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THE LIBERATION OF PUBLIC EMPLOYEES: UNION SECURITY IN THE PUBLIC SECTOR

A. L. ZWERDLING*

INTRODUCTION

Recent years have witnessed a marked rise in the number of public employees¹ and an even faster growth in public employee union membership.² At the same time, public employees have intensified their demand for rights won long ago by private sector workers: the right to organize and act collectively through employee organizations of their own choosing; the right to have the employee organization recognized as the exclusive bargaining representative; and the right to bargain collectively as to wages, hours, and other terms and conditions of employment.³ While there is no uniform national legislation with respect to public employees,⁴ the current trend is toward full recognition of these rights by state governments⁵ and at least limited recogni-

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¹ In the last twenty years the number of federal, state and local government employees has more than doubled. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 433 (94th ed. 1973). There were 15.0 million civilian public employees in October, 1975, an increase of 358,000 over October, 1974. Of these, 12.1 million were nonfederal and 2.9 million were federal employees. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, REPORT OF JULY, 1976 reported at GOVT EMPL REL. REP. (BNA), § 71 at 2111 (Reference File).

² According to the Bureau of the Census, employees of state and local governments are joining unions in record numbers. Fifty-one percent of the full-time nonfederal public employees in the country are now union members. Only 41 percent were members 1972. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, SPECIAL STUDIES NO. 75, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1974 (1976), reported at 1976 GOVT EMPL REL. REP. (BNA), No. 648, B-21. Union membership in the federal sector also accelerated in 1975. 1976 GOVT EMPL REL. REP. (BNA), No. 645, A-9.

³ Most private sector employees have been protected by federal legislation since the enactment of the National Labor Relations Act in 1935 and the Railway Labor Act in 1926. National Labor Relations Act, 49 Stat. 449 *et seq.* (1935), as amended 29 U.S.C. §§ 141-87 (1970), as amended (Supp. V 1975). Railway Labor Act, 44 Stat. 577 *et seq.* (1926), as amended 45 U.S.C. §§ 151-88 (1970).

⁴ Section 2(2) of the Taft-Hartley Act, 29 U.S.C. § 152(2) (Supp. V 1975), specifically excludes government employers and thus their employees from coverage under the Act.

⁵ At the state level, at least 29 states have enacted statutes that recognize public sector collective bargaining and other fundamental rights for state and local employees. The recognition varies as to the categories of public employees covered and the rights guaranteed.

Eighteen states have a comprehensive, full scope law or laws mandating collective bargaining for state and local government employees. See Conn. Pub. Acts No. 75-566, §§

tion of these rights by the Federal government.⁶ As more and more jurisdictions move in this direction, attention is now being focused on union security, which is an agreement between a union and an

1-12 (July 7, 1975) (state employees), CONN. GEN. STAT. ANN. §§ 7-467 to -477 (1972), as amended (Supp. 1976) (local employees); FLA. STAT. §§ 447.201 to .607 (Supp. 1975-76); HAWAII REV. STAT. §§ 89-1 to -21 (Supp. 1975); IOWA CODE ANN. §§ 20.1-.27 (Supp. 1976); ME. REV. STAT. ANN. tit. 26, §§ 979 to 979-0 (1974), as amended (Supp. 1975-76) (state employees), *id.* tit. 26 §§ 961-73 (1974), as amended (Supp. 1975-76) (local employees), *id.* tit. 26 §§ 1021-1034 (Supp. 1975-76) (University of Maine employees; effective July 1, 1976); MASS. GEN. LAWS ANN. ch. 150E, §§ 1-15 (1976) (West); MICH. COMP. LAWS ANN. §§ 423.201 to .216 (1975); MINN. STAT. ANN. §§ 179.61-.76 (Supp. 1976) (West); MONT. REV. CODES ANN. §§ 59-1601 to -1617 (Supp. 1975); NEB. REV. STAT. §§ 48-801 to -823 (1974); N.H. REV. STAT. ANN. §§ 273-A:1 to -A:16 (Supp. 1975); N.J. STAT. ANN. §§ 34:13A-1 to -11 (Supp. 1976-77) (West); N.Y. CIV. SERV. LAW (consol.) §§ 200-14 (McKinney 1973), as amended (Supp. 1975-76); ORE. REV. STAT. §§ 243.650-.782 (1973); PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Supp. 1976-77); R.I. GEN. LAWS §§ 36-11-1 to -11-11 (Supp. 1975) (state employees), R.I. GEN. LAWS §§ 28-09.4-1 to -9.4-19 (1969) (local employees); S.D. COMPILED LAWS ANN. §§ 3-18-1 to -17 (1974), as amended (Supp. 1976); WIS. STAT. ANN. §§ 111.80-.97 (1974) (West) (state employees), *id.* §§ 111.70-.77 (1974) (municipal employees). Indiana's full scope public sector collective bargaining law, IND. CODE ANN. §§ 22-6-4 to 22-6-13 (Supp. 1976) (Burns), was held unconstitutional by a state court in *Community School Corp. v. Indiana Educ. Employment Rel. Bd.*, 91 L.R.R.M. 2521 (Ind. Cir. Ct. 1976). The law contains a provision prohibiting judicial review of the state board's bargaining unit determinations. IND. CODE ANN. § 22-6-4-8 (Supp. 1976) (Burns). This provision was held to be a violation of the due process guarantee of Art. I, § 12 of the Indiana Constitution. Since the unconstitutional provisions were viewed as an integral part of the statute, the court held that the entire statute was void. 91 L.R.R.M. at 2523.

