. LAWS § 36-11-2 (Supp. 1980) (state employees); § 28-9.3-7 (Supp. 1980) (teachers); VT. STAT. ANN. tit. 21, § 1726(8) (1978) (municipal employees); WASH. REV. CODE ANN. § 41.56.122(A)(1) (Supp. 1981) (all public employees except teachers); WIS. STAT. § 111.70(2) (1977) (municipal employees), § 111.81(6) (1974) (state employees).

69. ALASKA STAT. § 23.40.110(b) (1972); KY. REV. STAT. § 345.050(1)(c) (1977); ME. REV. STAT. ANN. tit. 26, § 1027 (Supp. 1981); VT. STAT. ANN. tit. 21, § 1726(8) (1978); WASH. REV. CODE ANN. § 41.56.122(A)(1) (Supp. 1981).

70. CAL. GOV'T. CODE § 3540.1(i) (West 1980); PA. STAT. ANN. tit. 43, § 1101.705 (Purdon Supp. 1980).

71. CAL. GOV'T. CODE § 3540.1(i) (West 1980); MICH. COMP. LAWS ANN. § 423.210(1)(c) (1978); MONT. REV. CODES ANN. § 59-1605(1)(c) (Supp. 1977); N.J. STAT. ANN. § 34:13A-5.5 (West Supp. 1981); N.Y. CIV. SERV. LAW § 208(3) (McKinney Supp. 1980); R.I. GEN. LAWS § 36-11-2 (Supp. 1980).

72. CONN. GEN. STAT. § 5-280 (Supp. 1981); HAWAII REV. STAT. § 89-4 (1976); MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981); MINN. STAT. ANN. § 179.65(2) (West Supp. 1981); OR. REV. STAT. § 243.672(c) (1979); WIS. STAT. § 111.70(2) (1977).

73. CONN. GEN. STAT. § 5-280 (Supp. 1981), HAWAII REV. STAT. § 89-4 (1976), and MINN. STAT. ANN. § 179.65 (West Supp. 1981) mandate fair share agreement with the exclusive representative, while N.Y. CIV. SERV. LAW § 208(3) (McKinney Supp. 1980) and R.I. GEN. LAWS § 36-11-2 (Supp. 1980) require agency shops. MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981), WASH. REV. CODE ANN. § 41.06.150 (Supp. 1981), and WIS. STAT. § 111.80 (1974 & Supp. 1981) automatically grant fair share agreements after a separate majority vote of unit employees.

ware Supreme Court, for example, has held that a technician considered a permanent employee under a prior merit system was properly discharged for failing to comply with the union security terms of a collective bargaining contract.[74] The court inferred from the bargaining statute's enactment[75] a legislative intent that contracts entered into in accordance with that statute's provisions should supersede conflicting prior legislation.[76] A Michigan court similarly recognized a "positive repugnancy" between that state's teacher-tenure laws and its collective bargaining statute.[77]

A minority of jurisdictions attempt to harmonize the terms of conflicting enactments rather than assume a direct conflict.[78] These courts take the position that collective bargaining serves the ultimate goal of labor peace and that union security provisions enhance the ability of unions to engage in meaningful negotiations. Individual states vary widely, however, in their approach to ensuring union stability while at the same time protecting minority rights.

1. Requirements of Membership.—Statutory requirements of formal membership in the representative organization are relatively rare in the public sector. The Court in *Abood* noted that the constitutionality of membership requirement in addition to financial support has not yet been decided.[79] Formal membership in a union generally requires adherence to union rules of conduct, which may compel attendance at all regularly scheduled meetings or participation in majority-authorized strikes. A state requirement that employees assume these obligations as a condition of employment raises serious questions of impaired as-

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74. Peterson v. Hall, 105 L.R.R.M. (BNA) 3353 (Del. 1980).

75. DEL. CODE ANN. tit. 29, § 5949(c) (1979).

76. 105 L.R.R.M. at 3355.

