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Labor / Higher Education Meets the Agency Shop: Most UC and CSU Employees Will Pay "Fair Share" to Unions Even If They Choose Not to Be Union Members

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Higher Education Meets the Agency Shop: Most UC and CSU Employees Will Pay "Fair Share" to Unions Even If They Choose Not to Be Union Members

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Code Sections Affected
Government Code §§ 3583.5, 3584 (new), 3583, 3585 (amended).
SB 645 (Burton); 1999 STAT. Ch. 952

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I. INTRODUCTION

Labor unions ("employee organizations" or "unions") contend that where the law requires them to represent all employees, including those who are not union members, in a bargaining unit, nonmembers should have to pay their share of union expenses.[1] Negotiating and administering collective bargaining agreements and representing employees in dispute and grievance settlements involve the expenditure of considerable time and money by employee organizations.[2] Nonunion employees who benefit from these union services without paying dues obtain a "free ride."[3] To prevent these "free rides," unions seek agreements that require the levying of mandatory dues on all employees who benefit from the union's services.[4]

Arrangements that require an employee either to join an employee organization or to pay the organization a "fair share fee" as a condition of employment are known as "agency shop arrangements."[5] Agency shop arrangements are one form of organizational security device[6] designed to strengthen employee organizations and insure their financial stability.[7] Long recognized as valid when negotiated

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1. *Worker Paycheck Fairness Act: Hearings on H.R. 1625 Before House Subcommittee on Employer and Employee Relations*, 105th Cong., at 5 (1998) (testimony of Morgan O. Reynolds, Professor of Economics at Texas A&M University) [hereinafter Reynolds Testimony].

2. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 (1976).

3. *Id.* at 222.

4. David B. Yelin, *Constitutional Considerations Affecting the Methods of Exacting Union "Fair-Share" Collective Bargaining Fees from Non-Member Public Employees*, 1985 DET. C.L. REV. 767, 768 (1985).

5. Wayne F. Foster, Annotation, *Union Security Arrangements in State Public Employment*, 95 A.L.R. 3d 1102, 1106 (1980).

6. Joseph G. Schumb, Jr., *Agency Fees in Educational Employment: Reality or Mirage?*, 18 SANTA CLARA L. REV. 909, 909-12 (1979).

7. Foster, *supra* note 5, at 1106. The various security devices can be arranged in the order of decreasing restrictiveness. Closed shops permit employment for union members only. *Id.* Union shops require an employee to join a union shortly after being hired and to continuously maintain union membership. *Id.* Maintenance-of-membership provisions require union members to maintain their union membership during the term of a collective

between private sector employees and employers, most organizational security devices have resulted in mixed legal results when used in the public sector.[8]

California law authorizes most local, State, and public education employees to enter into agency shop arrangements.[9] However, under the Higher Education Employee Relations Act (HEERA),[10] the option to enter into agency shop arrangements has not been available to employees of the University of California (UC) and California State University (CSU) systems.[11] In legislation unprecedented in the public sector, Chapter 952 mandates agency shop arrangements for UC and CSU bargaining units for which an exclusive representative has been selected.[12] Those employees who are not union members, yet benefit from union representation, will be required to pay a "fair share service fee" to the union until such a time that a majority of the employees in a bargaining unit vote to discontinue the agency shop arrangement.[13]

This Legislative Note will discuss the legal history of collective bargaining rights in California public employment, consider the constitutional challenges to agency shop arrangements, and examine California's current statutes related to agency shop arrangements in public employment.[14] A review of the essential elements of Chapter 952 and an analysis of the issues raised by Chapter 952 is also provided.[15] Finally, this Legislative Note suggests a rather extreme solution for those employees opposed to mandatory fair share service fees.[16]

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bargaining agreement. *Id.* Agency shop or fair share agreements require every employee either to join the union or to pay a service fee to the union as a condition of employment. *Id.* Checkoff privileges afford an option to employees whereby they can choose to contribute to the union but are not required to do so as a condition of employment. *Id.*

8. *See* Schumb, *supra* note 6, at 911-12 (noting that in private employment, while closed shops had been prohibited in 1947, union shops, maintenance of membership agreements, and agency shops each had been validated by 1963); Foster, *supra* note 5, at 1106 (noting that in public employment, while all jurisdictions prohibit closed shops, several jurisdictions permit agency shops, and some authorize union shops and maintenance-of-membership provisions).

9. *See* CAL. GOV'T CODE § 3502.5(a) (West 1995) (authorizing agency shops for most local public employees); *id.* § 3515.7(a) (West 1995) (authorizing agency shops for most State employees); *id.* §§ 3540.1(i)(2), 3546 (West 1995) (authorizing agency shops for most public education employees).

10. *Id.* §§ 3560-3599 (West 1995 & Supp. 2000).

11. ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 3 (June 29, 1999).

12. CAL. GOV'T CODE § 3583.5 (enacted by Chapter 952); *see* ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 4 (June 29, 1999) (indicating that critics of the legislation note that statutorily imposed agency shop arrangements are unprecedented in California's public sector).

13. CAL. GOV'T CODE § 3583.5 (enacted by Chapter 952). "Fair share service fee" is synonymous with "agency shop fee" and "fair share fee." *See* ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 3 (June 29, 1999) (indicating that SB 645 addresses the issue of "agency shop/fair share fees").

14. *Infra* Part II.

15. *Infra* Parts III, IV.

16. *See infra* Part IV.F (suggesting that decertifying an employee organization may be easier than defeating the agency shop arrangement imposed by Chapter 952).

II. LEGAL BACKGROUND

The perceived need for agency shop arrangements arises from the law's requirement that an employee organization acting as the exclusive representative of a bargaining unit must fairly represent all employees in the bargaining unit, whether or not those individual employees wish to be represented by the organization.[17] The legal duty of a union to fairly represent all members of a bargaining unit, and not just union members, was established[18] in 1944 with the U.S. Supreme Court decision in *Steele v. Louisville & Nashville Railroad Co.*[19] Today, the National Labor Relations Act (NLRA)[20] codifies the duty of an exclusive employee organization to represent nonunion members in a bargaining unit.[21] The NLRA does not, however, apply to government employees.[22] Instead, state law and the federal Constitution govern the collective bargaining rights of these public employees.[23]

California law recognizes important distinctions between public and private employees, resulting in public employees being denied the common law collective bargaining rights that exist for private employees.[24] One important distinction is that the incentive to oppress labor that exists in the private sector is largely absent in the public sector.[25] Two other distinctions justify the absence of common law collective bargaining rights for public employees.[26] First, the public interest in the uninterrupted performance of government functions requires that public employees

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17. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-22 (1976) (noting that in carrying out its collective bargaining duties under federal labor law, an exclusive representative "is obliged 'fairly and equitably to represent all employees[,] ... union and non-union,' within the relevant unit," that such responsibility requires the expenditure of time and money, and that employee organizations seek to compel nonunion employees to share in this expense) (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 761 (1961)).

18. *See* Reynolds Testimony, *supra* note 1, at 5 (indicating that *Steele* represented the first recognition of this obligation).

19. 323 U.S. 192 (1944); *see id.* at 199 (holding that the Railway Labor Act's use of the word "representative" implied that the union "is to act on behalf of all employees which, by virtue of the statute, it undertakes to represent").

20. 29 U.S.C.A. §§ 151-1169 (West 1988 and 1994).

21. *Id.* § 159(a) (West 1994).

22. *Id.* § 152(2) (West 1988) (excepting government from the definition of "employer" in the Act); *see also* NAACP v. Detroit Police Officers Ass'n, 821 F.2d 328, 331-32 (6th Cir. 1987) (indicating that "[p]ublic employees are not governed by the federal labor laws").

23. Greg W. Pearman, *Public Employee Bargaining Rights: An Avenue for Success for the Majority or a Trap for the Minority?*, 1994 J. DISP. RESOL. 301, 303 (1994).

24. *See, e.g.*, Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 298, 168 P.2d 741, 745 (1946) (indicating that public employees do not have the same bargaining rights as private employees); City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App. 2d 36, 49, 210 P.2d 305, 313 (1949) (same).

25. *See Nutter*, 74 Cal. App. 2d at 298, 168 P.2d at 744-45 (suggesting that the incentive for personal gain that exists in the private sector but not in the public sector results in a disregard for the welfare of employees).

26. *See Los Angeles Bldg. & Const. Trades Council*, 94 Cal. App. 2d at 49, 210 P.2d at 313 (indicating that certain civil rights are sacrificed by government employees because of two significant differences between private and public employees).

sacrifice certain civil rights.[27] Also, the fair treatment of public employees is, to a considerable extent, compelled by law.[28] Therefore, except as may be authorized by law, public employees have no right to bargain collectively.[29]

A. *The Evolution of Public Employee Bargaining Rights in California*

1. *The Brown and Winton Acts*

In 1961, landmark legislation intended to improve employer-employee relations in California's public agencies gave public employees the right to join employee organizations for the purpose of representation in matters related to employment conditions.[30] Known as the Brown Act,[31] this legislation applied to nearly all non-federal government agencies within the State and their employees.[32] Employees elected by popular vote or appointed to their positions by the Governor were expressly exempted from the Act, and the legislation allowed public agencies to exempt law enforcement positions from coverage when doing so was in the public interest.[33]

In addition to allowing public employees to join employee organizations, the Brown Act also provided employees covered under the Act with the right to refuse to join an organization and to represent themselves individually.[34] The Brown Act, however, fell short of providing employee organizations with anything more than an advisory role in establishing employment terms.[35] The Act merely required public agency employers to reasonably consider the recommendations of employee organizations in establishing employment policy.[36] It did not contemplate the negotiation of collective bargaining agreements between employee organizations and public agencies.[37] The Brown Act also contained no reference to exclusive

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27. *Id.*, 210 P.2d at 313.

28. *Id.*, 210 P.2d at 313.

29. City of Hayward v. United Pub. Employees, Local 390, 54 Cal. App. 3d 761, 763, 126 Cal. Rptr. 710, 711 (1976).

30. 1961 Cal. Stat. ch. 1964, sec. 1, at 4141-43 (enacting CAL. GOV'T CODE §§ 3500-3509).

31. *Id.*; *see* B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 455 (9th ed. 1987) (noting that this legislation was known as the Brown Act until it was amended in 1968).

32. 1961 Cal. Stat. ch. 1964, sec. 1, at 4141-42 (enacting CAL. GOV'T CODE § 3501(b)-(c)).

33. *Id.* at 4141-43 (enacting CAL. GOV'T CODE §§ 3501(c), 3508).

34. *Id.* at 4142 (enacting CAL. GOV'T CODE § 3502).

35. *See* Glendale City Employees' Ass'n v. City of Glendale, 15 Cal. 3d 328, 335, 540 P.2d 609, 614, 124 Cal. Rptr. 513, 518 (1975) (indicating that the George Brown Act "provided only that management representatives should listen to and discuss the demands of the unions").

36. 1961 Cal. Stat. ch. 1964, sec. 1, at 4142 (enacting CAL. GOV'T CODE § 3505).

37. *See* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 176, 624 P.2d 1215, 1219, 172 Cal. Rptr. 487, 491 (1981) (noting that the Brown Act did not obligate an employer or employee to attempt to reach agreement on employment terms and did not provide explicit authority to reach binding agreements).

representation of bargaining units by a single representative organization or to agency shop arrangements.[38]

Public school employees were removed from the framework of the Brown Act with the passage of the Winton Act[39] in 1965.[40] Applying to employees of county school districts, county boards of education, county superintendents of schools, and school district personnel commissions with merit systems,[41] the Winton Act was similar to the Brown Act in most respects.[42] The Act did contain notable innovations,[43] including a provision allowing public school employee organizations to meet and confer with employers regarding educational policy unrelated to employment terms and conditions.[44] However, like the Brown Act, the Winton Act did not authorize collective bargaining of employment terms.[45] Employers were only required to consider the recommendations of employee organizations in establishing employment policy.[46]

2. *The Meyers-Milias-Brown Act*

In 1968, the Brown Act was amended by the Meyers-Milias-Brown Act (MMBA).[47] The MMBA applies to local public employees, specifically those

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38. *See* 1961 Cal. Stat. ch. 1964, sec. 1, at 4141-43 (enacting CAL. GOV'T CODE §§ 3500-3509) (containing no reference to exclusive representation or organizational security arrangements).

39. 1965 Cal. Stat. ch. 2041, sec. 1-2, at 4660-63; *see* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 463 (9th ed. 1987) (noting that this legislation was known as the Winton Act).

40. 1965 Cal. Stat. ch. 2041, sec. 1, at 4660 (amending CAL. GOV'T CODE § 3501) (removing public school employees from coverage under the Brown Act).