One state has a comprehensive, full scope law mandating collective bargaining for *state employees*, see ALASKA STAT. §§ 23.40.070 to -.260 (1972), while allowing local governments to opt out of coverage, ALASKA STAT., Temporary and Special Acts of 1972 § 4, ch. 113.

Four states have comprehensive laws mandating collective bargaining for *local government employees*. See NEV. REV. STAT. §§ 288.010-.280 (1973); OKLA. STAT. ANN. tit. 11, §§ 548.1-.14 (Supp. 1975-76) (West); VT. STAT. ANN. tit. 21, §§ 1501-1623 (Supp. 1975); WASH. REV. CODE ANN. §§ 41.56.020 to .56.950 (1972) as amended (Supp. 1975), *id.* §§ 28B.52.010 to .52.200 (Supp. 1975) (community college employees), *id.* §§ 41.59.010 to .59.950 (Supp. 1975) (public school employees).

Two states have authorized a limited form of collective bargaining for *state government employees*. See DEL. CODE tit. 19, §§ 1301-12 (1974); WASH. REV. CODE ANN. §§ 41.06.070 to .06.340 (1972), as amended (Supp. 1975) (state civil service employees), *id.* §§ 28B.16.010 to .16.230 (1972), as amended (Supp. 1975) (state higher education personnel). The Delaware law has a provision for coverage of *local government employees* if the local governing bodies opt for coverage. DEL. CODE tit. 19, § 1301(a)(3) (1974).

Three states have mandatory meet and confer laws covering *state and local government employees*. The laws of California and Kansas are relatively comprehensive, whereas the Missouri law is not. See CAL. GOV'T CODE §§ 3525-36 (1966), as amended (Supp. 1976) (West) (state employees), *id.* §§ 3500-09 (1966), as amended (Supp. 1976) (local employees), *id.* §§ 3540-49 (Supp. 1976) (West) (public school employees); KAN. STAT. §§ 75-4321 to -4337 (Supp. 1975) (state employees covered; local employees covered, if local government opts for coverage, *id.* § 75-4321(c)); MO. REV. STAT. §§ 105.500-.530 (1966), as amended (Supp. 1976).

⁶ On the federal level, Exec. Order No. 11,491, 3 C.F.R. 861 (Supp. 1966-70), as amended by Exec. Order No. 11,838, 3A C.F.R. 126 (1975), which were issued pursuant to authority granted to the President by 5 U.S.C. § 7301 (1970), guarantees federal employees in the executive branch the right to bargain collectively within narrow limits.

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employer⁷ requiring employees, as a condition of continued employment, either to join the union or pay a set amount to the union.⁸

Attention has been drawn to union security agreements because of their conflicting significance for unions, non-union member employees, and employers. To the union, union security agreements mean that its financial stability is insured, at least for the duration of the collective bargaining agreement. To the non-union member employee, union security agreements mean that he must contribute to the financial stability of an organization with members, policies, and ideals which he may abhor. To the employer opposed to unions in general⁹ or opposed to the union currently representing his employees,¹⁰ union security agreements mean that the strength of the unwanted union will be increased. To the employer not opposed to unionization, union security agreements mean that labor peace will be increased because of the union's financial stability.¹¹

The public sector has provided a particularly fertile area for challenging the validity of union security agreements for two reasons. First, in the public sector, unlike the private sector,¹² there is no federal law authorizing the collection of union security fees. Consequently, non-union member employees and employers have attacked the statutory and common law authority of governmental units to enter into union security agreements.¹³ Second, in the public sector,

⁷ Union security can be mandated by law, but more frequently it is a negotiated clause in the collective bargaining agreement. See notes and text at notes 76-103 *infra*.

⁸ Union security arrangements are not a recent innovation in public employment. Studies in 1943, 1949 and 1955 discovered a significant number of union shops or modified union shops in various municipal collective bargaining agreements. More recent data in 1970 showed that over 43% of 700 AFSCME contracts contained union security provisions. DEPT OF LABOR, OFFICE OF LABOR-MANAGEMENT POLICY DEVELOPMENT, COLLECTIVE BARGAINING, PUBLIC EMPLOYMENT, AND THE MERIT SYSTEM 98-100, 114 (1972) [hereinafter cited as DOL].

⁹ The National Right to Work Committee [hereinafter referred to as the Committee], which has been in existence for over twenty years, is the leading proponent in a long succession of employer-funded groups dedicated to opposing union security and the labor movement. See generally GROUP RESEARCH, INC., THE NATIONAL RIGHT TO WORK COMMITTEE I, 3-7 (1962). In 1968, the Committee created a litigating arm, the National Right to Work Legal Defense Foundation, Inc. with a board of directors nearly identical to that of the Committee.

¹⁰ An employer, for example, may prefer to have his employees represented by an independent union, rather than one associated with an international organization, because the independent union would not have the international's resources at its disposal. Also, the officials of an independent union might well be the employer's own employees.

¹¹ A lack of financial stability undermines meaningful collective bargaining by encouraging greater hostility between the union and the employer. The union's hostility toward the employer is aimed at attracting more financial support from nonmember employees; while the employer's hostility toward the union is motivated by the desire to obtain more favorable agreements from the financially strapped union. See generally Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 189-90 (1975) [hereinafter cited as Blair].