77. Detroit Bd. of Educ. v. Parks, 98 Mich. App. 22, 296 N.W.2d 815 (1980).

78. One Oregon decision, Carlson v. City of Portland, 45 Or. App. 439, 608 P.2d 1198 (1980), construed the "just cause" language in a city charter to include all rules and regulations reasonably related to the improvement of public services. Rules created pursuant to a nondiscriminatory collective bargaining contract that were not in conflict with other state laws were therefore presumed to be reasonable and enforceable. *Id.* at 448, 608 P.2d at 1202. The Pennsylvania Supreme Court, in an attempt to harmonize its statutes, simply stated that a union security provision allowing discharge for nonpayment of dues created an exception to the Public School Code. Dauphin County Teachers Ass'n v. School Bd., 483 Pa. 604, 398 A.2d 168 (1978). *But see* 1977 Op. Calif. Att'y Gen. No. CV 77/56 (cited in 742 GOV'T. EMPL. REL. REP. (BNA) 13 (1977)).

79. 431 U.S. at 217.

sociational freedom.[80]

The membership terms in most statutory provisions have not been interpreted by the courts. The state of Washington's civil service law, however, which expressly permits the negotiation of a union shop,[81] has been rather tortuously construed as precluding any requirement of formal association with a representative organization. The Washington Supreme Court has held that, because membership under the statute extends only to the payment of dues and *not* to the payment of any other fees, the legislature must have contemplated only an agency shop arrangement.[82] The court noted that the major advantage of the agency shop is that it requires a sharing of the cost of exclusive representation but allows nonmembers to refrain from participation in union activities they oppose.[83] Citing *Abood,* the majority pointed out that the required relationship did not infringe on first amendment rights because it was not membership in the usual sense but "rather [was] akin to a buyer-seller or debtor-creditor relationship for collective bargaining services rendered . . . ."[84] Although the Washington court's statutory construction seems strained, it exemplifies the movement of modern jurisdictions away from the associational restrictions inherent in a

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80. *See* Blair, *supra* note 4, at 197.

81. WASH. REV. CODE ANN. § 41.06.150(12) (Supp. 1981) provides:

> That for purposes of this clause membership in the certified exclusive bargaining representative shall be satisfied by the payment of monthly or other periodic dues and shall not require payment of initiation, reinstatement or any other fees or fines and shall include full and complete membership rights: and provided further, that in order to safeguard the right of non-association . . . such public employee shall pay to the union, for purposes within the program of the union as designated by such employee that would be in harmony with his individual conscience, an amount of money equivalent to regular union dues minus any included monthly premiums for union sponsored insurance programs, and such employee shall not be a member of the union but shall be entitled to all the representation rights of a union member.

82. Association of Capitol Powerhouse Eng'rs. v. State, 89 Wash. 2d 177, 187, 570 P.2d 1042, 1048 (1977).

83. *Id.* at 180-81, 570 P.2d at 1044 (quoting Zwerdling, *supra* note 2, at 1007-08).

84. *Id.* at 187, 570 P.2d at 1048. The court also noted that employees who objected to union membership on religious grounds were allowed to deduct the cost of "members only" benefits. *Id.* at 181, 570 P.2d at 1045. The court failed to explain, however, why religious objectors were also specifically exempted from membership in the union, while the limiting language on fees paid by other employees contained no such provision. One commentator has pointed out that this difference "intimates" legislative contemplation of formal membership for the majority of workers. *See* T. HAGGARD, *supra* note 16, at 219.

union shop toward the more equitable agency shop or service fee arrangements.