41. *See id.* at 4661 (enacting CAL. EDUC. CODE § 13081(b)-(c)) (defining the types of public school employees to which the Winton Act applies).

42. *Compare id.* (enacting CAL. EDUC. CODE § 13081(c)) (excepting employees elected by popular vote or appointed by the Governor from coverage under the Winton Act), *with* 1961 Cal. Stat. ch. 1964, sec. 1, at 4141-42 (enacting CAL. GOV'T CODE § 3501(c)) (excepting employees elected by popular vote or appointed by the Governor from coverage under the Brown Act), *and compare* 1965 Cal. Stat. ch. 2041, sec. 2, at 4661 (enacting CAL. EDUC. CODE § 13082) (preserving the right of covered employees to join employee organizations, to refuse to join employee organizations, and to represent themselves in employment relations), *with* 1961 Cal. Stat. ch. 1964, sec. 1, at 4142 (enacting CAL. GOV'T CODE § 3502) (providing covered employees with the right to join employee organizations, to refuse to join employee organizations, and to represent themselves in employment relations), *and compare* 1965 Cal. Stat. ch. 2041, sec. 1-2, at 4660-63 (amending CAL. GOV'T CODE § 3501 and enacting CAL. EDUC. CODE §§ 13080-13088) (containing no reference to exclusive representation or organizational security arrangements), *with* 1961 Cal. Stat. ch. 1964, sec. 1, at 4141-43 (enacting CAL. GOV'T CODE §§ 3500-3509) (same).

43. *See* Grasko v. Los Angeles City Bd. of Educ., 31 Cal. App. 3d 290, 301, 107 Cal. Rptr. 334, 342 (1973), *overruled on other grounds by* City and County of San Francisco v. Cooper, 123 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975) (claiming that the Winton Act was similar to the Brown Act, but that the Winton Act also contained a number of innovations).

44. 1965 Cal. Stat. ch. 2041, sec. 2, at 4661-62 (enacting CAL. EDUC. CODE § 13085) (providing employees with a right to meet and confer with employers regarding educational objectives and curriculum).

45. *Grasko*, 31 Cal. App. 3d at 302, 107 Cal. Rptr. at 342.

46. *See id.* at 303-04, 107 Cal. Rptr. at 343 (examining the legislative intent to determine that employees only had the power to recommend employment policy to public school employers).

47. CAL. GOV'T CODE §§ 3500-3510 (West 1995 & Supp. 2000).

employed by towns, cities, and counties, whether or not incorporated or chartered, and other government subdivisions, districts, and public agencies.[48] After the courts found the MMBA to be inapplicable to employees of superior and municipal courts,[49] the Legislature amended the MMBA to include most superior and municipal court employees.[50] While the Brown Act allowed public agencies to prohibit law enforcement personnel from joining employee organizations when doing so was in the public interest, the MMBA disallowed such a prohibition with respect to certain full-time peace officers.[51]

Whereas the Brown Act had provided all employee organizations with the right to represent their members in employment relations with public agencies, and had required the governing body of the public agency to meet with and consider the presentations of all employee organizations, the MMBA allows the public agency employer to deal only with "recognized" organizations.[52] "Recognized" organizations are those which the public agency has formally acknowledged as an organization that represents employees of the organization.[53] Public agencies have the power under the MMBA to adopt their own rules in determining whether to formally recognize an employee organization.[54] The agencies can adopt such rules, however, only after they conduct a good faith consultation with the employee organization, and they cannot unreasonably withhold such recognition.[55]

In contrast to the earlier Brown and Winton Acts, the MMBA contemplates the negotiation of written agreements between the employee organization and the employer.[56] The MMBA requires employer representatives and recognized employee organizations to meet and confer in an effort to reach agreement on employment matters, and, upon agreement, requires them to prepare a written, but non-binding, "memorandum of understanding" for consideration by the governing

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48. *Id.* § 3501(b)-(c) (West 1995 & Supp. 2000). Note that because they were omitted from the definition of public employees contained in the MMBA, State employees initially remained subject to the provisions of the original statute. Such treatment was expressly codified in 1971 and continued until the 1977 Dills Act. *See* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 455 (9th ed. 1987) (noting the statutory coverage periods for State employees).

49. *See* Sacramento County Employees Org. v. Sacrament County, 201 Cal. App. 3d 845, 849, 247 Cal. Rptr. 333, 335 (1988) (holding that municipal and superior courts were not "public agencies" under the MMBA).

50. *See* CAL. GOV'T CODE § 3501.5 (West 1995) (stating that "public employee" under the MMBA includes employees of superior and municipal courts).

51. CAL. GOV'T CODE § 3508 (West 1995). Note that child support and welfare fraud investigators have been held not to be "peace officers" under the MMBA, while coroner investigators were held to be "peace officers" under the MMBA. San Bernardino County Sheriff's Employees' Benefit Ass'n v. San Bernardino County Bd. of Supervisors, 7 Cal. App. 4th 602, 611-12, 8 Cal. Rptr. 2d 658, 662-63 (1992).

52. CAL. GOV'T CODE § 3505 (West 1995).

53. *Id.* § 3501(b) (West 1995).

54. *Id.* § 3507 (West 1995).

55. *Id.*

56. *Id.* § 3505.1 (West 1995).

body.[57] The "memorandum of understanding" then becomes binding if it is accepted by the governing body.[58]

The MMBA, like the Brown Act, did not originally refer to exclusive representation or agency shop arrangements.[59] However, amendments to the MMBA and case law eventually introduced the concept of exclusive representation and ultimately led to the express authorization for local public employee organizations to negotiate agency shop arrangements. A 1971 amendment to the MMBA provides that public agencies may adopt rules for the "exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself."[60] While this provision seems merely to permit exclusive representation, at least one court interprets this provision as mandating that there be only one employee representative of a bargaining unit.[61]

The concept of exclusive representation was strengthened in *Relyea v. Ventura County Fire Protection Dist.*,[62] which rejected an employee's right under the MMBA to directly bargain with the employer.[63] Because an employer only has a statutory duty to negotiate with an employee organization, the individual's right to self-representation does not include the right to bargain over employment terms and conditions.[64] Thus, where the employer has chosen to negotiate exclusively with an employee organization, the self-representation right becomes merely the right to raise personal grievances and vent individual concerns.[65]

Agency shop arrangements initially were found to be invalid under the provisions of the MMBA.[66] In *City of Hayward v. United Pub. Employees, Local 390, of Serv. Employee Int'l Union, AFL-CIO*,[67] the city and the union entered into a "memorandum of understanding" which recognized the union as representing a

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57. *Id.* §§ 3505-3505.1.

58. American Fed'n of State, County and Mun. Employees v. County of San Diego, 11 Cal. App. 4th 506, 513, 14 Cal. Rptr. 2d 51, 55 (1992).

59. *See* 1968 Cal. Stat. ch. 1390, sec. 1-13, at 2725-29 (amending CAL. GOV'T CODE §§ 3500-3501, 3503-3505, 3507-3508, and enacting CAL. GOV'T CODE §§ 3504.5, 3505.1-3505.3, 3510-3511) (containing no reference to exclusive representation or organizational security arrangements).

60. CAL. GOV'T CODE § 3507 (West 1995).

61. Placentia Local Fire Fighters, Local 2147 v. City of Placentia, 57 Cal. App. 3d 9, 21, 129 Cal. Rptr. 126, 135 (1976). The court indicated, however, that an individual member could still choose not to join that organization and could bargain directly with the agency. *Id.*, 129 Cal. Rptr. at 135.

62. 2 Cal. App. 4 th 875, 3 Cal. Rptr. 2d 614 (1992).

63. *Id.* at 877, 3 Cal. Rptr. 2d at 615.

64. *See id.* at 880-82, 3 Cal. Rptr. 2d at 617-19 (deciding that allowing individual bargaining would be inconsistent with certain MMBA provisions and the apparent intent of the Legislature). The court expressly refused to follow the contrary decision reached in *Placentia* because that decision was not supported by any legal analysis. *Id.* at 882, 3 Cal. Rptr. 2d at 619.

65. *id.* at 883, 3 Cal. Rptr. 2d at 619.

66. City of Hayward v. United Pub. Employees, Local 390, 54 Cal. App. 3d 761, 764-67, 126 Cal. Rptr. 710, 712-14 (1976).

67. 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976).

majority of the employees in a particular bargaining unit and required non-union members of the unit to pay the union a fee equivalent to the amount of union dues as a condition of employment.[68] The agency shop provision was invalid because it was inconsistent with both the freedom granted employees by the MMBA to choose whether or not to join an employee association and the MMBA provision which forbade a public agency or employee organization from interfering with that right to choose.[69] The *City of Hayward* court considered the forced payment of dues to be the equivalent of participation in an employee organization, thereby having the practical effect of inducing union membership on the part of unwilling employees.[70] Such coercion is forbidden by law.[71] The court concluded that union security devices such as agency shop arrangements were valid only when authorized by statute.[72] Such authorization came in 1981 when the MMBA was amended to include express authorization for local public employees, with the exception of management, confidential, and supervisory employees, to enter into agency shop arrangements.[73]

3. *The Education Employee Relations Act*

The Winton Act, which had been severely criticized for failing to provide an effective means of conducting public education employee-employer relations,[74] was repealed in 1975[75] by legislation known as the Rhodda Act or the Education Employee Relations Act (EERA).[76] Like the acts that came before it relating to public employees' collective bargaining rights, the EERA provides that employees may choose whether or not to join an employee organization.[77] Like the MMBA, the EERA contemplates the negotiation of written collective bargaining agreements.[78] Unlike the prior legislation related to public employees' collective bargaining rights, the EERA expressly calls for exclusive representation of a bargaining unit by a single employee organization.[79] Once an exclusive representative is chosen, an employee can no longer negotiate directly with the

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68. *Id.* at 763, 126 Cal. Rptr. at 711.
69. *Id.* at 764, 126 Cal. Rptr. at 712.
70. *Id.* at 767, 126 Cal. Rptr. at 714.
71. *Id.*
72. *Id.*
73. CAL. GOV'T CODE § 3502.5(a) (West 1995).
74. Schumb, *supra* note 6, at 909.
75. 1975 Cal. Stat. ch. 961, at 2247 ((repealing CAL. EDUC. CODE §§ 13080-13088).
76. CAL. GOV'T CODE §§ 3540-3549.3 (West 1995 & Supp. 2000).
77. *Id.* § 3543 (West 1995).
78. *See id.* § 3540.1(h) (West 1995) (defining "meeting and negotiating" to include good faith efforts to reach agreements and, if requested by either party, to execute written documents incorporating those agreements); *see also id.* § 3543.5(c) (West 1995) (making it unlawful for a public school employer to refuse to meet and negotiate in good faith with an exclusive representative).
79. *Id.* § 3540 (West 1995).

employer.[80] The EERA also codifies the duty of the exclusive representative to fairly represent each and every employee in the bargaining unit.[81] Presumably because of the exclusive representation requirement and the duty to fairly represent all employees within a unit, the EERA also includes provisions for organizational security, including the agency shop arrangement.[82]

The EERA applies to employees of school districts, county boards of education, and county school superintendents, provided that they are not elected by popular vote or appointed by the Governor.[83] The EERA is also applicable to employees of community college districts.[84] Under the EERA, however, management employees and confidential employees are prohibited from being represented by an exclusive representative and from meeting and negotiating with employers.[85]

While the MMBA allows the public agency employer to establish rules regarding the recognition of employee organizations, the EERA specifies the procedure by which an employee organization may become certified as an exclusive representative of a bargaining unit.[86] The certification provisions of the EERA require proof that a majority of employees in a unit support a particular employee organization before that organization can be certified as the exclusive representative.[87] Where such majority support is in doubt or contested, exclusive representatives may be chosen by election.[88] An organization must receive a majority of the votes cast in order to become the exclusive representative, and each ballot must include a choice of "no representation."[89]

The EERA established the Public Employment Relations Board (PERB)[90] and vested in the independent agency the responsibility for, among other things, determining appropriate bargaining units, conducting elections, certifying exclusive representatives, and reviewing and deciding unfair practice charges.[91] Later

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80. *Id.* § 3543.

81. *Id.* § 3544.9 (West 1995).

82. *See id.* § 3546 (West 1995) (allowing organizational security arrangements); *id.* § 3540.1(i)(2) (West 1995) (defining organizational security to include agency shop arrangements).

83. *Id.* § 3540.1(j)-(k).

84. United Pub. Employees, Local 790, v. Public Employees Relations Bd., 213 Cal. App. 3d 1119, 1131-32, 262 Cal. Rptr. 158, 165-66 (1989).