¹² See National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

¹³ See notes and text at notes 122-95 *infra*.

unlike the private sector, the collective bargaining activities of unions are often necessarily political in nature.¹⁴ As a result, non-union member employees, with the support of employers, have claimed that even if the collection of service fees is valid, the use of such fees for political purposes violates the dissenter's constitutional rights.¹⁵

The first section of this article will consider the developing rights of public employees—the right to join unions, the right to exclusive recognition, and the right to fair representation. The article will then analyze union security provisions in the public sector. The various forms of these provisions, as well as the need for, and validity of public sector union security agreements will be examined. On the basis of this examination it will be submitted that union security agreements are vital to the stability of public sector unions and that such agreements, provided they contain protection for the rights of non-union member employees and union member dissenters, are valid.

I. THE DEVELOPING RIGHTS OF PUBLIC EMPLOYEES

Until recently, state and municipal governments had either refused or been reluctant to accept public employee organizations.¹⁶ This resistance arose primarily from policy considerations based on the concepts of sovereignty, illegal delegation of authority, and the public interest. The sovereignty argument stemmed from the notion that the government, as the repository of supreme power, could not tolerate the decrease in power that was certain to result if unionization and collective bargaining were permitted.¹⁷ The illegal delegation theory was premised on constitutional, statutory, and common law requirements that certain decisions be made by government officials. According to this theory, collective bargaining results in shared decision-making between employers and employees on issues such as wages, hours, and conditions of employment. Since in the public sector such decisions have traditionally been made by executive and legis-

¹⁴ See notes and text at notes 196-208 *infra*.

¹⁵ See notes and text at notes 242-57 *infra*.

¹⁶ See generally K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 11-33 (1967); NIGRO, *MANAGEMENT-EMPLOYEE RELATIONS IN THE PUBLIC SERVICE* 26-29 (1969) [hereinafter cited as NIGRO]; Spero, *Collective Bargaining in Public Employment: Form and Scope*, 22 *PUB. AD. REV.* 1 (1962); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 *YALE L. J.* 1107 (1969) [hereinafter cited as Wellington & Winter].

¹⁷ An example of this reasoning can be found in *Perez v. Board of Police Comm'rs*, 78 Cal. App. 2d 638, 178 P.2d 537, 19 L.R.R.M. 2518 (1947). In upholding a resolution barring police officers from joining labor unions, the court stated: "The failure to [enforce the resolution] would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants . . ." *Id.* at 651, 178 P.2d at 545, 19 L.R.R.M. at 2524. The sovereignty argument was supported by the experience in the private sector where unionization and collective bargaining had resulted in an increase in the power of the employees and a corresponding decrease in the power of the employers. See Wellington & Winter, *supra* note 16, at 1108-09.

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lative bodies, collective bargaining would be an illegal delegation of these governmental functions.¹⁸ The public interest objection to public sector unionization was founded upon the view that employee organizations would inevitably make demands, such as increased wages, that were inconsistent with community interests such as lower taxes.¹⁹

More and more jurisdictions, however, are now enacting statutes authorizing public sector unionization and collective bargaining.²⁰ This change in position has been motivated, in part, by the declining persuasiveness of the concepts of sovereignty and delegation,²¹ and by the realization that the public interest, in addition to being difficult to define,²² may in fact be served by the labor stability that follows union recognition and collective bargaining. As public employees have turned to dealing collectively with employers, the result has been more than higher wages, shorter hours, and better working conditions,²³ for in addition to such tangible economic benefits, collective bargaining has resulted in the recognition of the right of public employees to join unions, the right of public employees to have their unions recognized as exclusive bargaining representatives, and the right of non-union member public employees to fair representation by

¹⁸ The theory was expressed in *Railway Mail Ass'n v. Murphy*, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom.*, *Railway Mail Ass'n v. Corsi*, 267 App. Div. 470, *aff'd*, 293 N.Y. 315, 56 N.E.2d 721, *aff'd*, 326 U.S. 88 (1945), in the following terms:

To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is . . . inconsistent with every principle upon which our government is founded. . . . To admit as true that government employees have the power to halt or check the functions of government unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power.

See *Wellington & Winter*, *supra* note 16, at 1109-11.

¹⁹ See NIGRO, *supra* note 16, at 29-30.

²⁰ See note 5 *supra*. Although state laws vary as to coverage, the trend is toward enacting comprehensive statutes. The Advisory Commission of Intergovernmental Relations recommended that all states enact legislation requiring state and local governments to recognize the right of their employees to join and be represented by unions. ADVISORY COMMISSION ON INTER-GOVERNMENTAL RELATIONS, LABOR MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 93 (1969) [hereinafter cited as ACIR].

²¹ See *Wellington & Winter*, *supra* note 16, at 1115-1117. See generally, K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 2.01-.10, 27.01-07 (1972).

²² See NIGRO, *supra* note 16, at 29-30.

²³ The broader and noneconomic significance of public sector collective bargaining has been described by Jerry Wurf, International President of AFSCME:

Collective bargaining is more than simply an additional holiday, or a pay increase, or an improved pension plan, or a grievance procedure. It is, of course, all of these, and their importance can hardly be overestimated. But it is, in its most profound sense, a process.

It is a process which transforms pleading to negotiation. It is a process which permits employees dignity as they participate in the formulation of their terms and conditions of employment. It is a process which embraces the democratic ideal and applies it concretely, specifically, effectively, at the work place.