2. Religious Exemptions.—Although Washington and several other states provide some form of express statutory protection for the rights of dissident workers whose objections are based on religious grounds,[85] the scope of that protection is far from clear. Most of these statutes require that the exemption be based either on membership in a bona fide religious sect[86] or on bona fide religious convictions founded on the doctrine of a formal sect.[87] Little judicial discussion of these terms has occurred, but several courts have narrowly construed the statutory exemptions. For example, a recent Washington decision[88] held that the state's religious exemption applied only to members of actual religious bodies or churches and not to individuals asserting purely personal beliefs.[89] In a similar Oregon case,[90] a school teacher argued that deeply held personal beliefs[91] entitled her to both statutory and constitutional protection. The Oregon Court of Appeals agreed with the union that the statute required a letter from the employee's pastor reciting the length of her church membership and confirming that such membership precluded union association. The court held that, even assuming the existence of religious beliefs entitled to constitutional protection, the employee had failed to demonstrate a nexus between those beliefs and her unwillingness to join or support the union.[92]

The absence of an applicable state law may not preclude

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85. ALASKA STAT. § 23.40.110(b) (1972); CAL. GOV'T CODE § 3540.1(i) (West 1980); MONT. REV. CODES ANN. § 59-1605(1)(c) (Supp. 1977); OR. REV. STAT. § 243.672(c) (1979); VT. STAT. ANN. tit. 21, § 1726(8) (1978). The NLRA has recently been amended to provide for similar protection.

86. *E.g.*, MONT. REV. CODES ANN. § 39-31-204(1) (1979).

87. *E.g.*, ALASKA STAT. § 23.40.225 (Supp. 1980). *See also* VT. STAT. ANN. tit. 21, § 1726b(11) (1978) which, in addition to the general antidiscrimination clause, prohibits a union from seeking the discharge of an employee who has refused membership for reasons of religious belief. No alternative form of payment is provided in the statute.

88. Grant v. Spellman, [1980], 854 GOV'T EMPL. REL. REP. (BNA) 16, 16-17 (Wash. Super. Ct., Feb. 6, 1980).

89. *Id.* at 17.

90. Gorham v. Roseburg Educ. Ass'n, 39 Or. App. 231, 592 P.2d 228 (1979).

91. Plaintiff asserted the following personal tenets: faith in human potentialities; a commitment to further the ethical life of mankind; faith in the democratic process and its underlying ethical principles; and a commitment to the process of critical thinking and methods of free and honest inquiry. *Id.* at 234, 592 P.2d at 229.

92. *Id.* at 236, 592 P.2d at 230-31.

religious challenges to the use of compulsory fees on other grounds. A Michigan circuit court sustained one employee's attack under Title VII of the Civil Rights Act.[93] The plaintiff sought a declaratory judgment allowing her to pay the equivalent of union dues to a charitable organization. Dismissing as groundless speculation the union's fears that this alternative would lead to a mass exodus of its membership, the court held that, absent a showing of hardship on either the employer or the union, federal law required accommodation of all deeply held convictions, which the court described as follows:

> One need not be a member of a recognized religious organization nor is there any requirement that the religious objection be a recognized tenet of any particular church or religious organization. It need not be logical or subject to analyzation, nor is there any requirement that the belief be one of long standing. It only need be sincere.[94]

3. Limitations on Expenditures.—Once a jurisdiction has determined which employees are covered by union security provisions, it must then decide which expenditures may properly be made from exacted fees. Six states[95] limit the amount of the union service fee to an employee's pro rata share of the cost of traditional bargaining activities: collective negotiations, contract administration, and grievance adjustment. This limitation is the least intensive and probably most reasonable implementation of the "free rider" rationale "that each employee within the bargaining unit [should] share in defraying the costs of the representation . . . that the bargaining agent is required to provide without discrimination."[96]

In identifying expenses that appropriately fall within the cost of representation, some tribunals do not question expenses deemed to benefit all employees.[97] For example, the Minnesota Public Employment Relations Board has said:

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93. School Dist. of Grand Haven v. Grand Haven Ass'n of Educ. Secretaries, [1980] 813 GOV'T EMPL. REL. REP. (BNA) 46 (Mich. Cir. Ct. May 7, 1979). Plaintiffs cause of action was based on 42 U.S.C. § 2000(j) (1976).

94. 813 GOV'T EMPL. REL. REP. at 46. The court added that the offer to pay another organization refuted any "free rider" challenges. *Id.* at 47.

