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### The Evolving Law of Agency Shop in the Public Sector

Martin H. Malin

*IIT Chicago-Kent College of Law*, [mmalin@kentlaw.iit.edu](mailto:mmalin@kentlaw.iit.edu)

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# The Evolving Law of Agency Shop in the Public Sector

MARTIN H. MALIN\*

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## I. INTRODUCTION

Unions and employers frequently provide in their collective bargaining agreements that employees who are members of the bargaining unit but are not members of the union must pay the union a fee not to exceed the regular periodic dues charged to union members. These fees, frequently called agency shop or fair share fees, are imposed on nonmembers to prevent them from receiving the benefits of union representation without having to pay for them.<sup>1</sup> Mandating agency shop fees as a condition of public employment implicates the first amendment rights of the fee payers.

The Supreme Court has considered the relationship between agency shop fees and the first amendment on several occasions. The Court's decisions consistently distinguish between the collection and the expenditure of agency shop fees. Fee

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\* Professor of Law, IIT Chicago-Kent College of Law. B.A. 1973, Michigan State University; J.D. 1976, George Washington University. I wish to thank my colleagues Sheldon Nahmod and Margaret Stewart for their helpful comments and Sheryl Dworkin and Kathleen Reilly for their research assistance. Funding for this article was provided by the Marshall Ewell Research Fund at IIT Chicago-Kent College of Law.

1. A union, once selected by a majority of the employees in a bargaining unit, becomes the exclusive bargaining representative for all employees in the unit. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). The union comes under a duty to represent those employees fairly, regardless of whether they are union members. *See, e.g.,* Del Cassal v. Eastern Airlines, 634 F.2d 295 (5th Cir.), cert. denied, 454 U.S. 892 (1981); Jones v. Trans World Airlines, 495 F.2d 790 (2d Cir. 1974). Union members, through their dues, thus are forced to subsidize the costs of representing nonmembers employed in the bargaining unit. The prevention of such "free riding" by nonmember employees is the generally accepted justification for agency shop and similar fees. *See, e.g.,* Oil Workers v. Mobil Oil Corp., 426 U.S. 407, 415-16 (1976); International Ass'n of Machinists v. Street, 367 U.S. 740, 761 (1961); NLRB v. General Motors Corp., 373 U.S. 734 (1963).

collection does not infringe on the fee payers' first amendment rights;<sup>2</sup> neither does the expenditure of the fee in support of the union's role as exclusive bargaining representative.<sup>3</sup> Expenditure of agency shop fees on political or ideological matters that are unrelated to collective bargaining and are opposed by the fee payer does, however, unconstitutionally infringe the fee payer's first amendment rights.<sup>4</sup> The union need not presume fee payer dissent to these political and ideological expenditures. It may require fee payers to voice their dissent,<sup>5</sup> although such a requirement must be limited to a general statement of objection.<sup>6</sup>

The Supreme Court's decisions also require unions to adopt procedures that are adequate to safeguard objecting fee payers' first amendment rights. Unions must give potential objectors sufficient notice to enable them to appraise the impact of the fee on their first amendment rights.<sup>7</sup> Unions must employ whatever means are necessary (such as advanced reductions and escrows) to ensure that they will not use objectors' fees, even temporarily, for nonchargeable expenditures.<sup>8</sup> They must afford objectors a reasonably prompt hearing before a neutral decisionmaker at which the union bears the burden of proving its entitlement to the fee.<sup>9</sup> The union, however, need not establish the fee with exacting precision. For example, it may base the fee for a given fiscal year on the expenditures it made in the preceding fiscal year.<sup>10</sup>

Although the Court has developed a wide body of agency shop law, it has not clearly articulated the manner in which expenditure of objectors' fees violates the first amendment. At times the Court has indicated that the fees infringe on objectors' rights to refrain from political and ideological activity, thus implicating the first amendment's free speech clause, while at other times it has indicated that the fees infringe on objectors' first amendment right to refrain from associating with the union. The Court's failure to define precisely the nature of the first amendment rights at issue has left unions, fee payers and lower courts with little guidance to resolve several important issues in agency fee administration. These issues include: 1) what standard should be applied to determine whether particular expenditures are chargeable to objectors; 2) what role the objection plays in agency fee administration; 3) what type of notice the union must give to objectors; and 4) what role is played by the neutral decisionmaker who presides over a fee objection hearing.

This Article attempts to resolve these issues. It begins by demonstrating the Supreme Court's failure to articulate a consistent rationale for constitutional limitations on agency shop fees. It then offers such a rationale and applies the rationale to each of the issues listed above.

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2. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 238 (1956).

3. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977).

4. *Id.* at 235-36.

5. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

6. This follows from the reasoning of the Court that the first amendment right to speak entails a concomitant right to remain silent; requiring a detailed objection would require the objector to speak in violation of his or her first amendment rights. *See infra*, notes 56-63 and accompanying text.

7. *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 303 (1986).

8. *Id.* at 304, 309-10.

9. *Id.* at 307.

10. *Id.* at 307, n. 18.

## II. THE SUPREME COURT AND AGENCY SHOP: TOWARDS A COHERENT VIEW OF THE CONSTITUTIONAL RESTRICTIONS ON UNION FEES AND EXPENDITURES

### A. *The Early RLA Cases*

The Supreme Court's initial confrontations with constitutional challenges to agency shop fees arose in the private sector under the Railway Labor Act (RLA).<sup>11</sup> In *Railway Employees Department v. Hanson*,<sup>12</sup> the Court sustained the constitutionality of a union shop agreement authorized by the RLA. The Court first found state action sufficient to subject the provision of a contract between a private union and a private company to constitutional scrutiny. The requisite state action arose from the RLA's preemption of state statutes that prohibited agency fee agreements.<sup>13</sup>

The Court then considered and rejected the fee payers' arguments that the collective bargaining agreement violated their freedom of association by compelling them to subsidize a union that engaged in political activities. The Court declared flatly that compelled financial support of the exclusive bargaining representative was not tantamount to enforced ideological conformity and did not violate the first amendment.<sup>14</sup> It left open the constitutionality of expenditure of the fees on political causes over the fee payer's objection.<sup>15</sup>

In *International Association of Machinists v. Street*,<sup>16</sup> another case under the RLA, the Court faced the issue that was reserved in *Hanson*. The Court recognized that expenditure of the fee on political causes could violate the fee payers' rights of free expression. It avoided the constitutional issue, however, by interpreting the RLA to prohibit unions from spending fees over the fee payer's objection on political activity unrelated to collective bargaining.<sup>17</sup>

### B. The Ambiguity of Abood

The Supreme Court first addressed the constitutionality of the agency shop in the public sector in *Abood v. Detroit Board of Education*.<sup>18</sup> The Detroit Board of Education and the Detroit Federation of Teachers agreed to an agency shop and the Federation assessed nonmembers a fee equal to regular union dues.<sup>19</sup> Some of the fee was contributed to political causes unrelated to collective bargaining.<sup>20</sup> Failure to pay

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11. 45 U.S.C. § 152 Eleventh (1982).

12. 351 U.S. 225 (1956).

13. *Id.* at 232; see *Crawford v. Airline Pilots Ass'n*, 870 F.2d 155, 160 (4th Cir. 1989) (rejecting union's argument that subsequent Supreme Court decisions had overruled *sub silentio* the finding of state action in *Hanson*).

14. *Hanson*, 351 U.S. at 231.

15. *Id.*

16. 367 U.S. 740 (1961).

17. *Id.* at 770. The Court later commented that this interpretation was "not without its difficulties." *Abood v. Bd. of Educ.*, 431 U.S. 209, 232 (1977). However, in *Communication Workers v. Beck*, 108 S.Ct. 2641 (1988), the Court extended its interpretation to section 8(a)(3) of the National Labor Relations Act, (codified as amended at 29 U.S.C. § 158(a)(3)), even though the NLRA does not preempt state laws which prohibit union security agreements.

18. 431 U.S. 209 (1977).

19. *Id.* at 212.

20. *Id.* at 213.

the fee could result in discharge from employment.<sup>21</sup> Several teachers who were not Federation members sued, alleging that the exaction of such a fee violated the first and fourteenth amendments of the Constitution.

The Court first faced the issue whether the exaction of any fee to support the exclusive bargaining representative was constitutional. Justice Stewart, writing for the majority, observed that employees might oppose on moral or ideological grounds positions taken by the union in collective bargaining and that, accordingly, a compelled agency shop fee "might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas or to refrain from doing so."<sup>22</sup> He agreed with the *Hanson* Court that such interference is constitutionally justified by the contribution of the agency shop to stable labor relations.<sup>23</sup> With respect to agency shop fees expended on political or ideological activities unrelated to collective bargaining, the justification evaporated and the exaction of such fees was held to be unconstitutional.<sup>24</sup>

Thus, *Abood* adopted the *Hanson-Street* distinction between permissible agency shop fees for collective bargaining expenditures and impermissible agency shop fees for political expenditures that are unrelated to collective bargaining, and the Court in *Abood* applied the distinction to the public sector in the context of first amendment issues. Justice Stewart's opinion, however, injected considerable ambiguity regarding the rationale for this distinction. The Court in *Hanson* rejected the argument that an agency shop fee necessarily infringes on first amendment rights of free association, and the Court in *Street* focused on the infringement on objecting fee payers' rights of free expression under the first amendment. Justice Stewart's language in *Abood*, however, suggests that any agency fee infringes on fee payers' freedom of association but, to the extent unions spend the fees on collective bargaining activities, the infringement is constitutionally justified by a compelling state interest in stable labor relations.<sup>25</sup>

Many courts and commentators have read Justice Stewart's opinion in this manner. In their view, the line between what expenditures can and cannot be charged constitutionally turns on the union's ability to trigger the state's compelling interest

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21. *Id.* at 212.

22. *Id.* at 222.

23. *Id.* at 226-27.

24. *Id.* at 234-36.

25. Justice Stewart wrote:

To compel employees financially to support their collective-bargaining representative has an impact upon their first amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive bargaining representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with the union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

*Id.* at 222.

in stable labor relations through the relationship of the expenditures to the union's role as exclusive bargaining representative.<sup>26</sup>

Although purporting to follow the reasoning of *Abood*, this approach to agency fees is inconsistent with Justice Stewart's analysis in the case. It also is inconsistent with the Court's application of *Abood* in subsequent agency fee cases.

If a compelled agency shop fee, regardless of its use, infringes on the fee payer's first amendment freedom of association, then a court can sustain the fee's constitutionality only if it can say, after exacting scrutiny, that the state's interest in imposing the fee is compelling.<sup>27</sup> Furthermore, the fee must be narrowly tailored so that the infringement of the objectors' rights is no greater than that which is necessary to advance the state's compelling interest.<sup>28</sup>

Justice Stewart did not subject the agency shop fee to this type of analysis. Assuming that the state has a compelling interest in stable labor relations,<sup>29</sup> Justice Stewart's scrutiny of the relationship between that interest and the agency shop can hardly be described as exacting. For example, Justice Stewart offered no analysis comparing the relative stability of labor relations within states that allow the agency shop against states that ban it. Such a comparison should have been feasible in both the private and public sectors.

Although the National Labor Relations Act expressly authorizes the agency shop and similar arrangements in private employment, it also permits states to ban such agreements within their jurisdictions.<sup>30</sup> Many states have enacted such prohibitions.<sup>31</sup>

26. See, e.g., *Hudson v. Chicago Teachers Union, Local 1*, 743 F.2d 1187, 1193-94 (7th Cir. 1984), *aff'd on other grounds*, 475 U.S. 292 (1986); *Smith v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1, 11-13, 248 Cal. Rptr. 263, 271 (1988); *In re Amendment to Integration Rule of the Fla. Bar*, 439 So.2d 213 (Fla. 1983); *Falk v. State Bar of Mich.*, 411 Mich. 63, 105, 305 N.W.2d 201, 212 (1981) (plurality opinion), *later op.*, 418 Mich. 270, 342 N.W.2d 504 (1983), *appeal dismissed*, 469 U.S. 925 (1984); *id.* at 149, 305 N.W.2d at 233 (Williams, J., dissenting); *In re Bd. of Educ. of Boonton*, 99 N.J. 523, 546, 494 A.2d 279, 291 (1985), *cert. denied sub nom.*, *Kramer v. Public Employment Relations Comm'n.*, 475 U.S. 1072 (1986); *Cantor, Forced Payments to Service Institutions and Constitutional Interests in Ideological Association*, 36 RUTGERS L.REV. 3, 14 (1983).

27. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

28. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92-93 (1982).