Address by Jerry Wurf, International President, AFSCME, 1967 U.S. Conference of Mayors, Honolulu, Hawaii, *quoted in* ACIR, *supra* note 20, at 51.

such exclusive bargaining representatives. Without such rights, the immediate economic benefits obtained through collective bargaining might well be short-lived.

A. Right To Join

Until the early 1960's, the courts held with near unanimity that public employees did not have a constitutional right to join or form unions²⁴ and, as a corollary, that legislatures could specifically forbid the joining or forming of unions.²⁵ The 1947 discussion of the California Court of Appeals in *Perez v. Board of Police*²⁶ exemplifies the rationale utilized by courts in denying public employees the right to join or form unions. In *Perez*, policemen alleged that a city resolution which prohibited them from joining or forming labor organizations thereby violated their constitutional rights to equal protection, freedom of speech, peaceable assembly, petition for redress of grievances, and due process.²⁷ The court rejected the claims, finding that the conditions of public employment, including the ability to join and form labor unions, were established by the people indirectly through government agencies and were necessary to advance the "public good."²⁸ Consequently, even when such conditions required the "surrender of certain liberties," there could be no "conflict with the will of the people as expressed in the Federal Constitution."²⁹

More recently, courts in both federal and state jurisdictions have struck down restrictions upon the right of public employees to join unions. In the landmark case of *McLaughlin v. Tilendis*³⁰ the United States Court of Appeals for the Seventh Circuit held that the dismissal of two teachers for their affiliation with the American Federation of Teachers violated the first amendment to the United States Constitution.³¹ The district court had dismissed the complaint using

²⁴ *E.g.*, *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547 (1947), *appeal dismissed*, 333 U.S. 852, *rehearing denied*, 333 U.S. 878 (1948); *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935); *Fursman v. Chicago*, 278 Ill. 318, 116 N.E. 158 (1917).

²⁵ For example, in 1963, the Michigan Supreme Court in *Local 201, AFSCME v. City of Muskegon*, 369 Mich. 384, 120 N.W.2d 197, 52 L.R.R.M. 2710, *cert. denied*, 375 U.S. 833 (1963), upheld the constitutionality of a rule promulgated by the local chief of police barring city police officers from becoming members in any organization identified with any federation or labor union that admits persons who are not members of the city's police force. *Id.* at 389-90, 396-98, 120 N.W.2d at 199, 202-03, 52 L.R.R.M. at 2711, 2714. *Cf.* *Mugford v. Mayor and City Council of Baltimore*, 14 L.R.R.M. 732, 734 (Md. Dist. Ct.), *aff'd*, 15 L.R.R.M. 646 (Md. Cir. Ct. 1944). See *Shaw, The Development of State and Federal Laws*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 21 (S. Zagoria ed. 1972).

²⁶ 78 Cal. App. 2d 638, 178 P.2d 537, 19 L.R.R.M. 2518 (1947).

²⁷ *Id.* at 642, 178 P.2d at 540, 19 L.R.R.M. at 2519.

²⁸ *Id.* at 645, 178 P.2d at 545-46, 19 L.R.R.M. at 2524-25.

²⁹ *Id.*

³⁰ 398 F.2d 287, 71 L.R.R.M. 2097 (7th Cir. 1968).

³¹ *Id.* at 288-89, 71 L.R.R.M. at 2098-99. The first amendment was applied to the state through the fourteenth amendment. *Id.*

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reasoning similar to that developed in *Perez*.³² The court of appeals, in rejecting this rationale, found that the teachers' first amendment rights to freedom of association³³ and freedom of speech³⁴ were infringed by the dismissal. The possibility that the union might in the future hurt the public interest by engaging in strikes did not justify violating the teachers' first amendment rights by prohibiting mere membership in the organization.³⁵ Other courts have extended the *McLaughlin* rationale to other classes of public employees,³⁶ and have struck down statutes which prohibited all or certain categories of public employees from joining or forming unions.³⁷

B. Right to Exclusive Recognition

Legal status—the recognition of the constitutional right to join or form public employee unions—does not in itself mean that public employee unions will be effective. Unions need the further right to deal exclusively with their members' employers, for without such a right, employers are able to reach separate agreements with dissident individual employees or groups of employees. Consequently, an employer might be encouraged to reject a union's reasonable proposals and reach agreements apart from the union in order to undermine the union's strength.³⁸ The doctrine of exclusive recognition requires

³² The court of appeals quoted the district court as finding that: The union may decide to engage in strikes, to set up machinery to bargain with the governmental employer, to provide machinery for arbitration, or may seek to establish working conditions. Overriding community interests are involved. The very ability of the governmental entity to function may be affected. The judiciary, and particularly this Court, cannot interfere with the power or discretion of the state in handling these matters.

Id. at 289, 71 L.R.R.M. at 2099.

³³ *Id.* at 288, 71 L.R.R.M. at 2098, citing *Sheton v. Tucker*, 364 U.S. 479 (1960).

³⁴ 398 F.2d at 289, 71 L.R.R.M. at 2099, citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

³⁵ 398 F.2d at 289-90, 71 L.R.R.M. at 2099.

³⁶ See, e.g., *Lontine v. Van Cleave*, 483 F.2d 966, 967-68, 84 L.R.R.M. 2445, 2446 (10th Cir. 1973) (deputy sheriff); *AFSCME v. Woodward*, 406 F.2d 137, 139, 70 L.R.R.M. 2317, 2318 (8th Cir. 1969) (street department employees); *Melton v. City of Atlanta*, 324 F. Supp. 315, 318-20, 76 L.R.R.M. 2511, 2514-15 (N.D. Ga. 1971) (police-men); *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 883, 76 L.R.R.M. 2932, 2934-35 (D.D.C. 1969), *aff'd*, 404 U.S. 802 (1971) (post office workers); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1075-78, 70 L.R.R.M. 2732, 2736-39 (W.D.N.C. 1969) (firefighters).