95. See note 72 *supra.*

96. Opinion of the Justices, 401 A.2d 135, 147 (Me. 1979).

97. *In re* Unfair Share Employees Org., [1980] 751 GOV'T EMPL. REL. REP. (BNA) 41 (Minn. Pub. Empl. Rel. Bd. Jan. 18, 1978).

> We view the words "negotiate and administrate an agreement" as a term of art which generally encompasses the entire collective bargaining and representational activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and "tolling up" processes related to a negotiated contract, and administering the same agreement after its consummation. It virtually amounts to a residuum of the union's total activities after the "union membership benefits" have been isolated and removed. This is the fair share of the collective bargaining costs to be reflected in the service fee.[98]

If the boundaries of permissible costs seem cloudy, those of prohibited costs are even less clear. Although a few states have enacted provisions that proscribe the use of fees for political or ideological purposes,[99] most states have done little to resolve the dilemma left by *Abood*. Given the inherently political nature of public sector bargaining, where should the line be drawn?[100] Only three states have incorporated explicit prohibitions in their statutory schemes. Montana, in the most abbreviated provision, only forbids contributions to political candidates or parties at the state and local levels.[101] New Jersey's broader statute, enacted in 1980,[102] proscribes funding of any activities or causes of a "partisan political or ideological nature, only incidentally related to the terms and conditions of employment."[103] Nevertheless, in express recognition of the unique nature of public employment, the statute goes on to state that amounts refunded to objecting employees should not include the costs of lobbying ac-

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98. *Id.* at 43 (citing Hawaii Pub. Empl. Rel. Bd. No. 72 (1976)).

99. MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981); MONT. REV. CODES ANN. § 39-31-402(3) (1979); N.J. STAT. ANN. § 34:13A-5.5(4)(c) (West Supp. 1980); N.Y. CIV. SERV. LAW § 208(3)(a), (b) (McKinney Supp. 1980).

100. For example, the New York statute simply requires a refund for expenditures "in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment." N.Y. CIV. SERV. LAW § 208(3)(a), (b) (McKinney Supp. 1980). Interestingly, the Taylor Law was amended with the *Abood* decision in mind. In view of the legislature's express desire to protect individual freedom of association, it is strange that the provision was not more clearly worded. *See* Note, *supra* note 67, at 575 n.56.

101. MONT. REV. CODES ANN. § 59-1605(1)(c) (Supp. 1977). This would appear much too narrow for the *Street* standard, which would prohibit the financing of any particular candidate. See note 28 *supra*.

102. N.J. STAT. ANN. § 34:13A-5.2 (West Supp. 1981).

103. *Id.*

tivities "designed to foster policy goals in collective negotiations and contract administration" or to secure additional employment advantages beyond those already gained through negotiations with the public employer.[104] The 1977 amendment to the Massachusetts bargaining statute contains the most comprehensive itemization of unacceptable political expenditures.[105] Unions may not use objector's fees for (1) contributions to political parties, candidates, or their committees; (2) publication of organizational preferences for those parties or candidates; (3) efforts to enact, defeat, repeal, or amend legislation unrelated to employment conditions or to the "welfare or working environment" of represented employees; (4) contributions to charitable, religious, or ideological causes not germane to representation; and (5) benefits available only to union members.[106]

Most jurisdictions lack such detailed legislative guidance and leave the determination of legitimate expenditures to administrative agencies charged with supervising the public bargaining process. In Hawaii, unions are granted automatic service fee deductions after certification but must first justify the amount of those fees in an administrative hearing.[107] The Hawaii Public Employment Relations Board has taken a pragmatic view of the political role public unions must play to maintain their existence by recognizing that legislative lobbying expenses are a significant and inevitable cost of representation.[108] Instead of viewing bargaining as limited to across-the-table negotiations with the executive branch, the Board takes the position that "the legislature provides the wherewithal to fund all agreements and retains control over working conditions . . . [and] has

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104. *Id.*

105. MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981).

106. *Id.* The list reveals the dangers of specificity. Perhaps in an attempt to overcome the ambiguities of the statute, the Massachusetts Public Employee Relations Board regulations enumerate additional activities that cannot be funded with compulsory dues: (1) social and recreational activities, (2) fines, penalties, or damages arising from the unlawful acts of the bargaining agent or its officers, (3) educational activities that are not germane to collective bargaining, (4) medical insurance, retirement benefits, or similar programs for members only, and (5) organizational costs for nonunit employees. Mass. Pub. Empl. Rel. Bd. Regs., *cited in* J. GRODIN, D. WOLLETT, & R. ALLEYNE, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 334 (1979).