29. Courts have recognized that a state has a compelling interest in stable labor relations in other contexts. For example, courts have relied on this state interest in upholding the constitutionality of prohibitions on supervisor or manager membership in unions representing rank-and-file employees. See, e.g., *Key v. Rutherford*, 645 F.2d 880 (10th Cir. 1981); *York County Firefighters v. County of York*, 589 F.2d 775 (4th Cir. 1978); *Elk Grove Firefighters Local 2340 v. Willis*, 400 F.Supp. 1097 (N.D. Ill. 1975), *aff'd mem.*, 539 F.2d 714 (7th Cir. 1976); *Shelofsky v. Helsby*, 32 N.Y.2d 54, 343 N.Y.S.2d 90, 295 N.E.2d 774, *appeal dismissed*, 414 U.S. 804 (1973).

30. National Labor Relations Act § 14(b), 29 U.S.C. § 164(b).

31. ALA. CODE §§ 25-7-30-25-7-36 (1986); ARIZ. CONST. art. XXV; ARIZ. REV. STAT. ANN. §§ 23-1301-23-1307 (1983); ARK. CONST. AMEND. XXXIV; ARK. STAT. ANN. §§ 11-3-301-11-3-304 (1987); FLA. CONST. art. I, § 6; FLA. STAT. ANN. §§ 447.01-447.15 (1981); GA. CODE ANN. §§ 34-6-20-34-6-28 (1988); IOWA CODE ANN. §§ 731.1-731.8 (1979); KAN. CONST. art. XV, § 12; KAN. STAT. ANN. § 44-831 (1986); LA. REV. STAT. ANN. §§ 23:981-28:987 (1985); LA. REV. STAT. ANN. §§ 23:881-23:889 (1985) (covers agricultural workers); MISS. CONST. art. VII, § 198-A; MISS. CODE ANN. § 71-1-47 (1972); NEB. CONST. art. XV, § 13; NEB. REV. STAT. §§ 48-217-48-219 (1985); NEV. REV. STAT. §§ 613.230-613.300 (Michie 1953); N.C. GEN. STAT. §§ 95-78-95-84 (1975); N.D. CENT. CODE § 34-01-14-34-01-14.1 (1972); S.C. CODE ANN. §§ 41-7-10-41-7-90 (Law Co-op 1986); S.D. CONST. art. VI, § 2; S.D. CODIFIED LAWS ANN. §§ 60-8-3-60-8-8 (1978); TENN. CODE ANN. §§ 50-1-201-50-1-204 (1983); TEX. REV. CIV. STAT. ANN., arts. 5154a, 5207a (Vernon 1987); UTAH CODE ANN. §§ 34-34-1-34-34-17 (1988); VA. CODE ANN. §§ 40.1-58-40.1-69 (1988); WYO. STAT. §§ 27-7-108-27-7-115 (Michie 1987).

Others, while allowing the agency shop in private employment, prohibit it in public employment.<sup>32</sup>

Justice Stewart's failure to scrutinize the contribution of the agency shop to stable labor relations might be explained by the procedural posture of the case.<sup>33</sup> The case was filed in state court where the fee payers alleged that the agency shop provision of the collective bargaining agreement was a per se unconstitutional

32. The majority view with respect to the public sector is that, absent statutory authorization, agency fee provisions are illegal. *See, e.g.,* *City of Hayward v. United Pub. Employees, Local 390*, 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976); *Smegel v. Southgate Community School Dist.*, 388 Mich. 531, 202 N.W.2d 305 (1972); *N.J. Turnpike Employees Union, Local 194 v. N.J. Turnpike Auth.*, 123 N.J. Super. 461, 303 A.2d 599 (1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974); *Farrigan v. Helsby*, 68 Misc. 2d 952, 327 N.Y.S.2d 909 (1971), *aff'd*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973); *Foltz v. City of Dayton*, 27 Ohio App. 2d 35, 272 N.E.2d 169 (1970); *Pa. Labor Relations Bd. v. Zelem*, 459 Pa. 399, 329 A.2d 477 (1974); *contra Tremblay v. Berlin Police Union*, 108 N.H. 416, 237 A.2d 668 (1968); *Town of North Kingstown v. North Kingstown Teachers Ass'n*, 110 R.I. 698, 297 A.2d 342 (1972).

33. It might also be explained by the manner in which the fee payers, represented by the National Right to Work Legal Defense Fund, presented their arguments to the Court. The fee payers attacked the proposition that the government's interest in labor peace justifies compelling nonmember financial support of their exclusive representative by waging a general assault on the institution of collective bargaining. They did not confront the effects on labor relations of having employees who contributed to the costs of their representation working side by side with employees who were "free riding" on their contributions. Instead, they painted the labor relations concerns underlying the agency shop solely as concerns for the union's financial strength and asserted that there was no rational basis for the proposition that a public employee union's financial strength contributes to labor relations stability. Brief for Petitioners at 122, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). They justified this assertion by attacking the concept of collective bargaining, *see id.* at 124-27, and urged the Court to condemn the labor relations stability rationale as a justification for extortion. *Id.* at 138-39. They then broadened their attack into a general assault on labor unions, arguing:

If we emphasize what should appear as elementary propositions of constitutional jurisprudence, it is because their message has not yet penetrated to those who support the agency-shop as a means of achieving "labor peace". Public employees, such as the Teachers, who dissent from compulsory-unionism arrangements themselves constitute no grave and immediate danger to the stability and effectiveness of public-sector labor relations. What poses a real and serious threat is the intolerance of union leaders and their misguided adherents, who all too often resort to harassment, intimidation, and even physical violence to attempt to coerce the "solidarity" among employees which they cannot bring about through peaceful persuasion and argument. It is union leaders, characteristically, who harass and incite animosities against nonunion employees—especially in situations where applicable law precludes agency-shop or other compulsory-unionism arrangements.

*Id.* at 141 (citation and footnote omitted).

The *Abood* fee payers thus did not present a traditional constitutional analysis of the government's burden of proof. They did not ask the Court to remand for a trial to develop evidence concerning the agency shop's contributions to labor relations stability. They buried in a footnote in their jurisdictional statement an observation that the school board and the union had the burden of establishing at trial a compelling state interest for the agency shop and that the lower courts' disposition of the case precluded such a trial. Appellants' Summary Jurisdictional Statement at 19 n.11. The thrust of their attack on the lower courts' summary proceeding, however, focused on the courts' ignoring their offer of proof. That offer of proof made it clear that the fee payers wanted a trial on the merits of collective bargaining and not on the justification for an agency shop. It provided, in relevant part:

A. Collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to plaintiffs, and that the advantages of collective bargaining do not, in any case, justify the deprivation of the constitutional rights of individuals.

Plaintiffs will show that among such disadvantages are the following:

1. Strikes called, sponsored and encouraged in violation of law.
2. Deprivation of individual choice in relation to many job prerequisites and privileges.
3. Loss of earnings on a long-term basis.
4. Damage suffered by individuals by reason of intra-union rivalries and inefficiency and corruption within unions.

*Id.*, Appendix at 21-22.

Thus, the *Abood* fee payers attempted to turn the constitutional issues surrounding the agency shop's justification into a policy debate over the wisdom of collective bargaining. With the attack on the agency shop presented in this manner, it is not surprising that the Supreme Court chose to leave resolution of the policy issues to the legislature.

infringement of their freedom of association and that the provision was unconstitutionally overbroad because it permitted a fee that would be used, in part, for political purposes unrelated to collective bargaining. The lower courts disposed of the fee payers' claims summarily, rejecting the free association claims in reliance on *Hanson* and the overbreadth claim because the fee payers had not communicated to the union their dissent to use of their fees to support political activity.<sup>34</sup> Justice Stewart could have reversed the lower courts' summary rejection of the fee payers' free association claims and remanded for development of a record on which to evaluate the state's claim that the agency shop promotes stable labor relations. Instead, he simply deferred to the Michigan legislature's judgment that the agency shop promotes stable labor relations by preventing employees who are not union members from enjoying the benefits of collective bargaining without contributing to the costs of representation. Justice Stewart avoided expressing an opinion on the wisdom of the legislature's judgment.<sup>35</sup>

Thus, although Justice Stewart's opinion in *Abood* suggested that the agency shop infringes on fee payers' rights to free association, his analysis of the constitutional justification for the agency shop is inconsistent with a finding of such infringement. The Court's subsequent consideration of what expenditures a union may constitutionally charge to objecting fee payers exacerbated this inconsistency.

### C. *Inconsistent Standards of Chargeability in Ellis*

If agency shop fees do infringe on fee payers' freedom of association, the range of expenditures for which a union may charge must be narrowly tailored so that the infringement does not exceed that which is necessary to advance the compelling state interest asserted—in this case the interest in stable labor relations. Because of the procedural posture of the appeal in *Abood*, Justice Stewart declined to define precisely the dividing line between permissible and unconstitutional charges.<sup>36</sup> In its next encounter with agency fees, the Court attempted such a definition. The Court's application of *Abood*, however, was not consistent with the narrow tailoring required of an infringement on a fundamental constitutional right.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,<sup>37</sup> the Court, in a constitutionally based interpretation of the Railway Labor Act, embarked on an item-by-item review of the chargeability of particular expenditures. It held that a union may charge objectors for the costs of social activities that are open to nonmembers, even though it characterized those activities as "not central to collective bargaining."<sup>38</sup> This holding is clearly inconsistent with a finding that such charges represent a narrowly tailored means of advancing a compelling state interest.

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34. *Abood v. Detroit Bd. of Educ.*, 60 Mich. App. 92, 93–94, 98, 102, 230 N.W.2d 322, 322–23, 326–27 (1975), *rev'd*, 431 U.S. 209 (1977).

35. *Abood*, 431 U.S. at 224–25, 225 n.20.

36. *Id.* at 249.

37. 466 U.S. 435 (1984).

38. *Id.* at 449.



On the other hand, the Court limited the chargeability of litigation expenses to matters directly involving the bargaining unit and limited charges for publications to that portion of the publications not containing political or ideological messages.<sup>39</sup> These limitations appear to be consistent with a fee that is narrowly tailored to the state's interest in stable labor relations. This consistency, however, was lost when the *Ellis* Court allowed unions to charge the full costs of their conventions even though numerous politicians addressed the delegates.<sup>40</sup>

The *Ellis* Court also attempted to define a general standard of chargeability. The Court opined that objectors can be charged for expenditures that are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative."<sup>41</sup> This standard is itself internally inconsistent. A standard of reasonableness allows for a far broader range of charges than does a standard of necessity. A comparison of two of the charges at issue in *Ellis* illustrates this.

Social activities promote a spirit of solidarity and encourage attendance at union meetings. Under a standard of reasonableness, they are sufficiently related to the union's collective bargaining functions to be chargeable. But, as the *Ellis* Court recognized, they certainly do not play a central role in the union's core functions of contract negotiation and contract administration. Under a standard of necessity, they would not be chargeable. It thus appears the *Ellis* Court chose to allow the union to charge for expenditures on social activities because it considered such expenditures to have been reasonably incurred in performing exclusive representation functions.

Whether litigation outside the bargaining unit is chargeable to nonmembers also depends on whether a reasonableness or necessity standard is applied. The litigation expenditures at issue in *Ellis* included those incurred in challenging the legality of the airline industry's Mutual Aid Pact. Under the Pact, nonstruck carriers provided substantial financial assistance to carriers on strike. The Ninth Circuit Court of Appeals held the expenditures chargeable because the litigation was aimed at strengthening the union's strike weapon.<sup>42</sup> The Supreme Court held that these expenditures would be chargeable only if the litigation directly concerned the objectors' bargaining unit.<sup>43</sup>

*Ellis* arose in a bargaining unit of Western Airlines employees. Under the Court's holding, the Mutual Aid Pact litigation could not be charged to the objectors if Western was not a party to the pact. Under a standard of reasonableness, however,

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39. *Id.* at 450-51, 453.

40. *Id.* at 448-49. This inconsistency was not lost on Justice Powell, who dissented from the Court's treatment of conventions:

The minutes of the [union] convention indicate that a number of major addresses were made by prominent politicians . . . . The union has not shown how this major participation of politicians contributed even remotely to collective bargaining. . . . Apparently no effort was made by the union in this case to identify expenses fairly attributable to these and other political activities and to make appropriate deductions from the dues of objecting employees. . . . [R]easonable estimates surely could have been made. The union properly felt a responsibility to allocate expenses where political material was carried in union publications.

*Id.* at 459-60 (Powell, J., concurring in part and dissenting in part) (citations omitted).

41. *Id.* at 448.

42. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 685 F.2d 1065, 1073-74 (9th Cir. 1982), *rev'd*, 466 U.S. 435 (1984).

43. *Ellis*, 466 U.S. at 453.

the litigation should be chargeable regardless of whether Western was a party to the Pact. The Pact still inhibited the effectiveness of the union's strike weapon with other airlines and thereby reduced its bargaining power with those employers. This could force the union to settle for lower wages and poorer working conditions than it might be able to negotiate in the absence of the pact. The depressed state of wages and working conditions at carriers who were parties to the pact could, in turn, exert downward pressure on wages and working conditions at Western.<sup>44</sup>

Thus, under the reasonableness standard used to evaluate the expenditures on social activities, the Mutual Aid Pact litigation expenditures were chargeable regardless of whether Western Airlines was directly involved. By conditioning their chargeability on the direct involvement of the objectors' bargaining unit, the Court appears to have applied a necessity standard instead. Thus, rather than clarify the ambiguities of *Abood*, *Ellis* only muddies the waters further.