³⁷ See, e.g., *Police Officers' Guild v. Washington*, 369 F. Supp. 543, 550-53, 85 L.R.R.M. 2203, 2208-10 (D.D.C. 1973) (three-judge court) (invalidating statute prohibiting police officers from associating with, becoming members of, or affiliating with, any organization which "holds, claims, or uses" the right to strike); *Alabama Labor Council v. Frazier*, 81 L.R.R.M. 2155, 2156 (Madison County Cir. Ct., Ala. 1972) (invalidating statute providing that any employee who joins or participates in a union loses all rights under the state merit system).

³⁸ For discussions of the significance of exclusive recognition to effective union representation, see *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62-65 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-82 (1967).

an employer to bargain solely with the union representing a majority of its employees, to negotiate in good faith with the exclusive representative, and to refuse to bargain with a rival union or with individual employees. On the other hand, a union, having gained exclusive recognition, is required to negotiate in good faith with the public employer and to fairly represent all employees in the particular bargaining unit whether they are members of that union, a rival labor organization, or no organization.³⁹ Thus, the doctrine encourages good faith bargaining by both the union and the employer while protecting the rights of individual employees.

In the private sector, sections 2, Ninth of the Railway Labor Act⁴⁰ and 9(a) of the Taft-Hartley Act⁴¹ mandate exclusive recognition.⁴² The constitutionality of the principle of exclusive recognition of an employee organization was established long ago in the private sector. In upholding the constitutionality of the Railway Labor Act provision in *Virginian Railway Co. v. System Federation No. 40*⁴³ the Supreme Court stated: "[t]he Fifth Amendment, like the Fourteenth, . . . is not a guarantee of untrammelled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable."⁴⁴ The Court found that the provision requiring exclusive recognition was not unreasonable because it did not interfere with the employer's right to select or discharge employees.⁴⁵ The Court subsequently employed the same reasoning in upholding the constitutionality of the Taft-Hartley Act provision in *NLRB v. Jones & Laughlin Steel Corp.*⁴⁶

³⁹ See notes and text at notes 67-74 *infra*.

⁴⁰ 45 U.S.C. § 152, Ninth (1970) provides in pertinent part:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.

⁴¹ 29 U.S.C. § 159(a) (1970) provides, in pertinent part, that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

⁴² *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 548 (1937) (Railway Labor Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937) (Taft-Hartley Act).

⁴³ 300 U.S. 515 (1937).

⁴⁴ *Id.* at 558 (citations omitted).

⁴⁵ *Id.* at 559.

⁴⁶ 301 U.S. 1, 44-45 (1937), *citing Virginian Ry.*

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The courts have found the principles which support the constitutionality of exclusive recognition in the private sector equally valid in the public sector. For example, in *Local 858, AFT v. School District No. 1*,⁴⁷ a federal district court considered whether the granting of exclusive access and communication rights to a majority organization was unconstitutional under the first and fourteenth amendments. The members of the minority organization first argued that giving one union exclusive privileges impaired their first amendment right to freedom of association.⁴⁸ The court stated that first amendment rights "may be impaired by state action when the state can show a compelling interest which, when balanced against the substantive right to be protected, outweighs that right."⁴⁹ The *Local 858* court identified the following state interests in permitting exclusive recognition in the public sector: (1) allowing all employees to exercise the right to form and join employee organizations; (2) providing the duly elected representative a ready means of communicating with all employees, not just its membership, thus assuring a viable, effective employee organization; (3) eliminating active interorganizational competition for membership except during the brief periods of representation elections; and (4) ensuring labor peace, enabling government bodies to effectively execute their assigned duties.⁵⁰ On the other hand, the court found that interference with the minority union members' freedom of association was "limited."⁵¹ While they were not granted access to school communication facilities nor were they provided with dues check-offs, the minority union members were in no way *prevented* from communicating or associating with each other. The court held, therefore, that there was no first amendment violation.⁵²

With respect to the fourteenth amendment challenge, the *Local 858* plaintiffs alleged that exclusive recognition amounted to the giving of privileges to certain teachers while denying them to others.⁵³ The court, while questioning whether a rational relationship or a compelling state interest test should be applied, found that the interests enumerated above⁵⁴ established a compelling state interest.⁵⁵ Thus, the court concluded that: "We have been shown no authority, nor has a convincing argument been advanced, to show a constitutional infirmity in extending the . . . [right to exclusive recognition] from private employers to public employers."⁵⁶ The decisions of other

⁴⁷ 314 F. Supp. 1069, 74 L.R.R.M. 2385 (D. Colo. 1970).

⁴⁸ *Id.* at 1074, 74 L.R.R.M. at 2387.

⁴⁹ *Id.* at 1076, 74 L.R.R.M. at 2389.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1077, 74 L.R.R.M. at 2390.

⁵³ *Id.*

⁵⁴ See text at note 50 *supra*.

⁵⁵ 314 F. Supp. at 1077-78, 74 L.R.R.M. at 2390-91.

⁵⁶ *Id.* at 1075, 74 L.R.R.M. at 2388.

federal⁵⁷ and state courts⁵⁸ which have considered the constitutionality of exclusive recognition in the public sector are in accord.