107. HAWAII REV. STAT. § 89-4(a) (1976).

108. Hawaii State Teachers' Ass'n, [1978] 803 GOV'T EMPL. REL. REP. (BNA) 21-22 (Hawaii Pub. Empl. Rel. Bd. Nov. 27, 1978).

merely delegated to the executive certain bargaining authority . . . . It is the legislature who determines when the fruits of negotiations will ripen."[109]

A few states have attempted to resolve another issue left unsettled by *Abood:* the propriety of nonpolitical expenses that either do not relate to collective bargaining or that pertain exclusively to membership benefits.[110] New York has ordered the return of insurance premiums to agency payors excluded from coverage under the policies those premiums support.[111] Hawaii has disallowed numerous expenses, including those for newspaper space for publicized recreational activities or ideological issues,[112] newspaper subscriptions for nonunit members such as retirees,[113] and union staff salary time attributable to nongermane activities.[114] The legitimacy of costs allocated to strike funds appears to depend upon the legality of that mechanism in the particular state.[115]

4. Rebate Procedures.—Deciding what constitutes a proper rebate procedure for challenged expenditures requires a balanc-

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109. *Id.* The Board acknowledged that union fees should not include the costs of lobbying and promoting broad social issues. *Id.*

110. In an unusual private sector case on this same issue, Ellis v. Railway Clerks, [1976] 91 L.R.R.M. (BNA) 2339 (S.D. Cal. 1976), the district court found that the union had breached its duty of fair representation by using agency shop fees and union dues for noncollective bargaining purposes. Relying on the *Street* decision, the court found the following expenditures illegal: (1) recreational or social functions not attended by management; (2) the death benefit program; (3) organizational and recognitional activities directed at nonunit employees; (4) a publication primarily devoted to nongermane coverage; (5) contributions to charities and ideological causes: (6) insurance, medical, and legal service programs for members only; (7) union conventions; (8) the defense or prosecution of any "non-germane" litigation; and (9) support of or opposition to legislative measures and executive orders, policies, and decisions. *Id.* at 2342. In effect, the court construed *Street* to permit no more than a fair share use of compulsory fees over the objections of the payors.

111. *In re* United University Professions, Pub. Empl. Rel. Bd. No. U-4457, *reported at* [1981] 900 GOV'T EMPL. REL. REP. (BNA) 20 (1980).

112. Hawaii Org. of Police Officers, [1980] 814 GOV'T EMPL. REL. REP. (BNA) 24 (Hawaii Pub. Empl. Rel. Bd. Apr. 17, 1980).

113. Hawaii State Teachers' Ass'n, [1979] 803 GOV'T EMPL. REL. REP. (BNA) 21 (Hawaii Pub. Empl. Rel. Bd. Feb. 21, 1979).

114. *Id.*

115. Hawaii allows these costs. *In re* Hawaii Gov't Empl. Ass'n, [1979] 833 GOV'T EMPL. REL. REP. (BNA) 18 (Hawaii Pub. Empl. Rel. Bd. Aug. 31, 1979). Michigan has sustained attacks on such contributions by finding them tantamount to approval of activities in direct contravention of its laws. Male v. Grand Rapids Educ. Ass'n, 98 Mich. App. 742, 295 N.W.2d 918 (1980).

ing of conflicting interests. The individual employee's constitutional rights must be weighed against policies that encourage union stability and promote common labor peace. Despite the constitutional implications, courts seek remedies that can be successfully implemented by the parties themselves without continuous judicial supervision.[116]