D. *Distinguishing Political and Commercial Speech: Justice O'Connor's Alternative Approach*

Justice O'Connor has offered a rationale for *Abood* and *Ellis* which, although viewing agency shop fees as infringing on fee payers' freedom of association, does not require that every fee expenditure be narrowly tailored to support a compelling state interest. In her concurring opinion in *Roberts v. U.S. Jaycees*,<sup>45</sup> Justice O'Connor distinguished the right of political association from the right of commercial association. In her view, the government must justify infringements on the right of political association with a compelling state interest, but may justify infringements on commercial association with a rational basis. In *Roberts*, Justice O'Connor opined that the Court had applied the distinction between political and commercial association in *Ellis*.<sup>46</sup>

Justice O'Connor's approach rationalizes many of the inconsistencies that arise when agency shop fees are viewed as infringements of freedom of association which are constitutionally justified by a compelling state interest. Under the O'Connor approach, compulsory agency shop fees that subsidize collective bargaining activities involve commercial association and only require a rational basis to be constitutional. Justice Stewart's deferral in *Abood* to the Michigan legislature's assessment of the agency shop's contribution to stability in labor relations is consistent with a rational basis test.

Justice O'Connor's approach also rationalizes the otherwise inconsistent *Ellis* standard that agency shop charges be based on expenditures reasonably or necessarily incurred as exclusive representative. Under Justice O'Connor's approach, expenditures that infringe on the right of commercial association need only be reasonably

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44. See *Crawford v. Air Line Pilots Ass'n*, 870 F.2d 155 (4th Cir. 1989) (employing a similar analysis to uphold a union's charging nonmembers for financing strikes in other bargaining units).

45. 468 U.S. 609 (1984) (O'Connor, J., concurring).

46. *Id.* at 634-35, 638 (O'Connor, J., concurring).

incurred to be chargeable, while expenditures which infringe on the right of political association must be necessarily incurred to be chargeable.<sup>47</sup>

Under the O'Connor analysis, expenditures on social activities could be justified as reasonable, even though they were not necessary, because, at most, they infringe on the right of commercial association.<sup>48</sup> Litigation, however, is political activity.<sup>49</sup> Thus, a union cannot charge objectors for litigation that does not directly involve their bargaining unit because those expenditures, while reasonable, are not necessary to the union's representation of the objectors. Conventions are more problematic because they contain elements that are both political and commercial. Under Justice O'Connor's approach, conventions are predominantly commercial and, accordingly, fully chargeable under a reasonableness standard.<sup>50</sup>

Justice O'Connor's approach, however, fails to rationalize a principle of agency shop doctrine that the Court has applied consistently in all of its cases. That principle is that a fee payer's dissent to expenditures is not to be presumed and that a fee payer has the burden of objecting to nonchargeable expenditures.<sup>51</sup> Nonmembers, however, have communicated their desire not to associate with the union by refusing to join. If the agency shop fee impacts on nonmembers' freedom of association, no purpose is served by requiring them to object formally to expenditures of fees for nonchargeable purposes. This is true regardless of whether the association at issue is commercial or political.

The requirement of objection is directly related to the Court's consistent analysis that *collection* of agency shop fees does not implicate constitutional rights but certain *expenditures* of those fees do unconstitutionally infringe on objectors' rights.<sup>52</sup> If, however, the rights at issue are rights of free association, the infringement would result from collection of the fee, not from the fee's expenditure. The expenditure would be constitutionally significant only because certain expenditures might justify the infringement. This would be true regardless of whether the association was commercial or political.

Thus, neither the theory that charging fees to nonmembers constitutes an infringement on those nonmembers' rights of free association—an infringement

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47. The Illinois Educational Labor Relations Board (IELRB), relying on Justice O'Connor's explanation of *Ellis*, has distinguished between an exclusive representative's institutional expenditures and its ideological expenditures. The IELRB views institutional expenditures as infringing on fee payers' commercial association rights and requires proof that they are reasonably incurred as exclusive bargaining representative to be chargeable. It views ideological expenditures as infringing on fee payers' political association rights and requires proof that they are necessarily incurred as exclusive bargaining representative to be chargeable. *DuQuoin Educ. Ass'n*, 4 Pub. Empl. Rptr. Ill. (Lab. Rel. Press) ¶ 1064 (Ill. Educ. Lab. Rel. Bd. 1988).

48. In *Ellis* the Court found it unnecessary to decide whether expenditures on social activities raised a first amendment issue. The Court implied that any freedom of association concerns the expenditures raised involved commercial association, observing that the fee payer's objections were "that these are *union* social hours," and that the expenditures did not magnify the potential infringement of first amendment rights already countenanced by the agency shop. 466 U.S. at 456 (emphasis in original).

49. See *infra*, notes 68–69 and accompanying text.

50. See *Roberts*, 468 U.S. at 635–36 (O'Connor, J., concurring) (distinguishing between political and commercial association depending on whether the activities predominantly involve protected expression).

51. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

52. *Abood*, 431 U.S. at 221–23.

justified by the compelling state interest in stable labor relations—nor Justice O'Connor's distinction between commercial and political association adequately explains the results in *Abood* and similar agency shop decisions. Both analyses share a fundamental premise that agency shop agreements infringe on objectors' rights of free association. This fundamental premise is flawed.

E. *A Solution: The State's Interest in Balancing Conflicting Free Speech Concerns*

Agency shop agreements do not compel employees who are not members of their exclusive bargaining representative to associate with that union. Employees are not forced to join the union. They are not subject to union rules, regulations or disciplinary action. They are not required to support the union's position or to honor union strikes and picket lines. Any attempt to subject nonmembers to union rules, regulations or discipline would be illegal.<sup>53</sup> The only requirement imposed on nonmembers is payment of a fee.

The requirement of fee payment is not likely to result in nonmembers being identified with the union. To the extent that members of the public may incorrectly associate nonmembers with the union, the association results from the nonmembers' employment in a bargaining unit represented by the union and not from the payment of an agency shop fee.<sup>54</sup> Thus, an agency shop agreement does not subject nonmembers to the union's control, nor does it create an incorrect association of a nonmember with the union in the public eye. Agency shop agreements and the collection of fees thereunder do not compel association in a constitutionally significant manner.

An agency shop agreement does compel a financial subsidy of a variety of union activities. Most of these activities relate to the union's service as exclusive bargaining representative. When a public employer recognizes a union as exclusive bargaining representative, it has delegated to the collective bargaining process the governmental function of setting terms and conditions of employment.<sup>55</sup> Requiring all employees governed by those terms and conditions to contribute to the cost of their establishment does not implicate the employees' constitutional rights as long as the contributions are rationally related to the performance of collective bargaining duties.

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53. See *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *NLRB v. Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213 (1972).

54. One commentator has made a similar observation concerning the likelihood that the public will identify a lawyer with the positions of the state bar association. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 52 (To the extent that the public incorrectly attributes the bar association's views to individual lawyers, the erroneous attribution will occur regardless of whether there is a unified bar. The public perception of lawyers as lawyers, rather than lawyers as bar association members causes the attribution.); see also *Smith v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1, 12-13, 248 Cal. Rptr. 263, 270 (1988) (contrasting mandatory fee payment with mandatory membership); *Falk v. State Bar of Mich.*, 418 Mich. 270, 294-95, 342 N.W.2d 504, 512 (1983) (opinion of Boyle, J.), *appeal dismissed*, 469 U.S. 925 (1984).

55. A frequently litigated issue in public sector collective bargaining is whether resolution of particular issues through the bargaining process amounts to an unlawful delegation of governmental power. See, e.g., *City of Detroit v. Detroit Police Officers Ass'n*, 408 Mich. 410, 294 N.W.2d 68 (1980), *appeal dismissed*, 450 U.S. 903 (1981); *Cleveland Police Patrolmen's Ass'n v. City of Cleveland*, 24 Ohio App. 3d 16, 492 N.E.2d 861 (1985).

Where the union spends agency shop fees on political or ideological activity, however, it is forcing the fee payers to subsidize speech. The protection of free speech and the right to refrain from speaking lie at the core of the first amendment. Political or ideological expenditures compel nonmember expression in a way that potentially infringes on their first amendment rights to refrain from such expression. Not all compulsory subsidization of political or ideological activity, however, violates the first amendment. A framework for analyzing such cases can be derived from the Supreme Court's decisions in *Wooley v. Maynard*<sup>56</sup> and *Pruneyard Shopping Center v. Robins*.<sup>57</sup>

In *Wooley*, the Court declared unconstitutional New Hampshire statutes that mandated that noncommercial motor vehicles display license plates containing the state motto, "Live Free or Die." The Court characterized the statutes as requiring, on pain of fine or imprisonment, that individuals use their private property as a "mobile billboard" for the government's ideological message.<sup>58</sup> As such, the statute infringed on *Wooley's* first amendment right to refrain from speaking.<sup>59</sup> The Court rejected the reasons offered by the state to justify the infringement.<sup>60</sup>

In *Pruneyard* the Court upheld a provision of the California Constitution which required a large privately owned shopping center to allow individuals, on shopping center property, to distribute literature and solicit signatures for a petition. The Court found no infringement of the shopping center owner's first amendment right to refrain from subsidizing political or ideological causes.<sup>61</sup> It distinguished *Wooley* on the basis of three factors. First, because of the public nature of the shopping center, it was not likely that others would attribute the pamphleteers' and solicitors' views to the center's owner. Second, the state did not prescribe the message to be disseminated on shopping center property. Third, the shopping center could disclaim sponsorship of any political or ideological activity undertaken on the property by posting generic signs to that effect.<sup>62</sup> In a concurring opinion, Justice Powell expressed concern that even in cases where the public is not likely to attribute the speaker's views to the property owner, the property owner may find those views so morally repugnant that he or she feels compelled to respond. Placing the property owner in such a position would infringe his or her right to maintain his or her views without disclosing them publicly. Analogizing to *Abood*, Justice Powell suggested that under these circumstances the property owner would have a right to exclude all speakers whose messages are unrelated to the purposes for which the property is open to the public.<sup>63</sup> Because his review of the record found no evidence that *Pruneyard's* owner faced

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56. 430 U.S. 705 (1977).

57. 447 U.S. 74 (1980).

58. *Wooley*, 430 U.S. at 713, 715.

59. *Id.* at 713.

60. *Id.* at 715-17.

61. *Pruneyard*, 447 U.S. at 87-88.

62. *Id.* at 87.

63. *Id.* at 100 (Powell, J., concurring).

such a predicament, Justice Powell agreed with the majority that *Pruneyard's* rights were not violated.<sup>64</sup>

Read together, *Wooley* and *Pruneyard* suggest that the constitutionality of compelled subsidization of speech will turn on the likelihood of public identification of the subsidizer with the speaker, the likelihood that the subsidizer will find the speaker's message so offensive that he or she will feel compelled to respond, the role of the government in deciding what message will be subsidized, and the strength of the government's interest in forcing the subsidy.

Agency shop agreements are not likely to result in the public identification of the fee payers with the union's political or ideological message. As observed previously, to the extent such a public identification occurs, it probably results from the fee payer's employment in a bargaining unit represented by the union.<sup>65</sup> In this sense, an agency shop agreement is more like *Pruneyard* than *Wooley*. Fee payers who have objected to being charged for political and ideological expenditures, however, have indicated that they find such causes so offensive that they will feel compelled to respond if they are forced to pay. In this sense the agency shop more closely resembles *Wooley*.

Unlike *Wooley*, the government does not dictate the specific political or ideological messages to receive the fee payers' subsidies. The government, however, does specify the speaker who is to receive the subsidies, *i.e.*, the fee payers' exclusive bargaining representative. Thus, the government plays a greater role in directing the subsidy than it played in *Pruneyard*, where it merely required the property owner to subsidize all speakers who sought to use the property, subject to reasonable rules and regulations.

The most problematic aspect of agency shop fees spent on political or ideological activity is the strength of the government interest offered to justify the infringement. The justification most commonly offered is the government's interest in stable labor relations fostered by the agency shop. As previously discussed, however, the Court has never closely scrutinized that justification. It has chosen instead to defer to legislative judgments about union security.<sup>66</sup>

A stronger state interest, one which although not totally ignored by the Court has received insufficient attention, is the role of the agency shop in balancing the conflicting first amendment rights of nonmember fee payers and union members.<sup>67</sup> Union members have a first amendment right to engage in and spend their money on the very political and ideological activities that objectors have a right to avoid. As exclusive bargaining representative, however, the union must service the collective bargaining needs of all employees in the bargaining unit regardless of union membership. Absent an agency shop agreement, union members' dues must be used

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64. *Id.* at 101 (Powell, J., concurring).