85. CAL. GOV'T CODE § 3543.4 (West 1995).

86. *Id.* §§ 3544-3544.7 (West 1995).

87. *Id.* § 3544.

88. *Id.* §§ 3544.1-3544.7.

89. *Id.* § 3544.7.

90. *Id.* § 3541.

91. *Id.* § 3541.3 (West 1995). The PERB was originally known as the Educational Employment Relations Board. 1975 Cal. Stat. ch. 961, sec. 2, at 2249-50 (enacting CAL. GOV'T CODE § 3541). Its name was changed to the Public Employment Relations Board with the enactment of the Dills Act in 1977. CAL. GOV'T CODE § 3513(h) (West 1995).

legislation expanded the PERB's jurisdiction so that it would include collective bargaining matters involving State employees and higher education employees.[92]

4. The Dills Act

The Dills Act[93] provides most State employees with collective bargaining rights similar to those existing for local public employees and public school employees. The Dills Act provides covered employees with the right to choose whether or not to join an employee organization and allows them to represent themselves individually.[94] The negotiation process between the employer and employee organization is to culminate in a written "memorandum of understanding" reflecting the agreed terms of employment.[95] The Dills Act also provides for the recognition of an exclusive representative.[96] Organizational security in the form of a "maintenance of membership" provision was authorized under the original version of the Dills Act.[97] A 1982 amendment to the Dills Act added agency shop arrangements to the permitted forms of organizational security.[98] The Dills Act applies to civil service employees of the State and the teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction.[99] However, managerial, confidential, supervisory, and certain other employees are expressly excluded from coverage under the Act.[100]

5. The Bill of Rights for State Excluded Employees

The rights of those State employees, including supervisors, not covered by the Dills Act are addressed in the 1990 Bill of Rights for State Excluded Employees.[101] "Excluded" employee organizations have the right to represent their members in their employment relations with the State, and "excluded" employees may also represent themselves.[102] However, the legislation expressly compels the State to meet and confer only with supervisory employee organizations, and the State need only consider the presentations of such organizations prior to establishing

92. *See* CAL. GOV'T CODE § 3513(h) (governing State employees); *id.* § 3562(b) (West 1995) (governing higher education employees and indicating that references to "board" in the Higher Education Employer-Employee Relations are references to the PERB).

93. *Id.* §§ 3511-3524 (West 1995 & Supp. 2000).

94. *Id.* § 3515 (West 1995).

95. *Id.* § 3517.5 (West 1995).

96. *Id.* § 3520.5 (West 1995).

97. 1977 Cal. Stat. ch. 1159, sec. 4, at 3753 (enacting CAL. GOV'T CODE § 3515).

98. CAL. GOV'T CODE § 3515.7(a) (West 1995).

99. *Id.* § 3513(c) (West 1995).

100. *Id.*

101. *Id.* §§ 3525-3539.5 (West 1995).

102. *Id.* § 3530.

employment policies.[103] The Act does not contemplate written agreements.[104] "Excluded" employees covered under this legislation are not subject to exclusive representation provisions, do not have the right to enter into organizational security arrangements, and do not have access to the PERB in the event of disputes.[105]

6. *The Higher Education Employer-Employee Relations Act*

Employees of the University of California (UC), Hastings College of the Law, and the California State University (CSU) obtain their collective bargaining rights from the 1978 Higher Education Employer-Employee Relations Act (HEERA).[106] However, the HEERA excludes managerial and confidential employees from coverage.[107] Student employees whose employment is contingent upon their status as students may be covered by the HEERA upon a determination by the PERB that they provide services unrelated to their educational objectives or, alternatively, that the educational objectives are subordinated to the service that they perform and that coverage under the HEERA would further the purposes of the HEERA.[108] The HEERA does not cover graduate student instructors and graduate student researchers, while the Act does cover medical housestaff participating in residency programs owned or operated by the UC.[109] Supervisors, while employees under the HEERA, are treated separately from other HEERA employees and have more limited rights.[110]

Under the HEERA, employees of the UC and the CSU have the right to form, join, and participate in employee organizations for the purpose of representation with respect to employer-employee relations.[111] These employees also have the right to refuse to join or participate in such organizations.[112] The Act contemplates

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103. *Id.* § 3533.

104. *See id.* §§ 3525-3539.5 (containing no reference to written agreements between employers and employees).

105. *See id.* (containing no reference to exclusive representation, organizational security, or the PERB).

106. *Id.* §§ 3560-3599 (West 1995 & Supp. 2000).

107. *Id.* § 3562(f) (West 1995).

108. *Id.*

109. *See* Association of Graduate Student Employees v. Public Employment Relations Bd., 6 Cal. App. 4th 1133, 1144-45, 8 Cal. Rptr. 2d 275, 282-83 (1992) (holding that the PERB's decision that providing graduate students with collective bargaining rights would not further the purposes of the HEERA justified a determination that graduate students were not employees under the HEERA); Regents of Univ. of California v. Public Employment Relations Bd., 41 Cal. 3d 601, 624, 715 P.2d 590, 605, 224 Cal. Rptr. 631, 646 (1986) (holding that the PERB's determination that the educational objectives of medical housestaff were subordinate to their educational objectives and that granting medical housestaff would further the purposes of the HEERA justified their inclusion as "employees" under the HEERA).

110. CAL. GOV'T CODE § 3580 (West 1995) (noting that supervisors have no rights under the HEERA other than those appearing in sections 3580.3-3581.7).

111. *Id.* § 3565 (West 1995) (concerning non-supervisors); *id.* § 3581.1 (West 1995) (concerning supervisors).

112. *Id.* § 3565 (West 1995); *id.* § 3581.1 (West 1995).

written "memoranda of understanding" with regard to employment terms for non-supervisors, and the selection of one organization as an exclusive representative of a bargaining unit.[113] The HEERA emphasizes that, regardless of the employee's choice regarding union membership, an exclusive employee representative is required to "represent all employees in the unit, fairly and impartially."[114] Prior to the passage of Chapter 952, the HEERA contained no reference to agency shop arrangements.[115]

Absent clearly contrary legislative intent, agency shop arrangements are inconsistent with, and prohibited by, statutes providing freedom of choice regarding union membership.[116] Thus, the failure of the HEERA prior to the passage of Chapter 952 to expressly address agency shop arrangements had the apparent effect of prohibiting even voluntary agency shop arrangements involving employees covered under the HEERA.

B. Current Agency Shop Statutes Affecting California's Public Employees

1. The MMBA's Agency Shop Provision

The MMBA authorizes local government employees in California, with the exception of management, confidential, and supervisory employees, to enter into agency shop arrangements.[117] The MMBA requires that agency shop arrangements satisfy the following criteria: (1) the service fee may not exceed the standard initiation fee, periodic dues and general assessments of the organization; and (2) the service fee must be paid for the duration of the collective bargaining agreement or for three years, whichever comes first.[118] Local public employees who are members of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting unions are not required to join or financially support any union as a condition of employment.[119] Instead, those with such conscientious objections may be required to pay sums equal to such service fees to a nonreligious, nonlabor charity fund.[120]

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113. *See id.* § 3560(e) (West 1995) (indicating that the selection of an exclusive representative is a primary purpose of the HEERA); *id.* § 3562(d) (West 1995) (defining "meet and confer" to include good faith efforts to reach agreement on employment terms and execute a written memorandum reflecting those terms); *id.* § 3570 (West 1995) (providing that higher education employers shall meet and confer with the employee organization selected as exclusive representative).

114. *Id.* § 3578 (West 1995).

115. *See id.* §§ 3560-3582 (West 1995) (containing no reference to organizational security arrangements).

116. *See supra* notes 66-73 and accompanying text (discussing agency-shop agreements).

117. CAL. GOV'T CODE § 3502.5(a) (West 1995).

118. *Id.*

119. *Id.*

120. *Id.*

Existing agency shop arrangements may be rescinded by a majority vote of all the local public employees in a bargaining unit covered by the arrangement.[121] The secret-ballot vote may take place upon a request for such a vote supported by a petition signed by at least thirty percent of the employees in the unit.[122] The vote may be taken at any time during the term of the collective bargaining agreement, but in no event shall more than one vote be taken during the term.[123] The MMBA does provide, however, that "the public agency and the recognized employee organization may negotiate . . . an alternative procedure or procedures regarding a vote on an agency shop agreement."[124]

The statute also requires a local public employee organization which has agreed to an agency shop provision to keep an itemized record of its financial transactions and to make a detailed written financial report, consisting of a balance sheet and an operating statement, available annually to the public agency employer and the employees who are members of the organization.[125] No requirement exists for such organizations to provide this information to nonunion employees who are required to pay a service fee pursuant to the agency shop arrangement.[126]

2. The EERA's Agency Shop Provision

The EERA authorizes public school employees to enter into agency shop arrangements.[127] Like the MMBA, the EERA requires that agency shop arrangement satisfy the following criteria: (1) the service fee shall not exceed the standard initiation fee, membership dues, and general assessments of the union; and (2) the fee must be paid for the duration of the collective bargaining agreement or for three years, whichever comes first.[128] The EERA contains an exemption similar to the one contained in the MMBA, whereby an employee may contribute the service fee amount to charity instead of to the union.[129] However, an employee may claim the EERA exemption only if she or he is a member of a religious body whose traditional tenets or teachings include an objection to supporting unions.[130] Also, the EERA provides that where an employee with such a religious objection requests individual representation from the union in a grievance, arbitration, or

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121. *Id.* § 3502.5(b) (West 1995).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* § 3502.5(d) (West 1995).
126. *See id.* (requiring that reports be made available only to employers and union employees).
127. *Id.* §§ 3540.1(i)(2), 3546 (West 1995).
128. *Id.* § 3540.1(i)(2).
129. *Compare id.* § 3546.3 (West 1995) (providing that members of religious groups may avoid paying a fee to the union), *with id.* § 3502.5(a) (providing that members of groups with conscientious objections to supporting unions may avoid paying a fee to the union).
130. *Id.* § 3546.3.

administrative hearing, the union may charge the employee for the cost of the representation.[131]

Under the EERA, each employee organization that has agreed to an agency shop arrangement must keep itemized financial records and make a detailed written financial report, in the form of a balance sheet and operating statement, available annually to the PERB and all members of the employee organization.[132] Like the MMBA, the EERA does not require that nonunion members of the bargaining unit be provided with the report.[133] Whereas the MMBA contains provisions related to votes to rescind an agency shop arrangement, the EERA authorizes a rescission vote "in accordance with the rules and regulations promulgated by" the PERB.[134] The PERB's rules and regulations regarding rescission votes for employees covered by the EERA are, however, very similar to the MMBA provisions regarding rescission of agency shop arrangements.[135]

3. *The Dills Act's Agency Shop Provision*

The Dills Act authorizes most State employees to enter into agency shop arrangements.[136] Managerial, supervisory, confidential, and other employees covered by the *Bill of Rights for State Excluded Employees* are not authorized to enter into agency shop arrangements, however.[137] Furthermore, the Dills Act provides that the agency shop or "fair share" fee be used "to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the [S]tate."[138] Like the MMBA and the EERA, the Dills Act requires that agency shop arrangements satisfy the following criteria: (1) the fee shall not exceed the standard initiation fee, membership dues, and general assessments of the union, and (2) that the fee must be paid for the duration of the collective bargaining agreement, or for three years,

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131. *Id.*

132. *Id.* § 3546.5 (West 1995).

133. *See id.* (providing only that financial reports be made available to organization members and the PERB).

134. *Id.* § 3546(b) (West 1995).

135. *See* CAL. CODE REGS. tit. 8, §§ 34020-34040 (1995) (requiring, for example, a rescission vote if 30% of the employees in a unit sign a petition in support of an election, and requiring a majority vote of all employees in a unit for rescission to be effective).

136. CAL. GOV'T CODE § 3515.7(a) (West 1995). The agency shop fee is referred to as a "fair share fee" in the Dills Act. *Id.*

137. *See id.* §§ 3525-3539.5 (West 1995) (containing no authorization for organizational security arrangements).