In addition to challenging the constitutionality of exclusive recognition, an employer or a minority union could attack the governmental entity's authority to enter into agreements calling for exclusive recognition. In the private sector, employers and unions are specifically authorized to enter such agreements by the Railway Labor Act and the Taft-Hartley Act.⁵⁹ Similarly, over half the states have statutes that explicitly provide for exclusive recognition in the public sector.⁶⁰ On the federal level, and in the remaining states, however, the authority to enter such agreements must either be implied from other statutory provisions or arrived at as a matter of common law. An example of such implied authorization is the Presidential Executive Order governing federal sector labor relations which provides for exclusive recognition.⁶¹ The order is based on section 7301 of Title 5, which provides that: "The President may prescribe regulations for the conduct of employees in the executive branch."⁶² There appears to have been no litigation on the issue of whether exclusive recognition relates to the "conduct of employees." On the state level, however, a few courts have determined that statutes, more tangentially related to collective bargaining than section 7301, authorized state and local governments to negotiate exclusive recognition clauses. For example, in *Fire Fighters Local 345 v. Burke*⁶³ a Kentucky court found that a city could enter exclusive representation agreements even though the legislature did "not specifically provide authority for such collective bargaining agreements."⁶⁴ The court reasoned that the legislature's establishment of medical and life insurance plans for public employees revealed a public policy favoring such agreements.⁶⁵ In addition, at

⁵⁷ *Federation of Teachers v. Board of Educ.*, 335 F. Supp. 385, 389, 78 L.R.R.M. 2764, 2767 (D. Del. 1971). One federal court decision to the contrary was later vacated by the Seventh Circuit Court of Appeals. *Federation of Teachers v. Area Schools*, 499 F.2d 115, 86 L.R.R.M. 2075 (7th Cir. 1974).

⁵⁸ *E.g.*, *Classroom Teachers Ass'n v. School District*, — Nev. —, —, 532 P.2d 1032, 1033, 88 L.R.R.M. 3391, 3391 (Nev. 1975); *Turnpike Employee's Union v. Turnpike Auth.*, 123 N.J. Super. 461, 466-67, 303 A.2d 599, 602-03, 83 L.R.R.M. 2250, 2252 (1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974); *Bauch v. New York*, 21 N.Y.2d 599, 606-08, 289 N.Y.S.2d 951, 955-56, 237 N.E.2d 211, 214-15, 67 L.R.R.M. 2994, 2996-97, *cert. denied*, 393 U.S. 834 (1968).

⁵⁹ See notes and text at notes 40-46 *supra*.

⁶⁰ See Note, *The Minnesota Public Employment Labor Relations Act of 1971*, 57 MINN. L. REV. 134, 145-46 (1972); D. WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS 1001-1132* (1973) (containing the texts of twenty-two state statutes requiring exclusive representation in teacher negotiations).

⁶¹ Exec. Order No. 11,491, 3 C.F.R. 861, 865-66 (Supp. 1966-70), *as amended by* Exec. Order No. 11,838 3A C.F.R. 126, 127-78 (1975).

⁶² 5 U.S.C. § 7301 (1970).

⁶³ 75 L.R.R.M. 2001 (Ky. Cir. Ct. 1970).

⁶⁴ *Id.* at 2004.

⁶⁵ *Id. Cf. Civil Serv. Forum v. New York City Transit Authority*, 4 App. Div. 2d 117, 125, 163 N.Y.S.2d 476, 484, 40 L.R.R.M. 2385, 2389 (2d Dep't 1957), *aff'd*, 4 N.Y.2d 866, 174 N.Y.S.2d 234, 150 N.E.2d 705 (1958).

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least one state appears to have permitted public sector exclusive recognition as a matter of common law.⁶⁶ Thus, challenges to the principle of exclusive recognition in the public sector, whether based on alleged unconstitutionality or on an alleged lack of authority, have been unsuccessful.

C. *Right to Fair Representation*

In endorsing the concept of majority rule embodied in the principle of exclusive recognition, the courts and various legislatures have not sacrificed minority employee rights. Minority employees both in the private⁶⁷ and public sectors,⁶⁸ have a right of fair representation owed to them by the exclusively recognized union of the particular bargaining unit. This right mandates that the exclusively recognized union "make an honest effort to serve the interests of *all* [bargaining unit] members, without hostility to any" and "subject always to complete good faith and honesty of purpose in the exercise of its discretion."⁶⁹

The doctrine of fair representation in the private sector was judicially created. The United States Supreme Court has held that since the interest of the individual employee is subordinated to the collective interests of all employees in the bargaining unit both the National Labor Relations Act,⁷⁰ and the Railway Labor Act⁷¹ impose upon the union the duty to represent all bargaining unit employees fairly.⁷² In the public sector the doctrine of fair representation has usually been specifically mandated in legislation.⁷³ The difference in approach between the private and public sector seems to be primarily a result of the fact that most public sector bargaining laws have been enacted after the National Labor Relations Act and the Railway Labor Act. Most state legislatures, therefore, had the advantage of the Supreme Court's determination that the right to exclusive recognition, to avoid tyranny of the majority, must be tempered with the right to fair representation.

⁶⁶ In *Education Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 472, 222 N.E.2d 243, 251 (1966), the court stated: "We conclude that the Board of Education of the City of Chicago does not require legislative authority to enter into a collective bargaining agreement with a sole collective bargaining agency selected by its teachers . . ." Cf. *Local 858, AFT v. School District No. 1*, 314 F. Supp. 1069 (D. Colo. 1970) (court upholds exclusive recognition clause between school district and teacher's union without discussing any statutory authorization for such clauses).