65. *See supra* note 54 and accompanying text.

66. *See supra* note 35 and accompanying text.

67. The Court recognized this interest in *Street*, 367 U.S. at 773; *accord* *Robinson v. N.J.*, 741 F.2d 598, 605 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), *later appeal*, 806 F.2d 442 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987); *cf.* *Petition of Chapman*, 128 N.H. 24, 30-32, 509 A.2d 753, 757-58 (1986) (unified bar association's expenditure of compulsory dues raises need to balance the free speech rights of the majority and objectors).

to service nonmember free riders. The union's statutory obligation to represent nonmembers can force it to divert funds that would otherwise be spent on political or ideological activity. The statutory duties of an exclusive bargaining representative thus can inhibit the union's and its members' exercise of their first amendment rights. An agency shop agreement tempers this inhibition by spreading the costs of representation among all who receive its benefits.

The treatment of litigation expenses in *Ellis* illustrates how the agency shop's role in reconciling the conflicting first amendment interests of union members and objecting fee payers can justify forcing objectors to subsidize some ideological activities. Litigation is a form of political expression and a method of petitioning the government for redress of grievances.<sup>68</sup> The Supreme Court has applied this principle on several occasions to efforts by labor unions to protect the litigation rights of their members.<sup>69</sup> The *Ellis* Court's holding that objecting fee payers can be charged for the expenses of litigation directly involving their bargaining unit<sup>70</sup> permits a direct infringement of the objectors' right to refrain from supporting such ideological activity.

The type of litigation that the Court held to be chargeable, however, was limited to that which is incident to contract negotiation and administration, grievance and dispute resolution, fair representation, jurisdictional disputes with other unions and similar matters affecting bargaining unit employees and normally conducted by an exclusive representative.<sup>71</sup> In other words, the Court permitted the union to charge objectors for litigation expenditures that it necessarily incurred as exclusive bargaining representative.<sup>72</sup>

These expenditures are thrust on the union because of its duties as exclusive bargaining representative. For example, a union that refuses to litigate to compel arbitration or enforce an arbitration award because the grievant is not a union member breaches its duty of fair representation.<sup>73</sup> Were the union unable to charge objectors for this narrow class of litigation, it might be forced to divert members' dues from supporting political and ideological activities to paying for the objectors' free ride. Thus, charging the objectors for these ideological activities can be constitutionally

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68. See, e.g., *NAACP v. Button*, 371 U.S. 415, 429-30 (1963).

69. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of Ry. Trainmen v. Va.*, 377 U.S. 1 (1964).

70. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 453 (1984).

71. *Id.*

72. See *supra* text accompanying and following notes 42-43.

73. Cf. *Branch 6000 Nat'l Ass'n of Letter Carriers, v. NLRB*, 595 F.2d 808 (D.C. Cir. 1979). This is not to suggest that a union's ability to charge nonmembers for litigation expenses should be limited to litigation which is compelled by its duty of fair representation. Such a limitation would be too narrow. There are many actions that a union can decline to take without breaching its duty of fair representation. The same decision, however, may breach the duty of fair representation where it is based on the membership status of the employees who are likely to benefit from it. For example, a union usually does not breach its duty of fair representation if it refuses to furnish a lawyer to represent a grievant in arbitration. *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985); *Grovner v. Georgia Pac. Corp.*, 625 F.2d 1289 (5th Cir. 1980); *Walden v. Local 71, Int'l Bhd. of Teamsters*, 468 F.2d 196 (4th Cir. 1972); *Steed v. United Parcel Service*, 512 F.Supp. 1088 (S.D. W.Va. 1981). The union does breach its duty, however, if it restricts the availability of counsel to members only. *Castelli*, 752 F.2d at 1483; *National Treasury Employees Union v. FLRA*, 721 F.2d 1402 (D.C. Cir. 1983); *Del Casal v. Eastern Airlines*, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981).

justified by the agency shop's role, which is to temper the inhibition on the union's political expression rights that its duties as exclusive representative entail. That justification evaporates, however, where the litigation expenditures are not necessitated by the union's role as exclusive representative, even if the union has a reasonable belief that the litigation ultimately will benefit bargaining unit employees.

In summary, the agency shop cases are appropriately understood not as cases involving compelled association, but as cases involving compelled political and ideological expression. Agency shop fees do not infringe on objectors' freedom of association, but to the extent they are spent on political or ideological activity, they do infringe on objectors' freedom of speech. That infringement is constitutionally justified where charges to objectors are limited to those that are necessarily incurred in the role of exclusive bargaining representative.

This analysis, like Justice O'Connor's distinction between commercial and political association, explains the Court's unquestioning acceptance of the legislative judgment of the agency shop's contribution to stable labor relations to justify the use of fee payers' money for nonpolitical and nonideological purposes. It also shares with Justice O'Connor's analysis the ability to explain the *Ellis* Court's use of a broad standard of reasonableness in evaluating expenditures on social activities and a narrow standard of necessity in evaluating expenditures on litigation.

The above analysis, unlike Justice O'Connor's distinction, also explains why the constitutional inquiry focuses on fee expenditure rather than fee collection. Fee collection does not compel nonmember association with the union. It is not constitutionally significant. Expenditure of fees on political or ideological activity, however, does compel fee payers to subsidize expression from which they have a first amendment right to refrain.

This analysis further explains why fee payers, who have already expressed their desires not to associate with the union by refusing to join must also express their objections to the use of their fees for nonchargeable expenditures. Because the right of free association is not involved, a fee payer's failure to join the union is not constitutionally significant. A fee payer's refusal to become a union member does not justify an assumption that he or she opposes the union's political activities or its expenditure of fee payer money in support of those activities.<sup>74</sup> Therefore, fee payers may be required to object formally to such expenditures to avoid being compelled to subsidize them. The objections need only be general statements of opposition to any nonchargeable expenditures because requiring greater specificity would infringe on fee payers' rights to maintain their political and ideological views in silence.

The question remains, however, whether analyzing agency fees as implicating free speech rather than free association rights is consistent with Justice Stewart's approach in *Abood*. The principal issue in *Abood* was whether the Railway Labor Act

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74. Authorities in labor relations are reluctant to infer anything from an employees' decision not to become a union member. For example, the NLRB will not infer that nonmembers are opposed to having the union serve as their exclusive bargaining representative. *NLRB v. North American Mfg. Co.*, 563 F.2d 894 (8th Cir. 1977); *NLRB v. Washington Manor, Inc.* 519 F.2d 750 (6th Cir. 1975); *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977); *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651 (1974).



cases, *Hanson* and *Street*, applied to public sector employment. The fee payers in *Abood* argued that in public employment all collective bargaining activity was inherently political and any fee charged to nonmembers was unconstitutional.<sup>75</sup> Justice Stewart's attention to the objector's freedom of association and his suggestion that any agency shop fee "might well be thought . . . to interfere in some way with an employee's freedom to associate . . ."<sup>76</sup> should be read in light of the case's RLA predecessors and the fee payers' arguments.

Justice Stewart's analysis reaffirmed the holding in *Hanson* that a union security fee does not infringe on first amendment rights. Justice Stewart went out of his way to defend the continuing validity of *Hanson* against attack by three concurring justices.<sup>77</sup> He then discussed ways in which compelled financial support for collective bargaining activity might be thought to affect fee payers' freedom of association.<sup>78</sup> This analysis led to a comparison of the constitutional claims of fee payers in the public sector with those of their private sector counterparts. Justice Stewart ultimately concluded that the first amendment rights of all fee payers were the same and that *Hanson* and *Street* controlled the issue in the public sector insofar as agency shop fees were used for collective bargaining purposes.<sup>79</sup>

Thus, the discussion of fee payer rights of free association in *Abood* was aimed at demonstrating that public employees' rights in this regard are no different from those of private employees. The *Abood* Court's conclusion that the case was governed by *Hanson* and *Street* leaves intact the principles enunciated in those cases that agency shop agreements do not compel ideological conformity but that expenditure of fee payers' money on ideological causes does infringe on their first amendment rights. The Court's continued insistence in *Abood* on fee payer objections and refusal to presume fee payer dissent strongly suggests that the Court's concern was compelled expression and not compelled association.

### III. THE RANGE OF CHARGEABLE EXPENDITURES

The only expenditures at issue in *Street* and *Abood* were contributions to candidates for elective office. Although a broader range of expenditures were at issue in *Ellis*, the Supreme Court failed to indicate clearly whether an objector's agency fee is limited to expenditures that are linked to collective bargaining regardless of their

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75. The parties' pleadings and briefs clearly identified the principal issue in *Abood* to be whether *Hanson* applied to the public sector. The fee payers argued that compulsory financial support of their exclusive representative was equivalent to compulsory association with the union and that because a public employee could not be forced to renounce union membership, a public employee also could not be forced to associate with a union as a condition of employment. Appellant's Jurisdictional Statement at 14-19, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); Appellant's Brief in Opposition to Appellee's Motion to Dismiss or Affirm at 2, 2 n.1; Appellant's Brief at 22-23, 34-62. They further argued that *Hanson* could not govern public sector employment because public sector collective bargaining was inherently political. Appellant's Brief at 62-115. The union and employer responded by defending *Hanson*, Appellees' Motion to Dismiss or Affirm at 2-4, and by arguing that payment of a pro rata share of the costs of representation was not equivalent to compelled association. Appellees' Brief at 40-47.

76. *Abood*, 431 U.S. at 222.

77. *Id.* at 220 n.13.

78. *Id.* at 222.

79. *Id.* at 223-32.

political or ideological nature, or whether the fee need only exclude political and ideological expenditures that are not appropriately linked to collective bargaining.

Two Circuit Courts of Appeals have held that an exclusive bargaining representative may charge nonmembers only for expenditures that the union affirmatively shows are related to its collective bargaining duties. The first court to so hold was the Seventh Circuit in *Hudson v. Chicago Teachers Union, Local No. 1*.<sup>80</sup> Although that case involved only fee payers' procedural rights, the court derived those rights from two sources. The first source was the fee payers' first amendment right not to subsidize political and ideological activity unrelated to collective bargaining.<sup>81</sup> The court recognized the fourteenth amendment's due process clause as the second source.<sup>82</sup> The court reasoned that any agency shop fee deprived fee payers of their liberty interest in refraining from association with the union. The court reasoned that such deprivations were justified by the government's interest in stable labor relations where the fees are used to support the union's collective bargaining functions. Nevertheless, the exaction of fees for collective bargaining deprived fee payers of their liberty to refrain from associating with the union and such a deprivation could not be accomplished without affording the fee payers due process of law. The court recognized that this holding went beyond *Abood*,<sup>83</sup> and was inconsistent with *Hanson*,<sup>84</sup> but declared that the first amendment prohibits unions from using fee payers' funds for nonpolitical and nonideological activities unrelated to collective bargaining.<sup>85</sup>

The Supreme Court affirmed the Seventh Circuit's holding that unions must afford fee payers procedural protections, but expressly declined to rule on the lower court's due process clause analysis and its implications for expenditures that are neither political nor ideological.<sup>86</sup> Justice White, the author of *Ellis*, joined by Chief Justice Burger, concurred and characterized the Seventh Circuit's view of nonpolitical and nonideological expenditures, as "[u]nder our cases . . . very questionable."<sup>87</sup> Nevertheless, in *Tierney v. City of Toledo*,<sup>88</sup> the Sixth Circuit read the Supreme Court's decision in *Hudson* to limit all agency fee charges to expenditures related to collective bargaining regardless of whether they are political or ideological.<sup>89</sup>

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80. 743 F.2d 1187 (7th Cir. 1984), *aff'd on other grounds*, *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The Seventh Circuit may have retreated from this position. See *Gilpen v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3258 (1989) (describing nonchargeable portion of fee as that used to support union's political or ideological goals); *Levine v. Hefferman*, 864 F.2d 457, 462 (7th Cir. 1988) (characterizing *Abood* and *Ellis* statements that compulsory contribution requirements significantly infringe on constitutional rights as dicta).

81. *Hudson*, 743 F.2d at 1192.

82. *Id.* at 1192-93.

83. *Id.* at 1193 ("The Supreme Court in *Abood* had no occasion to decide whether an agency fee exacted by a public employer on the union's behalf from a dissenting employee deprives the employee of his liberty of association. . . .").

84. *Id.* at 1194 ("Contrary intimations in *Railway Employees Dep't v. Hanson* are no longer authoritative.") (citation omitted).

85. *Id.*

86. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. at 304 n.13.

87. *Id.* at 311.

88. 824 F.2d 1497 (6th Cir. 1987).

89. *Id.* at 1504-05; *but see Hohe v. Casey*, 868 F.2d 69, 72, 72 n.5 (3d Cir. 1989), *cert. denied*, 58 U.S.L.W.