At least one state, Hawaii, requires justification of compulsory service fees before their levy.[117] The majority of states, however, adhere to the constitutional standard articulated in *Street*[118] and adopted by the Court in *Abood*:[119] the opposing employee must make an affirmative objection before dissent will be assumed.[120] Once a cost has been protested as impermissible, the burden shifts to the union to establish the legitimacy of its expenditures.[121] Although the Court in *Abood* suggested that the union could first determine which of its expenditures were political and then ascertain the ratio of these costs to its total outlays and reduce employee fees by a like percentage,[122] most courts require the union to document and justify individual expenses, including those spent on permissible uses.[123]

A few courts have gone even further in protecting associational freedoms by forcing unions to place all challenged funds

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116. These goals were articulated by the court in Ball v. City of Detroit, 84 Mich. App. 383, 393, 269 N.W.2d 607, 611 (1978).

117. See notes 107-109 *supra.*

118. *Street,* 367 U.S. at 774.

119. *Abood,* 431 U.S. at 239.

120. *E.g.,* Opinion of the Justices, 401 A.2d 135 (Me. 1979); Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978); Warner v. Board of Educ., 99 Misc. 2d 251, 415 N.Y.S.2d 939 (1979).

121. 431 U.S. at 239.

122. *Id.* at 240.

123. *E.g.,* California School Empl. Ass'n v. Bowen, [1977-78] PUB. BARG. C. (CCH) ¶ 36,448; Warner v. Board of Educ., 99 Misc. 2d 251, 415 N.Y.S.2d 939 (1979). For a discussion of the different administrative burdens of each procedure, see Comment, *supra* note 20, at 159. The courts in private sector cases have been particularly stringent on the unions in this regard. In Beck v. Communications Workers, 106 L.R.R.M. (BNA) 2323 (D. Md. 1981), a special master recommended that a union be permanently enjoined from collecting more than 19% of future agency fees and that it make restitution of 81% of all past fees. The master found that the union had failed to meet its burden of proof in justifying most expenditures as contract-related because its records did not specifically indicate that portion of the fees allocated to chargeable expenses. *Id.* at 2325. The court in Ellis v. Railway Clerks, [1980] 91 L.R.R.M. (BNA) 2339 (S.D. Cal. 1980), also required a union to document affirmatively all expenditures, including the time and expenses of all affiliates.

in escrow pending the outcome of a judicial inquiry.[124] Given the potential duration of most litigation, the detrimental impact of this requirement on the union's budget could be devastating. At least one court has therefore held that the governmental interest in union stability outweighs the individual rights concerned.[125]

To avoid constitutional attacks, many unions have voluntarily developed internal procedures to facilitate the appeals of dissenters.[126] Some states require that they do so to become eligible for compulsory agency or service fees.[127] The procedures themselves, however, have often been challenged either because their lengthy or insurmountable appeal mechanisms substantially obstruct the resolution of disputes or because otherwise satisfactory procedures have not been applied in a fair and impartial manner.[128]

5. Other Minority Protections.—Some states have devised alternatives to procedural challenges as a means of ensuring associational freedoms. Three states have laws requiring separate ratification of union security clauses,[129] and two of them also permit separate rescission of these clauses.[130] The vote apparently may be initiated by the public employer or another union. Wisconsin permits minority checkoffs despite the granting of a fair share agreement to the exclusive representative.[131] Courts or

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124. Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978); Minnesota Fed'n of Teachers v. Minnesota Educ. Ass'n, 257 N.W.2d 822 (Minn. 1977).

125. Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 265 N.W.2d 559 (1978). Given the relatively small amount of each individual's contribution, it would be difficult to show irreparable harm that would justify an injunction.

126. For a discussion of such procedures, see Comment, *supra* note 20, at n.147.

127. MINN. STAT. ANN. § 179.65 (West Supp. 1981); N.J. STAT. ANN. § 34:13A-5.2 (West Supp. 1981); N.Y. CIV. SERV. LAW § 201(2) (McKinney Supp. 1980).