⁶⁷ See text at notes 70-72 *infra*.

⁶⁸ See text at notes 73-74 *infra*.

⁶⁹ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953) (emphasis added). *Accord*, *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

⁷⁰ *Syres v. Local 23, Oil Workers*, 350 U.S. 892 (1955).

⁷¹ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-99, 202-04 (1944).

⁷² *Accord*, *Hines v. Anchor Motor Freight, Inc.*, — U.S. —, —, 96 S. Ct. 1048, 1056-57. (1976); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

⁷³ See, e.g., *Kaufman v. Goldberg*, 64 Misc. 2d 524, 531-33, 315 N.Y.S.2d 35, 43-44, 75 L.R.R.M. 2903, 2907-08 (1970).

In contrast to the judicial articulation of the right to fair representation, the legislative approach does not appear to have resulted in any material differences in the substance of the right accorded in the private and public sectors. The typical state labor relations provision requires both that the certified majority representative bargain for all employees within the bargaining unit and that all employees receive equally all the benefits of the collective bargaining agreement negotiated by the union and the employer. Additionally, it is the obligation of the union to process grievances of employees expeditiously, whether or not they are members of the union.⁷⁴ Consequently, in the public sector, just as in the private sector, the right to fair representation has accompanied the right to exclusive recognition.

D. Conclusion

As the rights of public employees have developed, the distinctions between private and public sector unionism have become less pronounced. Public employees, like their private counterparts, seem to have firmly established their right to join unions, to have the majority unions recognized as exclusive representatives, and to have such majority unions provide fair representation. Again as in the private sector, this increase in public employee rights has been attained through a process which balances the need for such rights against the corresponding decrease in management prerogative. In the public sector, however, the weight of management prerogatives is increased by notions of sovereignty, delegation, and the public interest.⁷⁵ Consequently, in spite of the recent development in public employee rights, the right to negotiate union security provisions, a right firmly established in the private sector, is still in a relative state of flux in the public sector.

II. UNION SECURITY PROVISIONS IN THE PUBLIC SECTOR

With the acceptance of unionization in the public sector, attention has focused on the validity of union security provisions—whether all members of the bargaining unit for which the union is the exclusive bargaining representative should be required as a condition of continued employment either to join the union or pay a proportionate share of the union's collective bargaining costs. Unionists often adopt the strong view of Samuel Gompers that those who do not join the union but receive benefits are despicable "parasites."⁷⁶ Others advo-

⁷⁴ *E.g.*, MONT. REV. CODES ANN. § 59-1603(3), (4) (Supp. 1975); VT. STAT. ANN. tit. 21, § 1726(b) (Supp. 1975).

⁷⁵ Indeed, the public interest is the basis on which public employees are still denied the right to strike. *See Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482, 28 L.R.R.M. 2408 (1951). For a discussion of the problems created for public employee unionism by sovereignty, delegation, and the public interest, see the notes and text at notes 16-23 *supra*.

⁷⁶ A much-quoted statement by former AFL President Samuel Gompers is: "Nonunionists who reap the rewards of union efforts, without contributing a dollar or

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cate that nonmembers should be allowed to be free riders enjoying all the benefits of the union and the collective bargaining agreement, but forcing the union members to bear all the costs.⁷⁷ Between these two extremes there has emerged a middle position—a union security provision requiring bargaining unit employees to pay a set amount of money to the union, but not requiring employees to join the union. While the validity of all forms of union security continues to be disputed, a trend is seemingly developing towards legislative authorization of such a public sector union security provision. This trend is perhaps best understood by surveying the forms of, the need for, and the challenges to union security provisions.

A. *The Forms of Public Sector Security Agreements*

Union security devices in both the private and public sectors have taken many forms—primarily including closed shop, union shop, agency shop, fair share clauses, and occasionally maintenance of membership clauses.⁷⁸ For several decades, union security in America was embodied chiefly in the closed shop agreement, which required all employees to be union members at the time of their initial employment and which “closed the shop” to all nonunion employees.⁷⁹ Although once authorized,⁸⁰ the closed shop was outlawed in the private sector in 1947 by section 8(a)(3) of the Taft-Hartley Act,⁸¹ which,

risking the loss of a day, are parasites. They are reaping the benefit from the union spirit, while they themselves are debasing genuine manhood.” S. GOMPERS, 12 AMER. FEDERATIONIST 221 (1905).

⁷⁷ See NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. ANNUAL REPORT 1-2 (1974).

⁷⁸ Maintenance of membership clauses require that all those who are members of the union as of the effective date of the collective bargaining agreement, or who join thereafter, must continue their membership for some period set forth in the agreement, usually the life of the agreement. Although maintenance of membership has sometimes been classified as a union security device, Hopfl, *The Agency Shop Question*, 49 CORNELL L. REV. 478, 478 n.4 (1964) [hereinafter cited as Hopfl], it will not be so categorized for the purposes of this article. Unlike union shop, agency shop, and fair share clauses, maintenance of membership agreements do not require nonmembers to bear their share of the costs of union representation and do not eliminate the problem of the free rider.

Two other kinds of contractual arrangements—exclusive recognition and dues checkoff—have been misnamed as union security devices. See Hopfl, *supra*, at 478 n.4. Neither conditions continued employment on union membership or on payments to the union of a set fee, and neither is a true union security clause.