The view of the Sixth and Seventh Circuits is grounded in the premise that an agency shop fee compels a nonmember to associate with the union. This premise is faulty. The agency fee does not compel fee payer association with the union in a constitutionally significant way. The fee payers' right at stake in agency fee cases is the right not to subsidize union political and ideological speech, rather than a right to refrain from association with the union. Thus the threshold issue in evaluating expenditures on which the fee is based is whether the expenditures are political or ideological in nature. Only then must they be justified as necessarily incurred by the union in performing its duties as exclusive bargaining representative.<sup>90</sup> This two-step analysis may be applied to two of the most controversial charges in public sector agency fees: charges for organizing expenses and charges for lobbying.

### A. Organizing

The *Ellis* Court held that RLA unions may not charge objecting fee payers for expenses incurred in organizing other bargaining units.<sup>91</sup> It recognized that organizing efforts could strengthen the union, thereby enhancing its likelihood of success at the bargaining table, but characterized the relationship between organizing and bargaining as "attenuated." The Court offered three reasons why such charges were beyond the scope of the agency fee authorized in the RLA.<sup>92</sup> Each of these reasons will not apply automatically in the public sector.

The first reason offered by the Court was specific legislative history indicating that Congress did not intend to allow RLA unions to charge objecting fee payers for organizing. Ironically, the Court relied on testimony by the union's president urging Congress to amend the RLA to allow for union security agreements and assuring Congress that unions were not seeking the amendment to enhance their general power in the railroad industry.<sup>93</sup> Whether similar legislative history exists under state statutes governing agency shop in the public sector must be determined on a state by state basis.

The Court's second and third reasons were interrelated. The Court asserted that the use of fees to organize employees outside the bargaining unit could produce only

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3216 (1989); *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (respectively characterizing nonmembers' first amendment rights as the right "not to be coerced to contribute funds to support political activities that they do not wish to support" (*Andrews*) and as the "'interest in not being compelled to subsidize the propagation of political or ideological views that they oppose'" (*Hohe*, citing *Hudson*, 475 U.S. at 305)).

90. The Court in *Ellis* also held that nonpolitical and nonideological expenditures must be justified as reasonably incurred in performing the duties of an exclusive bargaining representative. *See supra* notes 41-44 and accompanying text. This holding, however, was an interpretation of the Railway Labor Act, rather than the Constitution. It followed from the Court's earlier interpretation of the RLA in *Street*, linking the scope of the agency shop to the prevention of free riders. When faced with the constitutionality of charging objecting fee payers for one nonideological expenditure, *i.e.* social activities, the Court declined to decide whether the fee payers had any constitutional interest in resisting such charges. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 456 (1984). The Court's "reasonably incurred" standard for judging the chargeability of fee expenditures is consistent with the general judicial tendency to interpret labor relations statutes to afford unions a "wide range of reasonableness" in deciding how to represent employees. *See, e.g., Ford Motor Co. v. Hoffman*, 345 U.S. 330, 337 (1953). A similar standard should be imposed on public sector unions under applicable state public labor relations statutes.

91. *Ellis*, 466 U.S. at 451.

92. *Id.* at 451-53.

93. *Id.* at 451-52.

attenuated benefits to collective bargaining on behalf of the fee payer.<sup>94</sup> Consequently, the Court viewed such organizing efforts not to be directed at the free rider on whom the RLA's agency shop authorizations sought to impose fees. The Court characterized that free rider to be an "employee the union is required to represent and from whom the union cannot withhold benefits it obtained for its members."<sup>95</sup>

In the public sector, the use of interest arbitration and factfinding is widespread. This produces a relationship between organizing outside the fee payers' bargaining unit and collective bargaining within that unit that is more direct and substantial than that which exists under the RLA. Most jurisdictions prohibit public employee strikes and many of these substitute interest arbitration or factfinding as a method for resolving negotiation impasses in negotiations. Several of the jurisdictions which permit strikes require exhaustion of factfinding procedures before a strike. Even in jurisdictions that recognize a liberal right to strike, public employers and unions often use interest arbitration to avoid or settle strikes. Interest arbitrators generally place the greatest weight on evidence of wages and other employment terms and conditions of comparable employees and employers. Thus, by organizing outside the bargaining unit, a union can gain control over matters that could directly affect wages and working conditions within the unit.<sup>96</sup>

Resolution of the constitutional status of charges for organizing expenses requires an initial determination of whether such expenditures are political or ideological. In *Thomas v. Collins*<sup>97</sup> the Supreme Court invalidated a Texas statute requiring the registration of labor union organizers with the Texas secretary of state as that law was applied in the case. In the case, an international union president made a speech urging employees of a particular employer to join a particular local union. The Court held that the right to inform others of the advantages and disadvantages of joining unions is protected by the rights of free speech and free assembly.<sup>98</sup>

If a union organizer's speech urging unrepresented employees to join the union is protected by the first amendment, does it follow that agency fee payers employed in another bargaining unit have a first amendment right to refuse to subsidize the organizer's expenses? The answer lies in *Abood* and in the degree to which the majority found its decision controlled by *Elrod v. Burns*.<sup>99</sup>

In *Elrod*, the Court held unconstitutional the practice of the Cook County, Illinois, Sheriff's Office that, upon the election of a sheriff from the political party

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94. *Id.* at 452-53.

95. *Id.* at 452.

96. See Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C.L. Rev. 857, 869 n.85 (1988). At least three public sector labor boards have approved charges to fee payers for organizing expenditures. *Klaetsch and Lake County Federation of Teachers Local 504*, 4 Pub. Emp. Rptr. III. (Lab. Rel. Press) ¶ 1096 (June 29, 1988); *Rochon and AFSCME Council 31*, 3 Pub. Emp. Rptr. III. (Lab. Rel. Press) ¶ 3031 (Ill. Loc. Lab. Rel. Bd. 1987); *Browne v. Milwaukee Bd. of School Directors*, Decision No. 18408-D (Wisc. Emp. Rel. Comm'n Sept. 19, 1985); see also *Hudson v. Chicago Teachers Union, Local 1*, 699 F. Supp. 1334, 1339 n.2 (N.D. Ill. 1988).

97. 323 U.S. 516 (1945).

98. *Id.* at 532. The Court acknowledged that the state might be able to require prior registration as a means of regulating the collection of funds and sale of subscriptions but found the regulation overbroad as applied to Thomas's speech. *Id.* at 540-41.

99. 427 U.S. 347 (1976) (plurality opinion).

opposed to the party of the incumbent, all employees without civil service protection were discharged unless they pledged political allegiance to the newly elected sheriff's party, worked for candidates of that party, contributed a portion of their wages to that party or obtained the sponsorship of a member of that party.<sup>100</sup> The plurality held that the employees' discharges violated their rights of free expression and free association.<sup>101</sup>

In *Abood*, Justice Stewart, writing for the majority, analogized charging fee payers for expenditures on political and ideological causes that are unrelated to collective bargaining to the unconstitutional patronage dismissals in *Elrod*.<sup>102</sup> Justice Powell, concurring in the *Abood* judgment that reversed the Michigan Court of Appeals, carried the *Elrod* analogy further. In Justice Powell's view, collective bargaining in the public sector is inherently political and the requirement that nonunion members, as a condition of employment, subsidize the union was comparable to the requirement in *Elrod* that employees support the newly elected sheriff's political party.<sup>103</sup> In another concurring opinion, Justice Rehnquist was more blunt, stating that he could find no constitutionally significant difference between required public employee support of a political party and required public employee support of a labor union.<sup>104</sup>

Justice Stewart's majority opinion, however, did not carry the *Elrod* analogy that far. Justice Stewart conceded that because public employee unions' collective bargaining activity seeks to influence government policy, it might be termed political. He opined, however, that many of a public sector union's bargaining goals when sought in the private sector would also be entitled to first amendment protection. In the majority's view, the constitutionality of agency shop fees was no different in the public sector from the private sector.<sup>105</sup>

Thus, the *Abood* majority continued to recognize the distinction first articulated in *Hanson* between forcing fee payers to subsidize the process of setting their terms and conditions of employment and enforcing ideological conformity. The former does not infringe on fee payers' first amendment rights even though action undertaken in the process may be affirmatively protected by the first amendment.

Consequently, merely because the first amendment may protect a union's organizing efforts, it does not follow that forcing fee payers to subsidize those efforts unconstitutionally coerces ideological conformity. The distinction maintained from *Hanson* to *Abood* compels the opposite conclusion. When a state adopts a public sector bargaining statute, it delegates the establishment of wages, hours and working conditions to a process that begins with the employees' determination through majority vote whether, and by whom, they wish to be collectively represented. There is no constitutionally significant distinction between compelling objecting fee payers

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100. *Id.* at 351.

101. *Id.* at 373.

102. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

103. *Id.* at 256-59 (Powell, J., concurring in the judgment).

104. *Id.* at 243-44 (Rehnquist, J., concurring).

105. *Id.* at 231-32.

to subsidize the process at the bargaining table and compelling them to subsidize the process at the threshold determination of who, if anyone, will serve as exclusive bargaining representative. The chargeability of organizing expenses by public sector unions raises, as it did in *Ellis*, an issue of statutory interpretation concerning the scope of the authorized agency fee. It does not, however, raise an issue of constitutional magnitude.

### B. Lobbying

The *Abood* majority recognized that the process of collective bargaining in the public sector may go beyond the bargaining table and reach into the legislature. The Court recognized the possibility that unions may be able to charge objecting fee payers for the costs of certain lobbying activities, such as securing the employer's governing body's ratification of the contract and related budget and appropriations decisions.<sup>106</sup> The *Abood* Court's dicta do not say directly whether any lobbying activities may be charged to objecting fee payers. The Court merely recognizes the possibility that such charges might be constitutional and leaves the issue open. There is a wide range of possible solutions for this issue.

In the private sector—at least under the Railway Labor Act, where the presence of state action subjects the issue to constitutional analysis—no lobbying expenses appear to be chargeable to objecting fee payers. In *Abood*, the Court assumed this to be the case to the extent that the Court found it necessary to distinguish the public sector from the private: in the public sector the need to lobby for ratification and funding of a collective bargaining agreement made the line between chargeable and nonchargeable expenditures “somewhat hazier” than in the private sector.<sup>107</sup> The hazier line may, nonetheless, preclude public sector unions from charging objectors for any lobbying expenditures at all.<sup>108</sup>

If the status of the employer as a governmental entity does justify allowing a public sector union to charge objectors for some lobbying activities, the issue becomes what types of lobbying are chargeable. For purposes of analysis, lobbying activities may be divided into six classes.

106. *Id.* at 236.

107. *Id.* In *Ellis*, the district court held that the union could not charge objectors for lobbying on proposed, existing or pending legislation, executive orders, policies or decisions. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 91 L.R.R.M. (BNA) 2339, 2342–43 (S.D. Cal. 1976), *rev'd on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *rev'd*, 466 U.S. 435 (1984) (This holding was not considered on appeal.); *see also* *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1391 (6th Cir. 1989) (Private sector unions cannot charge for lobbying.).

108. *Cf.* *Falk v. State Bar of Mich.*, 411 Mich. 63, 116, 305 N.W.2d 201, 217–18 (1981) (Ryan, J., no majority opinion in case) (Unified state bar association may not use compulsory dues for any lobbying.), *later op.*, 418 Mich. 270, 342 N.W.2d 504 (1983), *appeal dismissed*, 469 U.S. 925 (1984). There is considerable irony in allowing public sector unions to charge for some lobbying while precluding RLA unions from doing the same thing. Fee payers' first amendment rights are implicated because of the presence of state action. The state action in public sector collective bargaining is direct and strong. The government, in its capacity as employer, mandates fee payer financial support of the union. Under the RLA, the state action is weaker and more indirect. The federal government merely authorizes private parties to require fee payer financial support of the union and implements that authorization by preempting contrary state laws. This irony suggests that the Court should reexamine its holding in *Hanson* that the RLA's preemption of state right to work laws amounted to state action. *See* Brief for the United States as Amicus Curiae at 27, *Communications Workers v. Beck*, 108 S.Ct. 2641 (1988) (criticizing finding of state action in *Hanson*).

The narrowest range of chargeable lobbying is the one suggested in *Abood*, *i.e.*, lobbying the employer's governing body to ratify and fund the contract. A broader, but still limited range of chargeable lobbying would add to the first classification legislation setting specific terms and conditions of employment that in the private sector would be set at the bargaining table. For example, pensions and tenure are frequently set by legislation rather than collective bargaining in the public sector.<sup>109</sup>

The third and still broader classification of chargeable lobbying activities would encompass lobbying with respect to statutes that regulate but do not establish terms and conditions of employment for employees of the type represented by the union. For example, a teachers' union may seek to charge objectors for lobbying the state legislature to set a minimum salary for teachers even though the collective bargaining agreement provides for a salary scale that greatly exceeds the proposed statutory minimum.<sup>110</sup> The fourth category of chargeable lobbying expenditures would include lobbying on legislation that does not directly set or regulate terms of the public employment contract but which, by regulating actions of the public employer, may affect the working conditions of public employees. For example, a union of professors at a public university might lobby the legislature or the university's governing body to limit enrollment or set minimum academic standards for admission. Such legislation would not regulate the teachers' collective bargaining agreement but arguably would affect their working conditions by affecting the quantity and quality of the students they would teach.