138. *Id.* § 3513(k) (West 1995).

whichever comes first.[139] The Dills Act's religious exemption provision is nearly identical to that of the EERA.[140]

The Dills Act contains provisions relating to the rescission of an agency shop arrangement by vote that are similar to those that the MMBA provides.[141] However, the Dills Act provides that, in the absence of an alternative agreement between the union and the State, the PERB is responsible for conducting the vote.[142] Each employee organization that has agreed to an agency shop arrangement must keep itemized financial records, and must provide annually a detailed written financial report, in the form of a balance sheet and operating statement, to the PERB and, in contrast to the MMBA and the EERA, to all employees in the bargaining unit.[143]

The Dills Act specifies that the employee organization is to calculate the amount of the agency shop fees, and requires the State employer to deduct the fees from the employees' wages.[144] Nonunion employees may demand and receive from the organization a return of any part of their service fees used by the organization for activities of a partisan political or ideological nature only incidentally related to employment terms and conditions.[145] Nonunion employees may also obtain a refund of any part of their service fee used to fund benefits available only to union members.[146] Fees used to cover the cost of supporting lobbying efforts designed to foster policy goals, collective negotiations, or contract administration are not subject to such a refund.[147] While the employee organization establishes the "demand and return" procedure, the PERB may compel the organization to return any fees which it determines to be subject to refund under the above provisions.[148]

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139. *Id.* (referring to the fee amount); *id.* § 3515.7(b) (West 1995) (referring to the time period).

140. *Compare* CAL. GOV'T CODE § 3515.7(c)-(f) (providing that only members of religious groups qualify for the exemption), *with id.* § 3546.3 (West 1995) (providing, like the Dills Act provision, that only members of religious groups qualify for the exemption).

141. *See id.* § 3515.7(d) (West 1995) (containing the Dills Act's rescission provision); *id.* § 3502.5(b) (West 1995) (containing the MMBA's rescission provision); *see also supra* notes 121-24 and accompanying text (discussing the MMBA's rescission provision).

142. *Id.* § 3515.7(d).

143. *Compare id.* § 3515.7(e) (requiring the employee organization to provide an annual financial report to the PERB and all employees in a bargaining unit), *with id.* § 3502.5(d) (West 1995) (requiring the employee organization to provide an annual financial report to the public agency employer and union employees in a bargaining unit, but not requiring the employee organization to provide an annual financial report to nonunion employees in the bargaining unit), *and id.* § 3546.5 (West 1995) (requiring the employee organization to provide an annual financial report to the PERB and union employees in a bargaining unit, but not requiring the employee organization to provide an annual financial report to nonunion employees in a bargaining unit).

144. *Id.* § 3515.7(b).

145. *Id.* § 3515.8 (West 1995).

146. *Id.*

147. *Id.*

148. *Id.*

4. The PERB's Additional Agency Shop Provisions

The PERB regulations provide additional procedures for implementing an agency shop arrangement.[149] Because the EERA and the Dills Act authorize the PERB to assist in the administration of agency shop arrangements, the public education and State employees covered under those acts obtain the additional protection provided by these PERB regulations.[150] The MMBA contains no such authorization for the PERB to become involved in agency shop arrangements between local public employee representatives and local public agency employers.[151] Protection for employees covered under the MMBA with regard to agency shop procedures is apparently provided only by the constitutional constraints on an employee organization.[152]

The PERB's regulations require that nonunion employees in a bargaining unit who are subject to an agency shop arrangement receive annual written notice from the employee organization identifying the amount of the service fee as a percentage of normal union dues, the basis for calculating the fee, and the procedure for appealing the fee.[153] These calculations must be made on the basis of an independent audit which shall be made available to the nonunion employees in the unit.[154] The financial reporting requirements under the EERA and the Dills Act are supplemented by the PERB regulations which require the reports to include the amount of dues and agency fees paid and to identify the expenditures used in calculating the agency fee.[155]

Additionally, the PERB regulations contain detailed procedures for appealing an agency fee amount and for protecting contested fees from improper use during the appeal procedure.[156] These regulations require that an impartial decision-maker evaluate the appeal, that the employee organization bear the burden of establishing the reasonableness of the fee, and that the hearing costs be borne by the employee organization.[157] Also, contested fees must be placed in an interest-bearing escrow account until all disputes regarding the fees are resolved.[158]

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149. CAL. CODE REGS. tit. 8, §§ 32992-32996 (2000).

150. *See, e.g.*, CAL. GOV'T CODE § 3515.7(d) (West 1995) (providing that the PERB shall conduct votes to rescind agency shop arrangements); *id.* § 3546(b) (West 1995) (providing that the PERB regulations shall control rescission votes).

151. *See id.* §§ 3500-3510 (West 1995 & Supp. 2000) (containing no references to the PERB).

152. *See infra* Part II.C (discussing the constitutional protections involved in agency shop arrangements).

153. CAL. CODE REGS. tit. 8, § 32992.

154. *Id.*

155. *Id.* § 32993.

156. *Id.* §§ 32994-32996.

157. *Id.* § 32994.

158. *Id.* § 32995.

C. Constitutional Challenges to Agency Shop Arrangements

Agency shop arrangements have met legal challenges with respect to the federal constitutional guarantees of freedom of speech and association, due process, and equal protection.[159] Thus far, courts have upheld agency shop arrangements as being constitutional.[160] However, particular aspects of agency shop arrangements are subject to constitutional limitations.[161]

The constitutionality of agency shop arrangements in the public sector was first examined in *Abood v. Detroit Board of Education.*[162] In *Abood*, the U.S. Supreme Court acknowledged that compelling employees to financially support their exclusive bargaining representative interferes with an employee's constitutional right to free expression and association.[163] However, insofar as the agency shop fees are used to finance expenditures for the purpose of collective bargaining, contract administration, and grievance adjustment, such interference is constitutionally justified by the government's interest in promoting harmony in labor relations.[164]

However, the *Abood* Court held that where a nonunion employee objects to the use of agency shop fees for political or ideological purposes unrelated to collective bargaining, unions violate the First and Fourteenth Amendments when they use the fees for such a purpose.[165] An employee is not required to object to specific expenditures in order to prevent his or her contribution from being used for ideological purposes; instead, a general objection to any sort of ideological expenditure is adequate.[166] The Court acknowledged the difficulty, particularly in the public sector, of distinguishing "between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."[167] Ultimately, the Court indicated that "the objective [is] to devise a [procedure for] preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities."[168]

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159. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (addressing freedom of speech and freedom of association); Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984) (addressing due process); Association of Capitol Powerhouse Eng'rs v. Div. of Bldg. and Grounds, 570 P.2d 1042 (Wash. 1977) (addressing equal protection).

160. *See* Foster, *supra* note 5, at 1107 (noting that agency shop fees have been held constitutional under the First and Fourteenth Amendments).

161. *See id.* (indicating that nonunion employees who object to certain employee organization expenditures unrelated to collective bargaining are entitled to a rebate of a portion of their agency shop fees).

162. 431 U.S. 209 (1977).

163. *Id.* at 222.

164. *Id.* at 222-27.

165. *Id.* at 235-37.

166. *Id.* at 241.

167. *Id.* at 236.

168. *Id.* at 237.

The U.S. Supreme Court later addressed both the constitutionality of a pure rebate procedure and the propriety of using agency shop fees for certain specific expenditures.[169] A pure rebate approach, where a union collects agency fees in an amount equal to union dues and then later refunds the portion that it was not allowed to exact in the first place, is inadequate to protect the constitutional rights of dissenting employees.[170] The existence of more acceptable alternatives, including the advance reduction of dues and the use of interest-bearing escrow accounts, prohibit a union from even temporarily committing dissenters' funds to improper uses.[171]

A union may constitutionally use the agency shop fees of dissenting employees for union expenses that are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative.[172] Generally, the costs of conventions, social activities, and union publications may properly be charged to dissenting employees.[173] Litigation expenses related to contracts, grievances, disputes, or other litigation concerning exclusive representation of the bargaining unit may also be charged to these employees, but litigation expenses not having a connection with exclusive representation may not be charged to dissenting employees.[174]

The procedure for ensuring the proper use of public employment agency shop fees is subject to challenge on both First Amendment and due process grounds.[175] A procedure that makes it likely that some of the money collected from nonunion employees will be used to support political objectives not germane to the union's collective bargaining function infringes on the First Amendment—even if the procedure is not shown to have resulted in improper expenditures.[176] In addition, forcing a public employee to support a union deprives the employee of "liberty" within the meaning of the Fourteenth Amendment.[177] The due process clause of the Fourteenth Amendment includes the right not to be deprived of liberty without receiving the procedural safeguards of timely and adequate notice of the impending deprivation and a reasonable opportunity for a hearing before an impartial adjudicator.[178]

Constitutional rights under the First and Fourteenth Amendments create different implications for the scope of protection.[179] The First Amendment requires

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169. Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435 (1984).
170. *Id.* at 444.
171. *Id.*
172. *Id.* at 448.
173. *Id.* at 448-51.
174. *Id.* at 453.
175. Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1192 (1984).
176. *Id.*
177. *Id.* at 1193.
178. *Id.* at 1192-93.
179. *Id.* at 1194.

the establishment of a procedure that will "make reasonably sure that agency shop fees will not be used to support the union's political and ideological activities that are not germane to collective bargaining."[180] The Fourteenth Amendment requires that the procedure ensure that those fees will not be used for "any union activities that are not germane to collective bargaining, whether or not the activities are political or ideological."[181] The procedure must reasonably ensure that the "deprivation [of an employee's freedom of association goes] no further than is necessary to prevent the individual from taking a free ride on [the organization] that . . . is providing services to him as his collective bargaining representative."[182] Finally, to remain constitutional, a union's procedure for collecting agency fees must "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[183]

The contention that agency shop arrangements violate equal protection rights has been dismissed by at least one court.[184] Where each employee in a bargaining unit may choose either to become a union member or to pay an agency shop fee, and where each receives equal benefits in the improvement of the terms and conditions of employment, those similarly situated have been held to be similarly treated.[185] Accordingly, equal protection rights are not violated.[186]

III. CHAPTER 952

Chapter 952 institutes a mandatory agency shop arrangement for all CSU and UC employees—other than the UC faculty who are eligible for membership in the Academic Senate—who are in bargaining units for which an exclusive representative has been selected.[187] As a condition of employment, affected employees either must join the employee organization and pay the organization the standard initiation fee, periodic dues, and general assessments, or must not join the organization and nevertheless pay the organization an agency shop fee.[188] The agency shop fees will not exceed the dues payable by members of the employee organization, and fees are to be used to cover the costs of negotiation, contract

180. *Id.*

181. *Id.*

182. *Id.* at 1193.

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

184. Association of Capitol Powerhouse Eng'rs v. Division of Bldg. and Grounds, 570 P.2d 1042, 1049 (Wash. 1977).

185. *Id.*

186. *Id.*

187. CAL. GOV'T CODE § 3583 (amended by Chapter 952); *id.* § 3583.5 (enacted by Chapter 952).

188. *Id.* § 3583 (amended by Chapter 952); *id.* § 3583.5 (enacted by Chapter 952). Note that Chapter 952 refers to the agency shop fee as a "fair share service fee." *Id.*

administration, and other activities germane to the organization's function as the exclusive bargaining representative.[189] Agency shop fees may also be used for lobbying activities if those activities are "designed to foster collective bargaining negotiations and contract administration or to secure the represented employees' advantages" in employment terms and conditions.[190] Employers will deduct employee union dues and assessments or agency shop fees from employee paychecks.[191]

Employees affected by Chapter 952 who are members of a bona fide religion, body, or sect that has historically held conscientious objections to joining or financially supporting unions are not required to join or financially support any employee organization as a condition of employment.[192] Those belonging to such a religion, body, or sect instead may pay sums equal to the fair share service fee to a nonreligious, nonlabor charity fund.[193] The employee must choose the charity fund from a list of at least three funds designated by the employer and the exclusive representative or by the employee if the employer and the representative fail to designate three funds.[194] In order to retain the exemption from financially supporting the employee organization, an eligible employee choosing the charitable contribution option must prove to the employer, on a monthly basis, that she or he has made adequate payments to the charitable fund.[195] Payroll deductions for charitable donations are neither required nor authorized under the Act.[196]

Under Chapter 952, every higher education employee organization with an agency shop arrangement is required to keep an itemized record of its financial transactions and must make a detailed written report, in the form of a balance sheet and an operating statement, available annually to the employer and the employees who are members of the organization.[197] If the organization is required to file financial reports under the federal Labor-Management Disclosure Act of 1959[198] or under section 3546.5 of California's Government Code,[199] that organization may

189. *Id.* § 3583.5(a)(1) (enacted by Chapter 952).

190. *Id.* § 3583.5(a)(2) (enacted by Chapter 952).

191. *Id.* § 3583(a) (amended by Chapter 952); *id.* § 3583.5(a)(1) (enacted by Chapter 952).

192. *Id.* § 3584(a) (enacted by Chapter 952). Note that, as opposed to the similar provisions in the EERA and the Dills Act, this provision, like its counterpart in the MMBA, allows members of non-religious groups to utilize the exemption. *Compare id.* § 3502.5 (West 1995) (containing the MMBA's conscientious objector exemption), *with id.* § 3515.7(c) (West 1995) (containing the Dills Act's religious exemption), *and id.* § 3546.3 (West 1995) (containing the EERA's religious exemption).