128. Although courts have upheld certain requirements as reasonable (protest by certified mail, two-week time period within which to protest), they also have required unions to provide an "impartial tribunal" sufficient to protect due process rights. 99 Misc. 2d at 257, 415 N.Y.S.2d at 945. *But see* Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers, 307 Minn. 96, 239 N.W.2d 437 (1976), in which the court held that a statute, by implicitly ensuring the right to notice of the service fees amount and the right to a hearing on disputed portions, satisfied all due process requirements. *Id.* at 102, 239 N.W.2d at 445. Because the United States Supreme Court has vacated the Minnesota order and remanded the case, the issue is not yet settled. *See* Threlkeld v. Robbinsdale Fed'n. Teachers, 429 U.S. 880 (1976).

129. CAL. GOV'T CODE § 3546 (West 1980); MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981); WIS. STAT. ANN. § 111.80(2) (1974).

130. See statutes in note 119 *supra.*

131. Milwaukee Fed'n of Teachers v. WERC, 83 Wis. 2d 583, 266 N.W.2d 314

administrative agencies in other states have strictly construed against the union either statutory language[132] or terms of a particular collective bargaining contract.[133]

V. CONCLUSION

The great majority of states either legislatively or judicially prohibit compulsory unionism in the public sector as an unreasonable exercise of governmental power and an unwarranted intrusion into the associational freedoms of both employers and their employees. Nevertheless, approximately one-third of the states, finding that at least some forms of union security serve the public interest, have expressly adopted the opposite policy. Any compulsory mechanism for the distribution of representation costs, however, necessarily impinges to some degree on the associational freedom of the minority of employees who object to either the agency relationship itself or the manner in which it is conducted.

The Supreme Court held in *Abood* that such a compulsion is constitutionally permissible if the rights of individuals to be free from excessive sovereign coercion are balanced against the governmental policies that give rise to the coercion. Certain forms of union security seem to produce greater individual coercion than any corresponding benefit to the public interest warrants. Requirements of actual membership or of financial support for activities beyond the scope of collective bargaining appear to compel governmentally a kind of association normally prohibited by the first amendment.

Even when the employee's support is limited to a "fair share" of the costs of bargaining, contract administration, and grievance adjustment, the scope of permissible expenditures has eluded precise definition. The Supreme Court in *Abood* found that the use of exacted fees or dues for political and ideological purposes constituted an impermissible infringement of constitutional rights but failed to identify the boundaries of prohibited political uses. These boundaries are of paramount importance in

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(1978).

132. City of Chicopee, [1980] 901 GOV'T EMPL. REL. REP. (BNA) 21.

133. Dauphin City Tech. School Educ. Ass'n v. School Bd., 483 Pa. 604, 398 A.2d 168 (1978) (although statute permitted discharge for nonpayment of dues, failure expressly to include such a remedy in the contract held to preclude its use).

the public sector where government not only defines the scope of collective bargaining but also fashions the rules for its conduct and ultimately determines who may participate.

Many courts have responded to this dilemma by attempting to define more clearly the forbidden sphere of political activity. Partisan support or the promotion of broad social policy positions only marginally related to employment should be proscribed. Legislative lobbying and other political activities, however, which may result in direct benefit to the represented employees, pose a more difficult problem. Employees should be adequately protected if the use of their fees is limited to political lobbying or activities whose immediate object is demonstrably within the authorized or permissible scope of bargaining.

A growing trend appears to limit service fee uses to truly representational purposes. To achieve this end, courts have, almost without exception, forced unions to justify their expenditures in considerable detail and awarded refunds for failure to do so. They also have uniformly required the existence of accessible and nondiscriminatory procedures to facilitate employee challenges to the use of their money.

The struggle to define the limits of union security in the public sector has, for many, symbolized the struggle to define the proper limitation on governmental control of the individual. The line drawn between acceptable and excessive government coercion depends upon a delicate balancing of public and private interests. The power of the government to draw that line has traditionally been restrained by the constitutional privileges and freedoms accorded individuals. So long as union security agreements require no more than the limited financial support of actual union representation, however, any resulting associational infringement does not rise to a constitutional level and is warranted by the public interest in labor stability.

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