The fifth category of possibly chargeable lobbying includes lobbying on statutes that regulate the public in general but have particular effects on working conditions of the type of public employees the union represents. For example, a police union might lobby for gun control legislation because it believes that the legislation will reduce the availability of firearms and make police work safer. Similarly, a transit union might lobby for increased gasoline taxes earmarked for mass transit because the availability of increased revenue will improve the union's position in collective bargaining.

The sixth, and by far the broadest, category of potentially chargeable lobbying expenditures are those aimed at generally applicable legislation which affects workers' terms and conditions of employment generally. For example, a union might lobby to retain the tax exempt status of employer-provided fringe benefits or the tax deductibility of union dues.<sup>111</sup>

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109. Several authorities have considered these lobbying activities to be chargeable. *Robinson v. N.J.*, 741 F.2d 598, 607-08 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *Champion v. Cal.*, 738 F.2d 1082, 1086 (9th Cir. 1984); *In re Board of Educ. of Boonton*, 99 N.J. 523, 546, 494 A.2d 279, 291 (1985), *cert. denied sub nom.* *Kramer v. Public Employment Relations Comm'n*, 475 U.S. 1072 (1986); *DuQuoin Educ. Ass'n and Bosecker*, 4 Pub. Empl. Rptr. Ill. (Lab. Rel. Press) ¶ 1064 (Ill. Educ. Lab. Rel. Bd. 1988).

110. *Cf. Champion v. Cal.*, 738 F.2d 1082, 1086 (9th Cir. 1984) (Union may charge for lobbying on statutes that "create a status quo from which the bargaining representatives start their negotiations.").

111. Compare *DuQuoin Educ. Ass'n and Bosecker*, 4 Pub. Empl. Rptr. Ill. (Lab. Rel. Press) ¶ 1064 (suggesting that such lobbying expenditures are not chargeable) with *Denham and AFSCME, Council 31*, AAA Case No. 51-673-0001-86-L (Nov. 29, 1986) (Duda, Arb.) (holding similar lobbying activity to be chargeable). The Illinois Local Labor Relations Board deferred to the *AFSCME, Council 31* arbitration award in *AFSCME, Council 31*, 3 Publ. Empl. Rptr. Ill. (Lab. Rel. Press) ¶ 3031 (Ill. Loc. Lab. Rel. Bd. 1987).

Several lower courts have seized on the *Abood* dicta and adopted a relatively broad classification of chargeable lobbying. For example, in *Champion v. California*,<sup>112</sup> the Ninth Circuit affirmed a district court's denial of preliminary injunctive relief against a union's charges for lobbying. The union had eliminated from the fee the expenditures on "partisan political or ideological causes only incidentally related to the terms and conditions of employment."<sup>113</sup> The court opined that public sector unions must "be given broad authority to protect their members' interests before the legislature."<sup>114</sup> Similarly, the Third Circuit and the New Jersey Supreme Court have upheld the facial validity of a New Jersey statute authorizing public sector agency shop charges for lobbying "designed to foster policy goals in collective negotiations and contract administration or to secure for employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective"<sup>115</sup> bargaining. Both courts adopted a standard allowing charges for lobbying that are germane to collective bargaining.<sup>116</sup>

Although the courts that have approved a germaneness standard for charging objecting fee payers for union lobbying expenditures have not addressed the constitutionality of charges for particular lobbying goals, opinions addressing a comparable issue in cases involving unified bar associations indicate that the germaneness standard is quite broad. For example, in *Falk v. State Bar of Michigan*<sup>117</sup> two justices of the Michigan Supreme Court read *Abood* as authorizing the bar association to spend compulsory dues for all of its lobbying activities because such expenditures were germane to the state's compelling interest in the administration of justice and advancement of jurisprudence by ensuring that the legislature will have the benefits of the collective experience of legal experts in a variety of fields.<sup>118</sup> In contrast, the New Hampshire Supreme Court in *In re Chapman*<sup>119</sup> read *Abood* to require that the bar association limit lobbying expenditures of compulsory dues to matters directly related to the efficient administration of the judicial system. It applied this narrower standard to prohibit the association from lobbying on nonprocedural aspects of proposed tort reform legislation.<sup>120</sup>

The courts that have adopted a broad standard of chargeable lobbying activities derive that standard by balancing the fee payers' right not to associate with the union against the government's interest in promoting stable labor relations by eliminating

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112. 738 F.2d 1082 (9th Cir. 1984).

113. *Id.* at 1085.

114. *Id.* at 1068.

115. N.J.S.A. 34:13A-5.5(c), (1988), cited in *In re Board of Educ. of Boonton*, 99 N.J. 523, 529, 494 A.2d 297, 282 (1985), cert. denied sub nom. *Kramer v. Public Employment Relations Comm'n*, 475 U.S. 1072 (1986).

116. *Robinson v. N.J.*, 741 F.2d 598, 607 (3d Cir. 1984), cert. denied, 496 U.S. 1228 (1985); *In re Boonton*, 99 N.J. at 547, 494 A.2d at 292. The germane-to-collective-bargaining standard was also adopted in *New Prairie Classroom Teachers Ass'n v. Stewart*, 487 N.E.2d 1324, 1329 (Ind. App. 1986). In *Lenhart v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1391 (6th Cir. 1989), the court also endorsed the germane-to-collective-bargaining standard, relying on the "reasonably incurred" prong of the *Ellis* test. The Court did not discuss the "necessarily incurred" language in *Ellis*.

117. 411 Mich. 63, 305 N.W.2d 201 (1981), later op., 418 Mich. 270, 342 N.W.2d 504 (1983), appeal dismissed, 469 U.S. 925 (1984).

118. *Id.* at 145-47, 305 N.W.2d at 231-32.

119. 128 N.H. 24, 509 A.2d 753 (1986).

120. *Id.* at 31-32, 509 A.2d at 758-59.



free riders. As I have previously shown, however, each side of the scale is overbroad. The agency shop does not compel fee payer association with the union. The only first amendment right at stake is the right of free speech, which is infringed when the union spends agency shop fees on political or ideological activity. Furthermore, courts have never strictly scrutinized the agency shop's contribution to stable labor relations in a manner sufficient to justify constitutionally the infringement on fee payers' free speech rights. Rather, the infringement may be justified because the agency shop balances the first amendment rights of union members and fee payers by reducing the union's need to use funds it might otherwise spend on political activity to subsidize the costs imposed on it by the statutory obligation to represent nonmembers employed in the bargaining unit.

Thus, assessing the chargeability of lobbying expenditures requires a threshold determination of whether forcing fee payers to subsidize union lobbying infringes on their free speech rights. Clearly it does. Even the narrowest category of possibly chargeable lobbying activities,—persuading the employer's governing body to ratify the contract—is fundamentally different from other agency shop fee expenditures. Although the ratification issues may be identical to the issues raised at the bargaining table, the forum has changed from a closed administrative process setting terms and conditions of employment to an open legislative process evaluating the wisdom of approving the negotiated terms and conditions.

The Supreme Court has recognized the effect of the forum on nonunion members' free speech rights in two cases that did not involve agency shop fees. In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,<sup>121</sup> negotiations between the district and its teachers' exclusive bargaining representative had deadlocked. At a public meeting of the school board, the union's president addressed the board on the pending negotiations. A nonunion member employed in the bargaining unit also addressed the board and urged it to reject one of the union's bargaining demands.<sup>122</sup> The Commission, in a decision affirmed by the Wisconsin Supreme Court, held that by listening to the nonmember employee the school board negotiated directly with an employee thereby bypassing the exclusive representative and committed an unfair labor practice.<sup>123</sup> The Supreme Court held that this application of Wisconsin law violated the nonmember employee's free speech rights. It emphasized that the school board meeting was open to the public<sup>124</sup> and that the Commission's interpretation of the principle of exclusive representation confined "the participation in public discussion of public business . . . to one category of interested individuals."<sup>125</sup>

In *Minnesota State Board for Community Colleges v. Knight*,<sup>126</sup> the Court reemphasized its holding that the principle of exclusive representation may not

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121. 429 U.S. 167 (1976).

122. *Id.* at 169–72.

123. *Id.* at 172–73.

124. *Id.* at 174.

125. *Id.* at 175.

126. 465 U.S. 271 (1984).

constitutionally bar nonunion members from opposing their exclusive representative's positions in open legislative sessions.<sup>127</sup> The Court, however, upheld the constitutionality of a Minnesota statute that required public employers to engage in nonbargaining meet-and-confer sessions with their professional employees' exclusive bargaining representatives over policy matters that were not mandatory subjects of bargaining.<sup>128</sup> The Court rejected nonunion members' arguments that their exclusion from the process violated the first amendment. It distinguished *Madison School District* as a case which involved the selective exclusion of one segment of the public from a generally open public forum.<sup>129</sup>

Thus, nonmembers have no constitutional right to interfere with their exclusive representative's activities at the bargaining table, but they do have free speech rights to oppose the union's positions in lobbying, even when the union is lobbying for approval of the contract it negotiated at the bargaining table. Compelling those nonmembers to subsidize financially union lobbying activities that they oppose infringes their free speech rights regardless of whether the union is lobbying for contract ratification or against taxation of fringe benefits.

The union may justify this infringement constitutionally where the compelled subsidization of lobbying enables it to avoid diverting funds from political activity to cover the costs of representing nonmembers. This justification is available only to the extent that the union necessarily incurs the lobbying expenditures in performance of its duties as exclusive representative. Moreover, because lobbying is never a necessity for a private sector exclusive representative, the necessity that justifies forcing public employees to subsidize union lobbying must result from the peculiar nature of public sector collective bargaining.

Application of the above analysis to the narrowest category of possibly chargeable lobbying activity makes it clear that a union may charge fee payers for costs incurred in securing the employer's ratification and funding of the contract. In the private sector, an employer may demonstrate bad faith by sending representatives to the bargaining table who do not have authority to bind it.<sup>130</sup> In the public sector, employer bargaining representatives rarely have that authority. The contract is subject to employer ratification. The exclusive representative's lobbying activities that secure ratification are a representational necessity created by the peculiar nature of public sector collective bargaining.

A similar analysis applies to the second category, lobbying on terms and conditions set by statute. In the private sector, the legislature generally does not set particular terms of the collective bargaining agreement.<sup>131</sup> Public sector collective bargaining has undergone an evolution in which many terms that were once set by the

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127. *Id.* at 281.

128. *Id.* at 274-75.

129. *Id.* at 281.

130. *See, e.g.,* NLRB v. Alterman Transp. Lines, 587 F.2d 212 (5th Cir. 1979).

131. There may be rare exceptions. *See, e.g.,* Act of Sept. 8, 1988, Pub. L. 100-429, 1988 U.S. CODE CON. & ADMIN. NEWS (102 Stat.) 1617 (1988) (imposing certain terms and conditions regarding job security on the Chicago and Northwestern Railroad and the United Transportation Union).

legislature have been shifted to the bargaining table. Nevertheless, state legislatures have retained the right to set certain terms and conditions of employment, most notably pensions. Lobbying on these terms and conditions of employment is a representational necessity peculiar to the public sector.

The representational necessity dissipates when the broader categories of lobbying are considered. Lobbying on legislation which regulates but does not set terms and conditions of employment is reasonable, but it is not necessary in the representation of bargaining unit employees. For example, successful lobbying to set or raise a minimum salary for teachers may assist a teachers union in negotiating higher salaries for bargaining unit employees. Such lobbying would be reasonable but not necessary to the representation of the bargaining unit. It would seem to differ little from a private sector union's lobbying to increase the general minimum wage. Even though such increases may result in higher wage agreements at the bargaining table,<sup>132</sup> fee payers may not be forced to subsidize the lobbying effort. Charging for the fourth category of lobbying, that is, lobbying for legislation that affects working conditions by regulating activities of the employer, also fails the necessity test. Lobbying by a teachers union on admissions standards is no more necessary to the union's performance as exclusive bargaining representative than lobbying for stricter airline safety standards would be for a pilots' or a flight attendants' union.

The fifth category, lobbying on legislation regulating the general public, is also reasonable but not necessary representation activity. A police union's lobbying on gun control differs little from a pilots' or flight attendants' union lobbying to ban plastic guns which can evade airport metal detectors. A transit union's lobbying for the use of gasoline taxes to fund mass transit does not differ from a private sector union's lobbying for government subsidies for its industry.

The sixth category, lobbying on matters that affect workers generally, misses the necessity standard by the widest margin. The relationship between lobbying on the tax treatment of fringe benefits and the performance of duties as exclusive representative is so indirect that such expenditures probably fail the far broader germaneness test as well.