193. *Id.* § 3584(a).

194. *Id.*

195. *Id.*

196. *See id.* (requiring the employee to prove that payments have been made rather than authorizing the employer to make a payroll deduction).

197. *Id.* § 3584(b) (enacted by Chapter 952).

198. 29 U.S.C.A. §§ 401-531 (West 1998).

199. CAL. GOV'T CODE § 3546.5 (West 1995).

satisfy the financial reporting requirement by providing the employer with a copy of those reports.[200]

Under Chapter 952, the agency shop arrangement will continue for each bargaining unit with an exclusive representative unless it is rescinded pursuant to a vote of employees in the unit.[201] The PERB will conduct a secret-ballot election to rescind the agency shop arrangement for a particular bargaining unit at the worksite if a request for a vote is supported by a petition.[202] The petition must contain the signatures of at least thirty percent of the employees in the unit, and those signatures must be obtained in one academic year.[203] In order for the agency shop arrangement to be rescinded, a majority of all the employees in the bargaining unit, not just a majority of those voting, must vote for rescission.[204] No more than one vote may be taken during the term of any "memorandum of understanding" in effect on or after January 2000.[205]

If the agency shop arrangement is rescinded by election, the agency shop arrangement may be reinstated by majority vote of the bargaining unit.[206] The secret-ballot reinstatement election will be conducted at the worksite by the PERB upon the receipt of a request for a vote supported by a petition signed by at least thirty percent of the employees in the bargaining unit.[207] No election to reinstate an agency shop arrangement may occur until at least one year after the rescission of such an arrangement.[208]

Under Chapter 952, the cost of elections to either rescind or reinstate an agency shop arrangement will be borne by the party petitioning for the election.[209] The employer is to remain completely neutral with respect to any election and may not participate in the election unless required to do so by the PERB.[210]

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200. CAL. GOV'T CODE § 3584(b) (enacted by Chapter 952). The California Government Code contains specific reporting requirements for recognized or certified employee organizations representing public education employees. *Id.* § 3546.5 (West 1995). The federal act requires annual financial reports for organizations representing private sector employees. 29 U.S.C.A. § 431(b).

201. CAL. GOV'T CODE § 3583.5(b)-(c)(1) (enacted by Chapter 952).

202. *Id.* § 3583.5(c)(1) (enacted by Chapter 952).

203. *Id.* An "academic year" for the UC runs from July to June. *See* Romano v. Rockwell Int'l, Inc., 14 Cal. 4th 479, 499, 926 P.2d 1114, 1126, 59 Cal. Rptr. 2d 20, 32 (1996) (indicating that "the plaintiff worked in the laboratory for the next academic year, from July 1992 to June 1993"). An "academic year" for the CSU is either two consecutive semesters commencing with the opening of the fall term or any three quarters in a period of four consecutive quarters, depending on whether the particular campus utilizes a traditional semester system or a year-round quarter system. CAL. CODE REGS. tit. 5, § 42700(v) (1999).

204. CAL. GOV'T CODE § 3583.5(c)(1) (enacted by Chapter 952).

205. *Id.*

206. *Id.* § 3583.5(c)(2) (enacted by Chapter 952).

207. *Id.*

208. *Id.*

209. *Id.* § 3583.5(c)(4) (enacted by Chapter 952).

210. *Id.* § 3583.5(b) (enacted by Chapter 952).

IV. ANALYSIS OF CHAPTER 952

A. Arguments For and Against Chapter 952

Whereas employee organizations with exclusive representation rights and obligations could not even negotiate agency shop arrangements with the UC and the CSU prior to the passage of Chapter 952, the new law now mandates such an arrangement.[211] Proponents believe that Chapter 952 is equitable legislation representing good public policy.[212] They argue that fairness dictates that employees should not be able to benefit from the efforts of a union without contributing to that union.[213] Proponents also note that prior to the enactment of Chapter 952, only higher education employees had been denied agency shop contracts—K-12, community college, State, and local government employees have had the statutory right to form such arrangements.[214] Some even argue that agency fee provisions are necessary in order to allow unions to provide full and fair representation to all bargaining unit members.[215]

Proponents claim that the mandatory nature of Chapter 952 is necessary to "level the playing field."[216] They note that for many years union members have carried the burden of providing fair representation to thousands of nonmembers.[217] Unions contend that when Pete Wilson was Governor, UC and CSU administrations

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211. *Id.* § 3583 (amended by Chapter 952).

212. *See, e.g.*, Letter from Patrick Hallahan, International Representative, and Shari Jones, Business Manager, Laborers' International Union of North America, to Senator John Burton, California State Senate (May 18, 1999) (on file with the *McGeorge Law Review*) (indicating that "[t]his is a matter of EQUITY for Higher Education Employees" because other public employees have the right to enter into agency shop arrangements); Letter from Jill Furille, Director, Government Relations, California Nurses Association, to Senator Patrick Johnston, Chair, Senate Committee on Appropriations (Apr. 29, 1999) (on file with the *McGeorge Law Review*) (indicating that Chapter 952 "is good public policy" because it will strengthen patient advocacy and patient protection in all the UC medical centers).

213. Memorandum from Judith Michaels, Legislative Director, California Federation of Teachers, to California State Senate Members (May 19, 1999) [hereinafter Michaels memo] (on file with the *McGeorge Law Review*).

214. Letter from Mason M. Warren, Vice President and Regional Manager, Laborers' International Union of North America, to Senator John Burton (July 24, 1999) (on file with the *McGeorge Law Review*); *see also* CAL. GOV'T CODE §§ 3540.1(i)(2), 3546 (West 1995) (granting public education employees the right to enter into agency shop arrangements); *id.* § 3515.7(a) (West 1995) (granting State employees the right to enter into agency shop arrangements); *id.* § 3502.5(a) (West 1995) (granting local government employees the right to enter into agency shop arrangements).

215. Letter from Sharon Scott Dow, Legislative Advocate, California Teachers Association, to Carole Migden, Chair, Assembly Appropriations Committee (July 9, 1999) (on file with the *McGeorge Law Review*).

216. *Id.*; *see also* Letter from Robert J. Gurian, Legislative Director, California Faculty Association, to Senator Burton (May 11, 1999) (on file with the *McGeorge Law Review*).

217. Letter from Robert J. Gurian, Legislative Director, California Faculty Association, to Senator Burton (Apr. 12, 1999) (on file with the *McGeorge Law Review*) [hereinafter Gurian Letter I].

deliberately tried to weaken unions and succeeded in reducing union membership.[218] Noting this opposition to union security by UC and CSU administrations, proponents of Chapter 952 argue that attempting to negotiate an agency shop arrangement through collective bargaining would prove futile, or that management would exact "too high a price" at the bargaining table.[219] Some even suggest that organizational security should not be an issue subject to collective bargaining.[220]

Opponents of the legislation argue that Chapter 952 eliminates historic rights of employees and gives unions unfair bargaining advantages.[221] They note that prior to the enactment of Chapter 952, employees covered under the HEERA could choose whether to support a union, but that Chapter 952 requires nonunion employees to financially support unions.[222] Opponents also argue that Chapter 952 unfairly provides unions with a "free" concession on an issue, organizational security, that is traditionally subject to collective bargaining negotiations.[223] Because Chapter 952 imposes agency shop fees without an initial employee vote, some claim that the legislation amounts to "stealing" money from employees' paychecks and "taxation without representation."[224]

B. Employees Affected by Chapter 952

The agency shop arrangement mandated by Chapter 952 applies only to certain higher education employees.[225] Chapter 952 requires that employees of CSU and UC—other than UC faculty who are eligible for Academic Senate membership—who are in a bargaining unit represented by an exclusive representative either join the representative organization or pay an agency shop fee.[226] Presently, no UC faculty members are affected by Chapter 952 because UC

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218. Letter from Allen Davenport, Director of Government Relations, Service Employees International Union, to Ted Lembert, Chair, Assembly Committee on Higher Education (June 15, 1999) (on file with the *McGeorge Law Review*).

219. ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 4 (June 29, 1999).

220. *See* Gurian Letter I, *supra* note 217 (arguing that "employees should not be asked to trade salary or other considerations for a negotiated fair share arrangement").

221. Letter from Stephen A. Arditti, Assistant Vice President and Director State Government Relations, University of California, to Senator John Burton (Apr. 9, 1999) (on file with the *McGeorge Law Review*) [hereinafter Arditti Letter].

222. *Id.*

223. *Id.*

224. *See* ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 4 (June 29, 1999) (noting that opponents liken agency shop fees to taxation without representation); Kenneth R. Weiss, *Union Dues Bill Angers Cal State Professors*, L.A. TIMES, June 17, 1999, at A3 (reporting that one CSU employee likened agency shop fees to stealing from employees' paychecks).

225. *See* CAL. GOV'T CODE § 3583.5(a)(1) (enacted by Chapter 952) (indicating that only certain employees are subject to the agency shop arrangement).

226. *Id.*

faculty members are not currently in a collective bargaining unit.[227] Chapter 952 will apply, however, to approximately 93,000 employees of the UC and CSU systems who are represented by unions.[228] Only about twenty-one percent of these employees are currently union members; the remaining 74,000 will be forced to choose whether to join the union and pay dues or remain a nonunion employee and pay an agency shop fee.[229]

The applicability of Chapter 952, and, in fact, the applicability of any labor relations laws, to the UC is unclear.[230] The UC is constitutionally autonomous, and the provisions of Chapter 952 may not apply to it unless its Board of Regents adopts Chapter 952's provisions by resolution.[231] However, when the HEERA was enacted in 1978, the UC Regents agreed to adhere to its provisions and not challenge its constitutionality.[232] Whether Chapter 952 will prompt the Regents to reconsider their position is unknown, but representatives of the UC have indicated that a constitutional challenge is unlikely.[233]

C. Chapter 952's Election Provisions

Chapter 952's election provisions favor unions over both management and others opposed to agency shop arrangements.[234] Most importantly, Chapter 952 provides that the mandatory agency shop arrangement may be rescinded only if a majority of the employees in a unit votes to rescind the arrangement.[235] Because employee turnout is notoriously low at elections, the chances of obtaining such a majority are slight.[236]

Also, elections to rescind an agency shop arrangement are more restricted by Chapter 952 than are elections to reinstate an agency shop arrangement.[237] Signatures on a petition calling for an election to rescind an agency shop arrangement must all have been obtained in the same academic year,[238] while no such restriction exists for signatures on a petition calling for the reinstatement of

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227. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 1 (Apr. 19, 1999).

228. Weiss, *supra* note 224, at A3.

229. *Id.*

230. ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 5 (June 29, 1999).

231. *Id.*

232. *Id.*

233. *Id.*

234. Arditti Letter, *supra* note 221.

235. CAL. GOV'T CODE § 3583.5(c)(1)-(2) (enacted by Chapter 952).

236. Peter Schrag, *Fair Share: Will Davis Wear His Union Suit?*, SACRAMENTO BEE, Sept. 1, 1999, at B7.

237. *Compare* CAL. GOV'T CODE § 3583.5(c)(1) (enacted by Chapter 952) (containing the requirements for compelling an election to rescind an agency shop arrangement), *with id.* § 3583.5(c)(2) (enacted by Chapter 952) (containing the requirements for compelling an election to reinstate an agency shop arrangement).

238. *Id.* § 3583.5(c)(1).

an agency shop arrangement.[239] Also, no more than one vote to rescind an agency shop arrangement may be taken during the term of any "memorandum of understanding."[240] While an election to reinstate a previously rescinded agency shop arrangement is limited in that it may be conducted no sooner than one year after rescission, no limitation exists on the number of reinstatement elections during the term of a "memorandum of understanding."[241]

A more subtle bias of Chapter 952 toward unions involves the cost of elections, which must be borne by the party petitioning for the election to either rescind or reinstate an agency shop arrangement.[242] On the one hand, an election to reinstate an agency shop arrangement presumably would be supported by the union representing the bargaining unit, and the union presumably would have ample funds to finance the election. On the other hand, an election to rescind an agency shop arrangement would have to be financed entirely by those employees who petition for rescission; the employer is required to remain neutral, and generally is not allowed to participate in the election.[243]

D. Agency Shop Fee Amounts Under Chapter 952

Chapter 952 does not expressly indicate the exact amount of agency shop fees, and it does not indicate who will determine the amount.[244] In contrast, the Dills Act,[245] which applies to State employees, expressly provides that the employee organization is to calculate the amount of the fees.[246] However, because the HEERA provides that the PERB is to administer the Act,[247] it is fair to assume that the PERB's regulations apply to these issues. Consistent with the Dills Act provision, the PERB's regulations indicate that the employee organization determines the amount of the agency fee.[248]

Chapter 952 and the PERB regulations appear to adequately protect the constitutional rights of employees by requiring that agency shop fees be used only to fund those activities of the employee organization that are germane to its function as a collective bargaining representative, and by establishing adequate

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239. *Id.* § 3583.5(c)(2).

240. *Id.* § 3583.5(c)(1).

241. *See id.* § 3583.5(c)(2) (containing no reference to a limit on the number of reinstatement elections).

242. *Id.* § 3583.5(c)(4) (enacted by Chapter 952).

243. *Id.* § 3583.5(b) (enacted by Chapter 952).

244. *See id.* § 3583 (amended by Chapter 952) (containing no reference to an agency fee amount or to the party responsible for determining the amount of the fee); *id.* § 3583.5 (enacted by Chapter 952) (same); *id.* § 3584 (enacted by Chapter 952) (same); *id.* § 3585 (amended by Chapter 952) (same).

245. *See supra* Part II.A.4 (discussing the Dills Act generally); Part II.B.3 (discussing the Dills Act's agency shop provision).

246. CAL. GOV'T CODE § 3515.7(b) (West 1995).

247. *Id.* § 3563 (West 1995 & Supp. 2000).

248. CAL. CODE REGS. tit. 8, § 32992(a)(1)-(2) (2000).

procedures to challenge the amount of the fees.[249] The PERB's procedures call for a written explanation of the basis for the fee, a prompt opportunity to challenge the fee before an impartial tribunal, and assurances via escrow provisions to ensure that agency fees not be used, even temporarily, for unconstitutional purposes.[250]

Chapter 952 provides that agency shop fees may not exceed the amount of union dues and that the fees may only be used to cover the cost of activities germane to the employee organization's function as an exclusive bargaining representative.[251] Thus, agency shop fees are likely to amount to seventy to eighty-five percent of union dues, which are presently $560 per year for a CSU professor.[252] Despite the limit on the amount of fees, disputes are still likely to result over whether certain union expenditures can legally be funded with agency shop fees.[253]

Chapter 952 provides that agency shop fees may be used to finance lobbying activities designed to foster collective bargaining negotiations or to secure advantages for represented employees other than those secured through meetings with the higher education employer.[254] Because public-sector collective bargaining requires negotiations with the Legislature, courts have held that the use of agency shop fees to finance these lobbying activities is constitutional.[255] However, agency shop fees may not constitutionally be used to finance political or ideological activities unrelated to collective bargaining.[256]

Distinguishing between lobbying efforts that are germane to an organization's function as collective bargaining representative and those lobbying efforts that are motivated by purely political or ideological concerns is problematic.[257] Some have noted that, in many respects, the public-sector union is indistinguishable from a

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249. *See* CAL. GOV'T CODE § 3583.5(a)(1) (enacted by Chapter 952) (providing that fees will not exceed the amount required to cover the costs of union functions that are germane to the union's function as the bargaining representative); CAL. CODE REGS. tit. 8, §§ 32994-32996 (2000) (providing procedures for contesting fees); *see also supra* Part II.C (discussing the constitutional issues raised by agency shop fees).

250. *See* CAL. CODE REGS. tit. 8, § 32992(a)(2) (providing that the basis of the fee must be provided to the employee in a written report); *id.* § 32994 (containing fee appeal procedures); *id.* § 32995 (providing that contested funds must be placed in escrow).

251. CAL. GOV'T CODE §§ 3583.5(a)(1) (enacted by Chapter 952).

252. *See, e.g.*, Sharline Chiang, *Unions Seek to Force Faculty to Pay Dues*, L.A. DAILY NEWS, May, 6, 1999, at N7 (estimating fees at 85% of dues); Dorothy Korber, *Bill Advances to Make Universities Union Shops; UC, CSU Employees Would Be Forced to Pay Dues*, L.A. DAILY NEWS, Aug. 27, 1999, at N10 (noting the amount of dues for a full CSU professor); *Senate OKs Bill Requiring Agency Shops at UC, CSU*, May 20, 1999, *available in* Westlaw, AP file (estimating fees at 70-80% of dues).

253. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) (noting the difficulty, especially in the public sector, in distinguishing between activities for which agency shop fees may be used and activities for which using agency shop fees is constitutionally prohibited).

254. CAL. GOV'T CODE § 3583.5(a)(2) (enacted by Chapter 952).

255. Champion v. California, 738 F.2d 1082, 1086 (9th Cir. 1984).

256. *Abood*, 431 U.S. at 237.

257. *Id.* at 236.

political party.[258] Also, contributing to particular candidates or lobbying for or against particular legislation ultimately may be more important than negotiations at the bargaining table in achieving a union's goals.[259] Because unions are likely to argue that nearly all of their political and lobbying expenditures are germane to their function as exclusive representative, some nonunion employees fear that their agency shop fees will be used to oppose proposals which many employees support, including a proposed merit-based pay system.[260]

E. Chapter 952's Conscientious Objector Exemption

Chapter 952 provides that members of a bona fide religion, body, or sect that historically has held conscientious objections to joining or financially supporting unions may pay their fee amount to a qualified charity rather than to the employee organization.[261] This provision, while apparently motivated by sensitivity to First Amendment concerns, raises other constitutional issues.[262] Also, Chapter 952's requirement that an employee choosing the charitable contribution exemption must prove to the employer—on a monthly basis—that she or he has made adequate payments to the charitable fund raises the practical issue of enforcement.[263]

1. Constitutional Issues Raised by the Conscientious Objector Exemption

a. Inquiring into One's Religious Beliefs and Affiliations

Chapter 952's exemption is available only to employees who are members of a bona fide religion, body, or sect whose traditions hold an objection to supporting unions.[264] Because personal, philosophic, and economic reasons may be behind an attempt to utilize this exemption, an employee's sincerity in claiming this exemption may come into question.[265] While an inquiry into the sincerity of one's religious beliefs in itself may be regarded as a violation of the spirit of the First Amendment's religious guarantees, the courts often undertake such "sincerity

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258. *E.g.*, *id.* at 257 (Powell, J., concurring).

259. *See* Schumb, *supra* note 6, at 922 (discussing the boundary between permissible and impermissible expenditures using agency shop fees).

260. Weiss, *supra* note 224, at A3.

261. CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952).

262. *See, e.g.*, *infra* Part IV.E.1.a (discussing the constitutionality of inquiring into the sincerity of a person's religious beliefs); *infra* Part IV.E.1.b.i (discussing Establishment Clause issues raised by the exemption); *infra* Part IV.E.1.b.ii (discussing the equal protection issues raised by the exemption).

263. *See infra* Part IV.E.2 (discussing the likelihood of termination as a remedy for an employee's failure to pay the required fee to a charitable organization).

264. CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952).

265. *See, e.g.*, *infra* note 271 and accompanying text (explaining an economic motive for attempting to utilize the conscientious objection exemption).

analyses."[266] Distinguishing between beliefs held as a matter of conscience and purported beliefs motivated by deception and fraud is necessary to prevent insincere parties from claiming a "religious belief" to obtain unfair benefits.[267] The sincerity of an employee's claim of membership in a religion, body, or sect that holds a conscientious objection to supporting unions is, therefore, a factual issue that is subject to dispute in court between the employee and the employee organization.[268]

b. The Establishment Clause and Equal Protection

Chapter 952's exemption for members of certain religions and groups also raises constitutional issues involving equal protection and the Establishment Clause.[269] Chapter 952 treats employees in a bargaining unit differently on the basis of their religious or philosophical affiliations.[270] In addition to having the choice to decide whether to support a union or a charity, employees utilizing this exemption will receive different, and most likely preferential, income tax treatment in comparison with those employees unable to utilize the exemption.[271]

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266. *See* Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (noting that "a state-conducted inquiry into the sincerity of the individual's religious beliefs" might be perceived by the state as "run[ning] afoul of the spirit of constitutionally protected religious guarantees"); Witmer v. United States, 348 U.S. 375, 381 (1955) (indicating that "the ultimate question in conscientious objector cases is the sincerity of the [objector] in his claimed belief"); International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 439 (2d Cir. 1981) (noting that courts will investigate a religious adherent's sincerity where a religious belief is asserted).

267. Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984).

268. *See* People v. Woody, 61 Cal. 2d 716, 726, 394 P.2d 813, 820-21, 40 Cal. Rptr. 69, 77-78 (1964) (noting that it is proper for the trier of fact to determine whether a religious belief is sincere and held in good faith).

269. *See infra* Part IV.E.1.b.i (discussing Establishment Clause issues); *infra* Part IV.E.1.b.ii (discussing equal protection issues).

270. *See* CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952) (providing that members of certain groups may claim an exemption unavailable to other employees).

271. *Compare* I.R.C. § 162(a) (1999) (identifying union dues as deductible expenses related to carrying on a trade), *and* I.R.C. § 67 (1999) (indicating, by omission, that union dues are a miscellaneous itemized deduction allowable only to the extent that the aggregate of such deductions exceeds 2% of the taxpayer's adjusted gross income), *with* I.R.C. § 170 (1999) (providing that charitable contributions are an itemized deduction limited to either 30% or 50% of the taxpayer's adjusted gross income). Example: An employee with a $50,000 adjusted gross income, no other miscellaneous itemized deductions, and charitable contributions that do not approach $15,000 would obtain a $500 deduction if his or her $500 agency shop fee is paid to a charity, because the 30% or 50% limit on charitable contributions is not breached. However, the same employee would obtain no deduction if the fee is paid to the union, because the fee does not exceed the 2% of adjusted gross income "floor" applying to union dues.

i. *The Establishment Clause*

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."[272] The framers intended the Establishment Clause to afford protection against the government's "sponsorship, financial support, or active involvement . . . in religious activity."[273] Accordingly, the Clause prohibits the government from passing laws which "aid one religion, aid all religions, or prefer one religion over another."[274]

When a party claims that a statute creates such a preference, the initial inquiry is whether the law facially differentiates among religions.[275] If a law facially differentiates among religions, it is subject to strict scrutiny, and will be held invalid unless the governing body can show that the law serves a compelling governmental interest and that the law has been narrowly tailored so that the granted preference closely fits the compelling interest.[276] If no facial preference exists, a statute may still violate the Establishment Clause if it has no secular legislative purpose, its principal effect advances or inhibits religion, or if it fosters excessive government entanglement in religion.[277] Within these limitations, however, the government may accommodate religious beliefs without violating the Establishment Clause.[278]

No clear consensus exists on the issue of whether religious exemptions like the one contained in Chapter 952 violate the Establishment Clause.[279] The Sixth Circuit has held that an essentially identical provision in the National Labor Relations Act (NLRA) was unconstitutional because it violated the Establishment Clause.[280] While the NLRA's religious exemption provision, like Chapter 952's exemption provision, did not expressly refer to any specific religion, the Sixth Circuit concluded that the NLRA exemption facially distinguished between religions because it "exempt[ed] from union membership only those employees who are members of 'bona fide' religious organizations having the beliefs described in the statute."[281] The court held that even if it assumed that protecting religious freedom

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272. U.S. CONST. amend. I.

273. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

274. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

275. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 695 (1989).

276. Larson v. Valente, 456 U.S. 228, 246-47 (1982).

277. *Lemon*, 403 U.S. at 612.

278. Rowe v. Superior Court, 15 Cal. App. 4th 1711, 1726, 19 Cal. Rptr. 2d 625, 634 (1993).

279. *Compare* Wilson v. National Labor Relations Bd., 920 F.2d 1282, 1287 (6th Cir. 1990) (holding that a religious exemption provision violated the Establishment Clause), *with* Grant v. Spellman, 664 P.2d 1227, 1232 (Wash. 1983) (Williams, J., concurring) (indicating that such religious exemption provisions are constitutional).

280. *Wilson*, 920 F.2d at 1287.