Thus, the range of chargeable lobbying expenditures is narrower than the lower courts have suggested. Generally, chargeable lobbying should be limited to obtaining contract ratification and funding from the employer's governing body and influencing legislation which directly dictates terms and conditions of employment. Of course, exemption from subsidizing broader lobbying activities is dependent on the fee payer's objection to such compelled subsidization. Accordingly, I now turn to the role of the fee payer's objection in the constitutional analysis of the agency shop.

#### IV. THE SIGNIFICANCE AND ROLE OF THE OBJECTION

The Supreme Court's approach to the significance and role of fee payer objections has been as confusing as its approach to defining the nature of the fee

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132. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (union's protest over presidential veto of minimum wage increase is protected concerted activity under § 7 of the NLRA).

payer's first amendment rights that are at stake in the agency shop context. The concept of fee payer objection originated in *Street* where the Court, in recognizing fee payers' statutory rights under the RLA to avoid subsidizing political expenditures with which they disagreed, declared that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."<sup>133</sup> In *Abood* the Court elevated this statutory right to a constitutional level in the public sector and adopted the *Street* analysis that a union need not presume fee payer dissent,<sup>134</sup> and the Court used the term objection to refer to the fee payer's communication of dissent to the union.<sup>135</sup>

Thus, as of the time the Court decided *Hudson*, an objection to an agency shop fee referred to the fee payer's communication of opposition to political and ideological expenditures unrelated to collective bargaining. In *Hudson*, the Court established a second purpose for an objection—to challenge the union's calculation of the amount of the fee that can be charged to objectors.<sup>136</sup> The Court held that all potential objectors are entitled to notice of how the union had calculated the fee and that objectors are entitled to a reasonably prompt hearing before a neutral decisionmaker.<sup>137</sup> Pending resolution of the objections, the union must use advanced reductions and escrows to ensure that objectors' funds are not used even temporarily for nonchargeable expenditures.<sup>138</sup>

In *Hudson*, the Chicago Teachers Union (CTU) charged nonmembers employed in the bargaining unit a fair share fee equal to ninety-five percent of regular union dues. The CTU's fee differed from the fee charged by the Detroit Federation of Teachers (DFT) in *Abood*. The DFT charged nonmembers 100 percent of regular union dues. The CTU's ninety-five percent fee was calculated by reducing the regular dues by the amount that the CTU conceded was spent on political and ideological activity unrelated to collective bargaining.<sup>139</sup> The CTU also employed an internal objection procedure. If an objector successfully used this procedure to reduce her fee, the CTU prospectively reduced the fees assessed all nonmembers regardless of whether they objected.<sup>140</sup> Thus, although the Constitution did not require the CTU to presume nonmembers' dissent to political and ideological expenditures, the CTU effectively chose to do so and not to charge nonmembers for those activities. Unlike

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133. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

134. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236–37 (1977).

135. The Court spoke of the need to prevent "compulsory subsidization of ideological activity by employees who object thereto." *Id.* at 237. The Court also held that the fee payers adequately communicated their dissent to the union by filing their lawsuit. *Id.* at 241; accord *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 119 n.6 (1963) (reaching same result under RLA). Read broadly, *Abood* and *Allen* might suggest that a prelitigation objection is never necessary. This would render the concept of an objection to communicate dissent illusory. Such a broad reading of the case law is not proper. The unions in both cases had not developed any internal objection procedures. Where a union fails to clearly delineate internal procedures, employees are not expected to follow them. Accordingly, they may communicate their dissent by filing suit. Where unions create fair and adequate objection procedures, courts should not allow fee payers to bypass them. Malin, *supra* note 96, at 884.

136. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

137. *Id.*

138. *Id.*

139. *Id.* at 295.

140. *Id.* at 296.

*Abood*, there was no need for a nonmember in *Hudson* to object in order to communicate dissent. The sole purpose of an objection was to challenge the union's calculation of the fee.

Perhaps because of the facts in *Hudson*, the Court did not address the relationship between the two purposes of an objection. Its failure to do so has left several questions unanswered. In a situation such as *Abood*, where the union charges a fee equal to 100 percent of dues unless a fee payer dissents, does the objection to paying for nonchargeable expenditures entitle the fee payer to a hearing, or must the fee payer expressly challenge the union's calculation of the chargeable percentage? What effect does the hearing and the neutral's decision have on fee payers hired after the proceeding and on fee payers who do not participate in the hearing but who later object to the fee? May a union or public sector labor board set a deadline for filing objections? The answers to these questions depend on the role of the hearing in agency shop administration.

The Seventh Circuit Court of Appeals recognized an objector's right to a hearing in its decision in *Hudson*. That court grounded the right in the first amendment and in the due process clause of the fourteenth amendment. It viewed the hearing as a procedure necessary to safeguard objectors' first amendment rights to refrain from subsidizing political and ideological activity unrelated to collective bargaining.<sup>141</sup>

The lower court's due process analysis was premised on the proposition that any agency shop fee, regardless of how it was spent, deprived nonmembers of their liberty interest in refraining from associating with the union.<sup>142</sup> The court viewed this deprivation as constitutionally justified to the extent that fees are spent on collective bargaining activities; but found that even a justified deprivation of liberty can occur only after affording the victims of the deprivation due process of law.<sup>143</sup>

The Supreme Court found it unnecessary to address the Seventh Circuit's due process analysis.<sup>144</sup> It imposed the requirement of a reasonably prompt hearing before an impartial decisionmaker because nonmembers whose first amendment rights are affected by the agency shop and who bear the burden of objecting are entitled to have their objections resolved fairly and expeditiously.<sup>145</sup> The burden is thus on the union to provide procedures that minimize the agency shop's infringement on nonmembers' rights and that enable nonmembers to protect their rights.<sup>146</sup>

The need for an expeditious hearing to protect objectors' rights is readily apparent. Absent a hearing, objectors would be entirely dependent on the union's good faith in calculating the fee. Even a union operating in good faith is subject to errors in its calculations and in its characterizations of particular expenditures as chargeable or nonchargeable. The objectors' sole recourse would be to sue the union. The hearing requirement protects against the possibility that unions will deliberately

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141. *Hudson v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd on other grounds*, *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

142. *Id.* at 1192-93. See *supra* notes 80-85 and accompanying text.

143. *Id.* at 1193.

144. *Hudson*, 475 U.S. at 304 n.13.

145. *Id.* at 307.

146. *Id.* at 302-03.

cheat or will make good faith errors in allocating the fee between chargeable and nonchargeable expenditures. This protection is enhanced by placing the burden of proof on the union. A union is less likely to try to impose nonchargeable expenditures on objectors if its fee is easily challenged and the challenge requires it to prove to a neutral decisionmaker its entitlement to the fee.

Thus, in cases where a union chooses not to presume dissent and charges an agency shop fee equal to union dues, a nonmember's communication of dissent to political and ideological expenditures would have considerably less meaning if the objectors were forced to accept the union's calculation unless they affirmatively challenged the fee. The objector's freedom from compelled expression is dependent on the union's duty to prove its claim to the fee before the neutral decisionmaker. That duty must be triggered by the communication of dissent to the union. The dissenter need not await the union's calculation and then affirmatively challenge it.

Situations will arise in which an objector communicates her dissent to the union after the neutral decisionmaker has resolved other objections in the bargaining unit. New employees may be hired and object after the conclusion of the hearing and the issuance of the decision. Continuing employees might record their dissent at this later date also. For example, assume that on June 1, an exclusive representative notifies potential objectors that effective July 1 they will be charged a monthly agency shop fee equal to regular dues. Several nonmembers object immediately. Two nonmembers do not object because, although they do not belong to the union, they agree with its political activities. Assume that a hearing is held before a neutral arbitrator who issues an award in late September. Assume further that in early October the union endorses certain candidates for political office. The two nonmembers who did not previously object support these candidates' opponents. They have first amendment rights to maintain the privacy of their views and to refrain from subsidizing the candidates whom they oppose. They exercise these rights by filing general objections to charges for political and ideological expenditures.

When a union receives a postdecision objection regardless of whether it came from a newly hired or a continuing employee, the union must reduce the objector's fee to the amount sustained by the neutral decisionmaker. However, these new objections need not trigger a new hearing. The new objector's first amendment rights are not at the mercy of the union's unilateral calculation. The hearing and neutral decision have already provided the procedural protection to which the objector is entitled. There is no reason to require another hearing unless the objector can point to evidence not considered at the first hearing which has a reasonable probability of changing the outcome.<sup>147</sup>

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147. See *Gilpen v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3258 (1989) (plaintiffs not harmed by inadequate notice because they received the benefit of any fee reduction ordered by the impartial arbitrator). This may be a crucial distinction between the Supreme Court's first amendment analysis and the Seventh Circuit's reliance on the due process clause as the source of the fee payer's right to a hearing. Under the first amendment, the hearing serves as a neutral check on the union's self-interested cancellation of the fee. It protects the first amendment rights of existing and future fee payers. If each individual fee payer, however, has a due process right to a hearing, posthearing objectors might be able to demand that right unless their failure to participate in the hearing waived their due process rights. If existing employees were given adequate *Hudson* notice, they may waive their hearing rights by remaining silent. Newly

Many unions and public sector labor relations agencies have set time limits for filing agency shop fee objections.<sup>148</sup> It is apparent from the above discussion that to the extent that such time limits purport to cut off a nonmember's right to dissent to charges for political and ideological activities, they are invalid. A union's political or ideological causes may change from those a nonmember supports to some that the nonmember opposes.<sup>149</sup> Even where the union's causes remain constant, the nonmember's political or ideological views may change. Because dissent is not presumed, objections operate prospectively only and the union is not prejudiced regardless of how late they are filed. Thus, a procedure which cuts off a nonmember's right to communicate dissent infringes the objector's right not to subsidize political or ideological activities without any countervailing union justification.

The setting of time limits for challenges to the union's calculation of the chargeable amount raises a different issue. If the union gives potential objectors adequate notice of the hearing procedures, nonmembers choose not to participate at their own peril. The hearing substitutes a neutral's evaluation of the union's proof for the union's unilateral calculation of the chargeable amount and thus protects the first amendment rights of all nonmembers including those who do not participate. Nonmembers who knowingly choose not to participate may be bound by the hearing result.<sup>150</sup>

Employees hired after the hearing will not have had prior notice of the fee contest procedures and cannot be bound by the result. Nevertheless, the hearing does safeguard their first amendment rights in the same manner as it safeguards the rights of continuing employees who chose not to participate. Thus new hires should be required to make a threshold showing of new evidence or arguments that might have changed the outcome before they can trigger a duty to provide them with an additional hearing.

## V. THE ROLE OF THE NEUTRAL DECISIONMAKER

It is clear from the above discussion that the neutral decisionmaker is the key procedural protection for objectors' first amendment rights. The neutral decision-

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hired employees, however, could not possibly waive rights that they did not acquire until they were hired. For a general discussion of waiver of due process rights see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 10-17 (2d ed. 1988).

148. See, e.g., *Cramer v. Matish*, 705 F.Supp. 1234 (W.D. Mich. 1988) (approving union plan requiring objections within 45 days following mailing of notice); *Lenhart v. Ferris Faculty Ass'n*, 707 F.Supp. 1473, 1481 (W.D. Mich. 1988) (approving union's requirement that objections be filed within 30 days after notice), *aff'd*, 881 F.2d 1388 (6th Cir. 1989); Cal. Pub. Empl. Rel. Bd. Agency Fee Regulations § 5(b) (providing for objection to be filed within 30 days after notice); 80 Ill. Adm. Code § 1125.30 (objection must be filed within six months following first payroll deduction); 402 Code of Mass. Regulations § 17.06(2) (challenge to amount of agency shop fee must be filed no later than six months after union has made a demand for payment); Minn. R. 5510.1410 (1987) (setting 30 day period for filing challenges).

149. See, e.g., *EEOC v. Univ. of Detroit*, 701 F.Supp. 1326 (E.D. Mich. 1988) (employee objected after union took a pro-choice position on abortion).

150. Another important distinction between objections that communicate dissent and those that challenge the fee calculation is that the former may be made through a general statement to protect the privacy of the objector's views. The latter, however, command no similar privacy interest. Provided that potential objectors are given sufficient notice regarding the fee calculation, they can be required to state the basis for their objection. See *Kuehn v. AFCSME Council 65*, 435 N.W.2d 130 (Minn. App.), *cert. denied*, 58 U.S.L.W. 3201 (1989).

maker stands between objectors' rights and the union's unilateral calculation of chargeable amount.

The neutral decisionmaker's review of the union's case generally will consist of two levels. First, the neutral will review the union's legal conclusion that particular expenditures are chargeable. The law governing chargeability is still in its early development. As court decisions further define the line between chargeable and objectionable expenditures, the significance of this role of the neutral will diminish. Second, the neutral must assess the proof offered by the union to support its calculation. This role is critical. The amounts involved in agency shop fee contests are usually small. Consequently, many feepayers choose not to participate in the hearing.<sup>151</sup> Those that do participate often are not represented by counsel. This can result in a hearing record consisting of a union's proof that has not been significantly challenged.