281. *Id.* The statute in question in *Wilson* was section 19 of the NLRA, which provides an exemption from union membership for those employees who are "member[s] of and adhere to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining

in the workplace was the compelling governmental interest, the statute would still fail a strict scrutiny analysis because the statute could be more narrowly tailored to fit the government's interest by providing an exemption "without regard to *membership* in a particular religious organization."[282]

In addition to finding that the exemption failed a strict scrutiny analysis, the Sixth Circuit noted that the exemption provision would also fail the three-prong *Lemon* test[283] reserved for those statutes that do not facially distinguish among religions.[284] The court concluded that the NLRA's religious exemption provision had the effect of advancing the beliefs of one religious sect over another and involved an excessive entanglement in religion.[285] The court supported its conclusion that the exemption provision advanced religion by noting that the provision increases the advantages of membership in the type of religious organization described in the statute.[286] Because the NLRA's exemption provision ultimately required courts to determine if a religion historically held conscientious objections to supporting unions, and because courts are not permitted to interpret particular religious doctrines, the court concluded that the NLRA's exemption provision required excessive government entanglement with religion.[287]

However, a Washington statute[288] providing a similar religious exemption from mandatory union support was held not to violate the Establishment Clause.[289] Justice Williams of the Washington Supreme Court noted in a concurring opinion that the exemption provision could survive a strict scrutiny analysis.[290] Union security clauses advance a compelling state interest because they foster industrial peace, stabilize labor-management relations, and help to avoid the confusion that results from enforcing multiple collective bargaining agreements.[291] Religious exemptions to union security clauses also advance the compelling state interest of fostering industrial peace because they accommodate religious beliefs.[292] Justice Williams went so far as to opine that "any decision striking down religious

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or supporting unions." *Id.* at 1288.

282. *Id.* (emphasis added). In distinguishing the NLRA provision from a similar Washington statute, the court found that the Washington statute could be read to allow those with religious beliefs against supporting unions to claim the exemption even if they were not members of a church. *Id.* at 1289.

283. Lemon v. Kurtzman, 403 U.S. 602 (1971).

284. Wilson, 920 F.2d at 1287-88.

285. *Id.*

286. *Id.* at 1288.

287. *Id.*

288. WASH. REV. CODE ANN. § 41.56.122(1) (West 1991) (providing that union security provisions in collective bargaining agreements are acceptable provided that they "safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member" by allowing those employees to "pay an amount of money equivalent to regular union dues and initiation fee to a nonreligious charity" instead of to the employee organization).

289. Grant v. Spellman, 664 P.2d 1227, 1230 (Wash. 1983).

290. *Id.* at 1231 (Williams, J., concurring).

291. *Id.* at 1232 (Williams, J., concurring).

292. *Id.* (Williams, J., concurring).

exemptions would amount to hostility towards religion."[293] Presumably because the majority found that the statute at issue could be read to allow an exemption for those who were not members of any specific religious organization, Justice Williams did not address whether the statute at issue had been tailored to provide the close fit between the preference and the government interest required by a strict scrutiny analysis.[294]

While California courts and the United States Supreme Court have not yet addressed the constitutionality of religious exemptions in union security arrangements, these courts have addressed other cases involving religious accommodations.[295] The California Supreme Court has held that the California Constitution imposes upon employers a duty to accommodate an employee's religious beliefs provided that the employer will not suffer undue hardship.[296] The court concluded that this accommodation of religious beliefs promotes equal employment opportunities for members of all religions.[297] The United States Supreme Court has held that statutes violate the Establishment Clause when they require the accommodation of an employee's religious beliefs without containing an exception related to hardships imposed on the employer or other employees.[298] However, in evaluating a religious exemption to the mandatory support of unions, at least one court has noted that allowing an employee to contribute to charity an amount equal to the amount other employees had to pay to the union did not result in a hardship to the employer.[299]

If a California court were to apply the rationale that the Sixth Circuit used in *Wilson*, Chapter 952's exemption provision would be found to violate the Establishment Clause of the United States Constitution.[300] Like the NLRA statute that failed the *Wilson* court's strict scrutiny analysis, Chapter 952's provision grants an exemption only to "member[s] of a bona fide religion, body, or sect that has historically held conscientious objections to joining or financially supporting" unions and, apparently, not to employees who have a conscientious objection to

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293. *Id.* (Williams, J., concurring).

294. *See id.* at 1230 (finding that the statute at issue could be read in such a way as to make the statute constitutional).

295. *See generally* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1984) (addressing an accommodation of religious beliefs in the workplace); Rankins v. Commission on Prof'l Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979) (same).

296. *Rankins*, 24 Cal. 3d at 174, 593 P.2d at 856, 154 Cal. Rptr. at 911 (construing CAL. CONST. art. I, § 8).

297. *Id.* at 178, 593 P.2d at 859, 154 Cal. Rptr. at 914.

298. *See Thornton*, 472 U.S. at 709-10 (holding that a Connecticut statute violated the Establishment Clause because it allowed Sabbath observers an absolute right not to work on their Sabbath).

299. *See* McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 37-38 (6th Cir. 1982) (noting that the exemption would not require the employer to pay additional wages and that no other employees would be adversely affected to support the conclusion that no hardship to the employer had been shown).

300. *See* Wilson v. National Labor Relations Bd., 920 F.2d 1282, 1286-88 (6th Cir. 1990) (applying both a strict scrutiny analysis and the three-prong test in reaching the conclusion that the religious exemption provision at issue was unconstitutional).

supporting a union, but are not members of such a religion, body, or sect.[301] Chapter 952's exemption provision could also be found to impermissibly advance religion and involve an excessive entanglement with religion for the same reasons cited by the *Wilson* court in its analysis of the NLRA exemption provision.[302]

The Sixth Circuit's decision in *Wilson*, however, appears to represent an isolated viewpoint with respect to religious accommodations and exemptions.[303] Other cases suggest that Chapter 952's exemption provision would be considered a constitutional accommodation of religious beliefs.[304] In the absence of the exemption provision, Chapter 952 might require those who conscientiously object to supporting unions to choose between honoring their religious beliefs and keeping their jobs.[305] Therefore, without the exemption, Chapter 952 itself might be considered an impermissible inhibition of religion in violation of the Establishment Clause.[306] Also, the duty imposed by both the Civil Rights Act of 1964 and the California Constitution to reasonably accommodate religious beliefs would support a decision upholding the exemption, especially if the burden imposed on employers is less than severe.[307]

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301. *See* CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952) (providing an exemption for those employees who are members of organizations that hold certain beliefs, but failing to indicate whether those employees who hold those same beliefs but are not members of an organization are entitled to the exemption). The *Wilson* court suggested that the NLRA provision might have survived a strict scrutiny analysis had it been drawn to provide the exemption to those who held a conscientious objection to unions but were not members of any group. *Wilson*, 920 F.2d at 1287.

302. *See* CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952) (providing the exemption for members of religious groups with a history of objecting to union support); *Wilson*, 920 F.2d at 1287-88 (noting that where a statute increases the advantages of membership in particular religions, there may be an advancement of religion, and also noting that where courts must inquire into a religion's history and doctrine, there may be an excessive entanglement in religion).

303. *See* 134 A.L.R. FED. 1 (1996) (referring to several cases that found no constitutional flaw in religious exemptions to union support and noting *Wilson* as the exception).

304. *See, e.g.*, Grant v. Spellman, 664 P.2d 1227, 1231-32 (Wash. 1983) (Williams, J. concurring) (finding that such exemptions can survive strict scrutiny); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1984) (holding a statutorily mandated accommodation unconstitutional because it made no exceptions for potential hardships); Rankins v. Commission on Prof'l Competence, 24 Cal. 3d 167, 178, 593 P.2d 852, 859, 154 Cal. Rptr. 907, 914 (1979) (finding that religious accommodations should be made so long as they do not impose under hardship).

305. *See* CAL GOV'T CODE § 3583.5 (enacting Chapter 952) (providing that as a condition of continued employment, an employee shall either join a union or support a union with the payment of a fair share fee); *Grant*, 664 P.2d at 1232 (noting that exemption provisions prevent employees from being placed in the position of "having to choose between religious beliefs and employment").

306. *See supra* note 277 and accompanying text (indicating that a statute may violate the Establishment Clause if it either advances or *inhibits* religion).

307. *See* McDaniel v. Essex Int'l Inc., 696 F.2d 34, 37-38 (6th Cir. 1982) (finding that allowing a charitable contribution in lieu of union support did not involve an unconstitutional application of Title VII of the 1964 Civil Rights Act because it did not unduly burden the employer); *supra* notes 296 and 298 and accompanying text (noting the California Supreme Court's and United States Supreme Court's holdings which call for the accommodation of religious beliefs where no hardship results).

ii. Equal Protection

Equal protection traditionally requires that a government action provide for uniform treatment of those similarly situated.[308] The Equal Protection Clause of the Fourteenth Amendment does not, however, require "absolute equality or precisely equal advantages"[309] under the law, and it does not prohibit every minor difference in the application of laws to different groups.[310] Instead, only classifications which are invidious, arbitrary, or irrational violate the Equal Protection Clause.[311]

Most statutes are valid under the Equal Protection Clause if they contain classifications that "rationally further a legitimate state interest."[312] However, statutes which involve suspect classifications, such as those based on race, alienage, or ancestry, or which interfere with fundamental rights, such as the right to vote, travel, or procreate, are subject to strict scrutiny.[313] The strict scrutiny analysis requires that a statute be narrowly tailored to further a compelling state interest in order to withstand an equal protection challenge.[314] The U.S. Supreme Court has suggested that a classification is suspect, and thus subject to heightened scrutiny, where the class has been "saddled with . . . disabilities, . . . subjected to a . . . history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness."[315]

Chapter 952's exemption provision involves a classification according to membership status in particular religions or groups.[316] The free exercise of religion is a fundamental right.[317] However, because the religious exemption provision of Chapter 952 accommodates religious beliefs and imposes only an incidental harm

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308. *See* Reynolds v. Sims, 377 U.S. 533, 565 (1964).

309. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

310. *See id.* at 24 (indicating that absolute equality is not required); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (indicating that the Constitution is not violated by every minor difference in treatment).

311. Clements v. Fashing, 457 U.S. 957, 967 (1982).

312. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

313. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (noting that strict scrutiny applies where a statue interferes with a fundamental right or disadvantages a suspect class); *id.* at 312 n.3 (noting that the U.S. Supreme Court had held the rights to vote, travel, and procreate to be fundamental rights); *id.* at 312 n.4 (noting that the U.S. Supreme Court had held classifications based on race, alienage, and ancestry to be suspect). Quasi-suspect classifications, including those based on sex, have been subjected to an intermediate standard of review that requires the classification to be substantially related to a legitimate state interest in order to withstand an equal protection challenge. City of Cleburne v. Cleburne Living Cent., 473 U.S. 432, 440-41 (1985). In practice, though, the difference between this intermediate standard and strict scrutiny may be illusory because, at least with regard to sex classifications, the U.S. Supreme Court has required states to show "exceedingly persuasive justification" for such classifications. United States v. Virginia, 518 U.S. 515, 531 (1996).

314. Plyler v. Doe, 457 U.S. 202, 217 (1982).

315. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

316. CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952).

317. Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974).

on those who are unable to claim the exemption, courts are unlikely to consider the exemption to constitute an interference with the free exercise of religion.[318]

The exemption provision discriminates against those employees in a bargaining unit who are not members of a religion or group which has historically held a conscientious objection to supporting unions.[319] However, courts are very unlikely to consider the class to be one that has been saddled with disabilities, subjected to a history of unequal treatment, or relegated to a position of political powerlessness.[320] Furthermore, in at least one case, classifications based on one's status as a conscientious objector were held not to be suspect.[321] In a few cases, however, courts have suggested that classifications based on religion are suspect classifications for the purposes of an equal protection analysis.[322]

A religious exemption does address the compelling state interests of maintaining industrial peace and providing equal employment opportunity among different religions.[323] Because this purpose is rational and not arbitrary, the exemption probably would survive the rational basis analysis that would apply if the provision is found not to contain a suspect classification or interfere with a fundamental right.[324] However, if Chapter 952's exemption provision is found to contain a suspect classification or to interfere with a fundamental right, the provision might be declared unconstitutional as a denial of equal protection.[325] The Sixth Circuit's decision in *Wilson* indicates that Chapter 952's exemption provision is not drawn narrowly enough to survive a strict scrutiny analysis because it provides an exemption only to members of a bona fide religious group and not to objectors who are not members of such a group.[326] However, as mentioned above in the Establishment Clause analysis, the Sixth Circuit's decision in *Wilson* appears

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318. *See id.* at 384-85 (noting that where a substantial government interest exists, incidental burdens may be placed on one's exercise of religion without violating fundamental rights).

319. *See supra* note 271 and accompanying text (discussing the advantages obtained by those employees who qualify for the exemption).

320. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 28 (suggesting that "large, diverse, and amorphous class[es]" are unlikely to be considered suspect).

321. *See* Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (deciding that conscientious objectors to war are not members of a suspect class).

322. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (listing religion as a suspect classification).

323. *See supra* notes 292 and 297 and accompanying text (noting the opinions of two courts which addressed the compelling state interest issue).

324. *See supra* note 312 and accompanying text (explaining the rational basis standard).

325. *See supra* notes 300-02 and accompanying text (applying the strict scrutiny analysis utilized by the Sixth Circuit in *Wilson* to Chapter 952's exemption provision).