The neutral decisionmaker cannot unquestioningly accept the union's proof even in the absence of a significant challenge by objectors. To do so would convert the hearing into a rubber stamp of the union's unilateral calculation. This would defeat the purpose behind the requirement that the union prove its claim in an impartial hearing.

The neutral decisionmaker must hold the union to its burden of proof. This entails requiring the union's proof to meet a threshold level of reliability. The degree of reliability defines the nature of the union's burden.

In *Hudson*, the Court recognized that it could not require absolute precision in calculating the fee.<sup>152</sup> Such a requirement would be so burdensome that, as a practical matter, it would negate the purpose of having an agency shop.<sup>153</sup> Thus, although the Court recognized that objections are to expenditures in the current year, it allowed unions to charge objectors based on expenditures they made in the prior year.<sup>154</sup> This approach recognizes that the prior year's expenditures usually will provide a reasonable estimate of what current year expenditures ultimately will be.

The neutral decisionmaker should apply a similar standard of reliability to the union's proof. In the typical case, the largest union expenditures will be for staff compensation. These expenditures will be allocated between chargeable and non-chargeable activities based on the allocation of the staff members' time. The basis for allocating employee time must meet a threshold standard of reliability for the union to carry its burden of proof with respect to these expenditures.

This standard of reliability should not require employees to maintain contemporaneous time sheets to account for every minute of their days. Requirement of such precision would be inconsistent with the *Hudson* Court's acceptance of the use of approximations in calculating the fee. The burden of such a recordkeeping requirement, particularly where there are few nonmembers, might outweigh the increased revenue that an agency shop generates and thereby defeat the agency shop's

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151. See Malin, *supra* note 96, at 873-74.

152. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 307 n.18 (1986).

153. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 239 n.40 (1977).

154. *Hudson*, 475 U.S. at 307 n.18.



purpose of spreading the costs of collective bargaining among all who receive its benefits.

On the other hand, the neutral cannot simply accept employees' uncorroborated estimates of how they spent the past year, even if the objectors do not challenge them. The likelihood that objectors will not be represented at the hearing substantially reduces the chances that these estimates will be rigorously cross-examined. Acceptance of uncorroborated estimates would amount to excessive deference to the union's unilateral calculation and an abdication of the neutral's role.

Accordingly, the neutral must insist that allocation of employee time be supported by a reasonably reliable method of corroboration. The degree of detail the neutral requires should depend, in part, on the nature of the employee's responsibilities. For example, an employee whose sole job is to process grievances may be able to estimate with reasonable accuracy that she spent all of her time on chargeable activity and could corroborate this estimate by reviewing her calendar and files to assure that she spent no time on objectionable activities. On the other hand, an employee whose responsibilities cover a diverse range of activities would require a much more detailed documentary basis for estimating the allocation of his time.<sup>155</sup>

The union's proof must also meet a threshold standard of specificity. This is necessary to enable the neutral to assess the union's determination that particular expenditures are chargeable. The degree of specificity should depend on the type of expenditure. There can be no doubt that some expenditures, such as collective bargaining and grievance processing, are chargeable to objectors. For these activities the union need not break down the expenditures with greater specificity to enable the neutral to assess their chargeability. The key issue regarding these expenditures will be whether the union actually spent the money in the manner it claims. The threshold standard of reliability ensures that the neutral will be able to assess independently the union's claims in these areas.

Other expenditures require the neutral to balance the union's rights against the objectors' first amendment rights. They involve activities that are not broadly chargeable to objectors. For example, litigation expenditures are chargeable only if they directly involve the bargaining unit. Otherwise, the litigation is not necessary to the union's role as exclusive bargaining representative and cannot be charged to objectors. Consequently, a union must identify its litigation expenditures with greater specificity to enable the neutral to assess their chargeability. The union must specify each piece of litigation, what its goals were, and how it involved the bargaining unit. The union must meet a similar level of specificity in proving its claims to charge for lobbying and other political or ideological activities.<sup>156</sup> Of course, in addition to being sufficiently specific, the union's proof must also meet the threshold requirement of reliability.

Taken together, the threshold requirements of reliability and specificity ensure

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155. The Illinois Educational Labor Relations Board applied this approach in *DuQuoin Educ. Ass'n and Bosecker*, 4 Pub. Emp. Rptr. Ill. (Lab. Rel. Press) ¶ 1064 (Ill. Educ. Lab. Rel. Bd. 1988).

156. The Massachusetts Labor Relations Commission adopted this approach in *Woburn Teachers Ass'n*, 13 Mass. Lab. Rel. Rep. (New Eng. Leg. Pub.) 1147 (Mass. Lab. Rel. Comm'n 1987).

that the hearing will produce a record that will facilitate independent neutral review of the union's claims. This will enable the hearing and impartial review to fulfill their roles in protecting the objector's first amendment rights.

## VI. THE REQUIREMENT OF NOTICE

The *Hudson* Court found the CTU's objection procedure constitutionally inadequate because, *inter alia*, the union did not give potential objectors sufficient notice.<sup>157</sup> The CTU advised potential objectors that it had calculated the fee by reducing the regular dues by five percent, an amount that represented the percentage of expenditures that the CTU determined not to be chargeable.<sup>158</sup> The Court held this notice inadequate because it failed to identify the expenditures that the CTU claimed to be chargeable. Disclosure of only the amounts the union admitted not to be chargeable did not advise nonmembers why the union was claiming it was entitled to the remainder.<sup>159</sup> The Court noted that the union need not provide nonmembers with a detailed exhaustive list of expenditures but suggested that adequate notice would require a listing of the major categories of expenditures and verification by an independent auditor.<sup>160</sup>

The purpose behind the notice requirement is to enable potential objectors to decide whether to object. The Court derived the notice requirement from the nonmember's burden of objecting. The Court reasoned that fairness and concern for nonmembers' first amendment rights required that "potential objectors be given sufficient information to gauge the propriety of the union's fee."<sup>161</sup> Thus, to be adequate, a union's notice must enable a reasonable fee payer to decide whether to object.

Objections, however, serve two different purposes. Although the *Hudson* Court relied on *Abood* for the burden to object, the cases involved different types of objections. In *Abood* the union chose not to presume fee payer dissent to political and ideological expenditures and initially charged them 100 percent of union dues. The purpose of objection in *Abood* was to communicate dissent and obtain a reduced fee. In *Hudson*, however, the union automatically reduced the fee for all nonmembers by the amount it believed represented objectionable expenditures. This rendered an *Abood* objection unnecessary. The sole purpose for an objection in *Hudson* was to challenge the union's fee calculation.

As previously discussed, the Court's failure to distinguish between the fee charged in *Hudson* and the fee charged in *Abood*, and its apparent confusion of the two types of objections, left unresolved the relationship between objections that

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157. *Hudson*, 475 U.S. at 306.

158. *Id.* at 306-07.

159. *Id.*

160. *Id.* at 307 n.18. The independent auditor's function is to verify that the expenditures that form the basis for the fee were actually made. An auditor cannot be expected to make legal conclusions regarding the union's determination that the expenditures could be charged to objectors. *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335 (2d Cir. 1987).

161. *Hudson*, 475 U.S. at 306.

communicate dissent and those that challenge the union's calculation.<sup>162</sup> It also left open whether its standards for the notice in *Hudson* apply equally to cases like *Abood* where nonmembers have the burden of communicating dissent.

Where the union reduces the fee for all nonmembers, the only purpose for objecting is to challenge the union's calculation. Indeed, the very reason for requiring a hearing is to prevent the dissenter's first amendment rights from being at the mercy of the union's unilateral judgment as to what is chargeable. Under these circumstances the union must provide potential objectors with the general categories of expenditures to enable them to make an intelligent decision whether to challenge the fee.

Where, however, the union initially charges a fee equal to regular dues and admits that the fee includes charges for objectionable expenditures, the burden on the nonmember is considerably lighter. The nonmember need only decide whether to communicate dissent. There is no need to decide whether to challenge the union's calculation because the communication of dissent automatically triggers the union's duty to prove its claim to any fee to a neutral decisionmaker.<sup>163</sup> The notice that the union must give to nonmembers need only provide sufficient information to enable them to decide whether to dissent.<sup>164</sup>

At first blush it may seem anomalous that a union that reduced the fee for all nonmembers, and thus appears to be more protective of their rights, faces a more stringent notice requirement than a union which initially charges nonmembers a fee that admittedly includes objectionable expenditures. This apparent anomaly may be explained by considering the likelihood that each approach will generate objections. A union which charges nonmembers a fee that admittedly includes objectionable expenditures is inviting numerous objections. A union which reduces the fee across the board is probably seeking to reduce, or even eliminate objections. Reductions for all nonmembers communicate a message to them that objection is futile because the union has already reduced the fee to the maximum extent required by the

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162. See *supra* text accompanying and following notes 135-40.

163. See *supra* text following note 145.

164. The Illinois Educational Labor Relations Board's decision in *DuQuoin Educ. Ass'n and Bosecker*, 4 Pub. Emp. Rptr. Ill. (Lab. Rel. Press) ¶ 1064 (Ill. Educ. Lab. Rel. Bd. 1988) illustrates this. Under then applicable IELRB rules, an objection registering dissent automatically triggered the escrowing of the objector's fees and the start of hearing procedures to determine the chargeable amount of its union's fee. The Illinois Education Association (IEA) charged objectors a fee equal to regular union dues but informed them that this included charges for political and ideological expenditures. The IEA's notice further informed fee payers that their fees would be reduced by the amount of money allotted to political and ideological expenditures. But the IEA failed to give fee payers adequate information to determine whether they should challenge its calculation of the amount which would be charged upon objection. The IELRB held that the IEA's notice was adequate. The IELRB reasoned that the fee payers were told enough to enable them to decide whether to object because they were told that if they did not object, the union would not presume their dissent to political and ideological expenditures and would charge them accordingly. Because those objections automatically triggered a hearing at which the union was required to prove its entitlement to any fee, no further information was required in the notice.

The National Labor Relations Board's General Counsel, in a memorandum applying *Hudson* to the private sector in light of *Communication Workers v. Beck*, 108 S. Ct. 2641 (1988), has suggested that the only notice a union must provide nonmembers where it charges full dues is the percentage of funds spent in the last accounting year on nonchargeable activities and the nonmembers' right to object to being charged for those activities. In the General Counsel's view, a union need only provide a detailed breakdown of its expenditures to those nonmembers who actually object. Memorandum GC88-14, [Nov. 1988] Daily Labor Report (BNA) No. 225, at D-1 (Nov. 15, 1988).

Constitution. The potential advantage to the union is substantial. If no nonmembers object, the union need not provide an impartial hearing or otherwise prove its claims. If only a few nonmembers object, the union is in strong position to settle those objections and avoid a hearing. Under these circumstances a more stringent notice requirement in cases of across the board reductions is not only not anomalous, it is entirely appropriate.

## VII. CONCLUSION

Although the Supreme Court has developed a wide range of settled doctrine in agency shop cases, it has not articulated a consistent, unambiguous framework for analyzing the conflicting rights of unions and fee payers. The Court's delineation of the fee payer rights at issue has shifted ambiguously between rights of free speech and rights of free association. In justifying infringements on fee payer rights the Court has uncritically accepted legislative judgments regarding the agency shop's contribution to the stability of labor relations. The Court has compounded the confusion by identifying but failing to discuss the relationship between two different functions of a fee payer's objection, *i.e.* recording the fee payer's dissent to political and ideological expenditures and challenging the union's calculation of the nonpolitical, nonideological percentage of the fee.

The appropriate approach to agency shop fees in the public sector views them as infringing on fee payers' rights of free speech rather than free association. This approach explains why collection of a fee is constitutionally insignificant while expenditure is constitutionally determinative. It also explains why unions need not presume fee payer dissent to political and ideological expenditures.

Even where political and ideological expenditures infringe on fee payer free speech rights, the role of the agency shop in balancing the conflicting first amendment interests of fee payers and union members can justify the infringement. The justification is limited to political and ideological expenditures that the union necessarily incurs in its role as exclusive bargaining representative.

Objections from fee payers record their dissent and trigger their first amendment rights not to subsidize union political and ideological activities that are not necessary to their representation. These rights would be illusory if the objectors had to rely exclusively on the union's calculation of chargeable and nonchargeable expenditures. Thus, the objection which registers fee payer dissent automatically challenges the union to prove its calculations in a hearing before a neutral decisionmaker. The neutral decisionmaker has a duty to review the union's evidence objectively to determine whether the union has met its burden of proof. That review requires that the union's proof meet threshold standards of reliability and specificity. Once the neutral has issued a decision, however, fee payers are no longer at the mercy of the union's unilateral calculation. Consequently, subsequent objections during the same year serve only to record dissent and need not trigger a new hearing on the same calculation.