326. *See supra* note 282 and accompanying text (noting that the Sixth Circuit held that the NLRA's exemption provision was not tailored narrowly enough to survive strict scrutiny). Note that this under-inclusiveness might also result in the provision's being held unconstitutional under the intermediate standard of review that is applied to quasi-suspect classifications such as those based on sex. *See supra* note 313 (discussing the intermediate standard of review).

to represent an isolated viewpoint on the issue of religious exemptions and accommodations.[327]

While some doubt exists as to the constitutionality of Chapter 952's exemption provision, similar exemptions in the MMBA, Dills Act, and EERA have not, to date, been held unconstitutional.[328] Also, if the exemption is held to be unconstitutional, a severability provision in the HEERA will allow the remainder of the legislation to survive.[329]

2. *Enforcement of the Conscientious Objector Exemption*

Whether an employee may be terminated or sued for failure to make the required charitable contributions are other issues which Chapter 952's exemption provision raises.[330] While Chapter 952 requires that union dues and agency shop fees being paid to an employee organization be deducted from paychecks by the employer, payroll deductions for charitable contributions are neither required nor authorized by Chapter 952.[331] Instead, an eligible employee making charitable contributions in lieu of paying agency shop fees to a union must prove to the employer each month that adequate payments have been made to the charitable fund.[332] While Chapter 952 indicates that payment of either dues or fees is a condition of employment,[333] the failure of an employee to make charitable contributions will not necessarily result in employment termination.[334] The phrase "condition of continued employment" is merely the statutory language used to acknowledge an agency shop authorization, and termination upon nonpayment of fees is only one possible remedy obtainable for an agency shop violation.[335] Civil lawsuits are another possible remedy.[336]

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327. *See supra* note 303 and accompanying text (acknowledging that *Wilson* is an isolated decision).

328. *See* CAL. GOV'T CODE § 3502.5(a) (West 1995) (providing the religious exemption for agency shop arrangements under the MMBA); *id.* § 3546.3 (West 1995) (providing the religious exemption for agency shop arrangements under the EERA); *id.* § 3515.7(c), (f) (West 1995) (providing the religious exemption for agency shop arrangements under the Dills Act).

329. 1999 Cal. Stat. ch. 952, sec. 5.

330. *See* Schumb, *supra* note 6, at 928-30 (discussing problems in enforcing the collection of agency shop fees).

331. *See* CAL. GOV'T CODE § 3584(a) (enacted by Chapter 952) (requiring no payroll deduction, but requiring that employees prove that they have made the contribution).

332. *Id.*

333. *See id.* § 3583.5(a)(1) (enacted by Chapter 952) (providing that paying the fair share fee is a condition of employment).

334. *Cf.* San Lorenzo Educ. Ass'n v. Wilson, 32 Cal. 3d 841, 846-49, 654 P.2d 202, 206-08, 187 Cal. Rptr. 432, 436-38 (1982) (evaluating the EERA's organizational security statutes and determining that termination is only one possible remedy for failure to pay agency shop fees).

335. *See id.* at 846-49, 654 P.2d at 206-08, 187 Cal. Rptr. at 436-38 (noting that "condition of employment" is a "textbook recital of an agency shop authorization" and indicating that civil lawsuits are appropriate remedies).

336. *Id.*, 654 P.2d at 206-08, 187 Cal. Rptr. at 436-38.

Some UC and CSU employees appear to be protected against termination by civil service and tenure laws.[337] For example, CSU employees may only be terminated for specific reasons, none of which involve the nonpayment of fees.[338] Also, because the HEERA does not supersede peer review principles of appointment, promotion, retention, or tenure of academic employees, CSU employees are also unlikely to face termination in the event of nonpayment of fees.[339] Finally, as the UC is an independent entity under the California Constitution, its personnel regulations and policies would likely control whether its non-academic employees could face termination for nonpayment.[340] Chapter 952 indicates neither that termination is a remedy for the violation of any of its provisions, nor that its provisions are intended to modify or supersede civil service laws, tenure laws, or UC regulations.[341] Therefore, while payroll deductions will ensure that union dues and agency shop fees are paid by those required to do so by Chapter 952, civil suits may be the sole remedy for employee organizations where an employee fails to make a charitable contribution as required by Chapter 952.[342]

F. The Decertification Option

Those employees who believe that Chapter 952 unfairly favors unions by removing the initial agency shop arrangement from collective bargaining and by providing unions with advantages in elections to rescind or reinstate agency shop arrangements do have one possible, albeit extreme, solution: decertification of their employee organization as an exclusive representative.[343] The HEERA provides that a petition may be filed with the PERB "requesting it to investigate and decide the question of whether the employees wish to decertify an exclusive representative."[344]

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337. Schumb, *supra* note 6, at 928-29.

338. CAL. EDUC. CODE § 89535 (West 1989).

339. *See* CAL. GOV'T CODE § 3561(b) (West 1995) (indicating that the HEERA does not supersede certain existing employment principles).

340. *See* CAL. CONST. art. IX, § 9 (forming the University of California). An analysis of UC regulations and policies is beyond the scope of this Legislative Note.

341. See CAL. GOV'T CODE §§ 3583.5, 3584 (enacted by Chapter 952) (containing no express reference to termination and no reference to Chapter 952 superseding civil service laws, tenure laws, or UC personnel regulations); *id.* §§ 3583, 3585 (amended by Chapter 952) (same).

342. *See* Schumb, *supra* note 6 at 933 (concluding that civil suits are, after termination and mandatory payroll deductions, the remaining available remedies to agency shop violations). Because an employee organization has a strong interest in preventing "free rides," an employee organization is likely to have standing to sue an employee who fails to make the required payments to charity. *See* City of Cupertino v. City of San Jose, 33 Cal. App. 4 th 1671, 1675, 40 Cal. Rptr. 2d 171, 173 (1995) (indicating that "[t]he pivotal issue in standing is [determining] whether a party has sufficient interest in the issues to ensure the suit will be pursued vigorously"); *supra* notes 3-4 and accompanying text (defining "free rides" and noting that unions are interested in preventing "free rides").

343. *See* CAL. GOV'T CODE § 3576 (West 1995) (providing the requirements for certification and decertification of an exclusive representative).

344. *Id.*

The petition may allege that an exclusive representative is no longer desired by the employees in the bargaining unit, and thirty percent of the employees in the unit must sign the petition.[345]

Because a significant majority of UC and CSU employees who are represented by an exclusive representative are not union members, decertification petitions may have the support necessary to compel the PERB to decertify employee organizations as exclusive representatives.[346] Decertification achieves the same result with respect to agency shop fees as does a successful election to rescind the agency shop arrangement, but it comes without the expense of an election and may resolve the problem of low voter turnout.[347] Of course, in addition to losing the obligation to pay an agency shop fee, the employees of a bargaining unit who have compelled the decertification of their employee organization lose the benefits of union representation.

V. CONCLUSION

Only an estimated twenty percent of the UC and CSU employees in bargaining units represented by an exclusive union representative are dues-paying union members; the remaining eighty percent have benefitted from the collective bargaining efforts of these unions without any obligation to financially support them.[348] Chapter 952 now requires most UC and CSU employees in bargaining units with exclusive representation either to join the union and pay dues, or pay a fair share service fee, either to the union or to a qualified charity.[349] Chapter 952 therefore marks the end of this "free ride" for approximately 70,000 employees of the UC and CSU systems.[350]

Chapter 952 does however represent an approach to public employee collective bargaining that is new to California.[351] In contrast to other California statutes affecting public employees, Chapter 952 mandates an agency shop arrangement,

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345. *Id.*

346. *See* Weiss, *supra* note 224, at A3 (noting that about 21% of those UC and CSU employees represented by unions are dues-paying members).

347. *See* CAL. GOV'T CODE § 3576 (West 1995) (containing no reference to any expenses involved in requesting decertification); *supra* note 236 and accompanying text (discussing low voter turnout).

348. *See* Weiss, *supra* note 224, at A3 (noting that only about 21% of those UC and CSU employees represented by unions are dues-paying members).

349. *See* CAL. GOV'T CODE § 3583 (amended by Chapter 952) (providing that joining the union is one option open to employees); *id.* § 3583.5 (enacted by Chapter 952) (providing that paying an agency shop fee to the union is another option); *id.* § 3584 (enacted by Chapter 952) (providing that in certain situations, the fee may be paid to a charity).

350. *See, e.g.*, Korber, *supra* note 252, at N10 (explaining that Chapter 952 affects nearly 70,000 employees who are covered by union contracts but decline to pay union dues).

351. *See* ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 4 (June 29, 1999) (indicating that critics of the legislation observe that statutorily imposed agency shop arrangements are "unprecedented in California's public sector").

rather than merely recognizing such an arrangement as an organizational security device that lawfully may be negotiated between public employers and employees.[352] In this way, Chapter 952 seemingly violates the stated purpose of the HEERA, which is to create "an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them."[353] While Chapter 952 provides that the agency shop arrangement may be rescinded by employee vote at any time after its implementation, the election provisions of Chapter 952 favor unions and make it difficult for opponents of the agency shop arrangement to mount a successful campaign to rescind the arrangement.[354] Opponents of the mandated agency shop arrangement are also unlikely to have Chapter 952 invalidated on constitutional grounds.[355] Instead, the extreme action of union decertification, which will remove a union as the exclusive representative of a bargaining unit, may be the only approach for opponents to eliminate the fair share fees mandated by Chapter 952.[356]

Barring any widespread drive to decertify unions, Chapter 952 represents a major victory for organized labor.[357] A vast majority of affected employees likely will choose to join unions and pay dues rather than pay a fair share fee without obtaining the right to vote on contracts and in union elections.[358] This increase in union membership, coupled with the unions' increased financial strength resulting from increased dues and the new fair share fees, will make unions a more formidable force in both the collective bargaining and political arenas.[359] Also, because Chapter 952 sets a precedent by mandating a union organizational security device for which individuals traditionally bargained in collective bargaining negotiations, unions are likely to lobby the Legislature for additional statutory

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352. *Compare* CAL. GOV'T CODE § 3502.5(a) (West 1995) (providing that agency shop agreements "*may* be negotiated" by local public employee organizations (emphasis added)), *and id.* § 3515.7(a) (West 1995) (providing that State employee organizations "*may* enter into an agreement . . . providing for organizational security in the form of . . . [a] fair share fee deduction" (emphasis added)), *and id.* § 3546(a) (West 1995) (providing that "[a]n organizational security arrangement [involving public school employees], in order to be effective, *must be agreed upon by both parties* to the agreement" (emphasis added)), *with id.* §§ 3583 (amended by Chapter 952), 3583.5 (enacted by Chapter 952) (establishing *mandatory* agency shop arrangements for many higher education employees).

353. *See id.* § 3560(e) (West 1995) (noting the purpose of the HEERA).

354. *See supra* Part IV.C (discussing the difficulties involved in attempting to rescind an agency shop arrangement).

355. *See supra* Part IV.D (discussing the constitutional implications of the amount of agency shop fees under Chapter 952); *supra* Part IV.E.1 (discussing the constitutional implications of Chapter 952's conscientious objector exemption).

356. *See supra* Part IV.F (discussing the decertification option).

357. *See, e.g.*, Kenneth R. Weiss, *Union "Fair Share" Bill Goes to Davis*, L.A. TIMES, Sept. 8, 1999, at B2 (noting that unions representing higher education employees will receive several million dollars, the biggest windfall in their history, with the passage of Chapter 952).

358. *Senate OKs Bill Requiring Agency Shops at UC, CSU*, *supra* note 252.

359. *See* Denny Campbell, *Forced Union Dues at UC, CSU is an Effort to Thwart Democracy*, SACRAMENTO BEE, Aug. 12, 1999, at B7 (indicating that Chapter 952 might increase union revenues by $10 million per year).

benefits that may be difficult or impossible to obtain through collective bargaining.[360]

While Chapter 952 reflects the California Legislature's disdain for the "free ride" problem that results from exclusive representation and a union's corresponding duty of fair representation of all employees in a bargaining unit, the debate over agency shop fees surely will continue. In organizations without agency shop arrangements, union members will continue to resent their co-workers who benefit from union representation without paying their share.[361] However, in a time when fewer and fewer American employees believe that unions are necessary to obtain justice at work, many will see compulsory financial support of unions as conflicting with the idea of freedom.[362]

360. *See* ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 645, at 4 (June 29, 1999) (noting the argument that Chapter 952 "may actually serve to reduce employee rights in the long run by statutorily 'opening the door' to remove key issues from the collective bargaining process").

361. *See* Michaels memo, *supra* note 213 (noting the argument that those who do not pay a union should not be allowed to benefit from the union's action).

362. Reynolds Testimony, *supra* note 1, at 5.