⁷⁹ See Pollitt, *Right to Work Law Issues*, 37 N.C. L. REV. 233, 236 (1959) [hereinafter cited as Pollitt].

⁸⁰ Wagner Act, 49 Stat. 449 § 8(3) (1935). This congressional authorization for the closed shop was sustained by the United States Supreme Court in *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-65 (1949). Besides the closed shop, the Wagner Act authorized all other union security provisions. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 739 (1963).

⁸¹ 29 U.S.C. § 158(a) (3) (1970). See *NLRB v. General Motors Corp.*, 373 U.S. 734, 740 (1963). The Act further limits union security agreements between unions and employers by yielding in § 14(b) to state laws which restrict or prohibit such agree-

as the Supreme Court has suggested, served to eliminate "... the most serious abuses of compulsory unionism. . . ."⁸² The closed shop has never existed to any significant extent in the public sector.

Union shop clauses mandate that all employees who are within a particular bargaining unit and covered by a collective bargaining agreement must join the exclusively recognized employee organization and must pay dues and initiation fees upon the completion of a specified time period, usually thirty days.⁸³ In the absence of state right to work legislation,⁸⁴ union shop provisions are permitted in the private sector by section 8(a)(3) of the Taft-Hartley Act⁸⁵ and section 2 of the Railway Labor Act,⁸⁶ and are also present in the public sector.⁸⁷ Such clauses have been upheld against claims that they force employees into ideological and political associations in violation of the first amendment and that they deprive employees of a liberty interest without due process in violation of the fifth and fourteenth amendments.⁸⁸ The Supreme Court rejected the first amendment claims on the ground that political and ideological coercion is not a

ments. Section 14(b), 29 U.S.C. § 164(b) (1970), states: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." National debate on the closed shop has continued and unsuccessful attempts have been made to repeal § 14(b). For example, in 1965 a labor-supported bill was introduced to repeal § 14(b). On July 28, 1965 the House of Representatives passed H.R. 77, 89th Cong., 1st Sess. (1965), but the bill died in the Senate.

⁸² *NLRB v. General Motors Corp.*, 373 U.S. 734, 740 (1963). See S. REP. NO. 105, 80th Cong., 1st Sess. 411-13 (1947).

⁸³ See Pollitt, *supra* note 79, at 235. Some collective bargaining agreements contain a modified union shop clause which exempts present employees who are not members of the union from the requirement of joining the union as a condition of continued employment. Any newly hired employee, however, must join the union within the time period specified in the clause.

⁸⁴ See note 123 *infra*.

⁸⁵ 29 U.S.C. § 158(a) (3) (1970).

⁸⁶ 45 U.S.C. § 152, Eleventh (1970) (60 not 30 days).

⁸⁷ See generally GOVT EMPL. REL. REP. (BNA), § 85 at 3511-3611 (Reference File). For executive employees of the federal government, § 1(a) of Exec. Order No. 11,491 3, C.F.R. 861, 862 (Supp. 1966-70) prohibits all forms of union security arrangements and states that all employees have the right to refrain from joining or assisting labor organizations.

Some states have expressly authorized negotiation of union shop provisions in the public sector. See, e.g., ALASKA STAT. § 23.40.110(b) (1) (1972) (state and local government employees; local opt out); KY. REV. STAT. ANN. § 345.050(1) (c) (Supp. 1974) (Baldwin) (firefighters); ME. REV. STAT. ANN. tit. 26, § 1027(3) (Supp. 1975-76) (University of Maine employees); VT. STAT. ANN. tit. 21, § 1726(a) (8) (Supp. 1975) (municipal employees); and WASH. REV. CODE ANN. § 41.56.122 (Supp. 1975) (local employees; religious exemption available), *id.* § 41.06.150 (Supp. 1975) (state civil service; majority of bargaining unit employees must approve the provision; religious exemption available), and *id.* § 28B.16.100(1) (Supp. 1975) (state higher education personnel; majority of bargaining unit employees must approve the provision; religious exemption available). For a discussion of two Washington cases construing the Washington law for state civil service employees, see notes and text at notes 175-80 *infra*.

⁸⁸ *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 234-37 (1956).

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necessary result of union membership.⁸⁹ In rejecting the due process claim, the Court upheld the reasonableness of Congress's determination that union shop clauses enhance employees' right to work.⁹⁰ Union shop clauses have also been upheld against claims that they violate Title VII of the Civil Rights Act of 1964.⁹¹

Agency shop clauses do not require bargaining unit employees to join or remain members of the union as a condition of continued employment. However, if an employee chooses not to join the union, the employee must pay a fee to the exclusively recognized employee organization.⁹² The fee is usually, but not necessarily, equal to the amount of union dues, and typically excludes union fines or assessments. The major advantage to the agency shop clause is that while requiring all employees to share the cost of union representation, it allows nonmembers to refrain from all union activity. Thus, the agency shop clause does not require an employee to associate with an organization to which he or she may be opposed. The major disadvantage in the agency shop approach is that the agency fee payor has no voice or vote in union affairs.⁹³ In the public sector, as in private industry,

⁸⁹ *Id.* at 236-38.

⁹⁰ *Id.* at 234-35. The Court in *Hanson* concluded: "We . . . hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments." *Id.* at 238. *Accord*, *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 117-18 (1963); *IAM v. Street*, 367 U.S. 740, 746 (1961).

The recent decision in *Marden v. IAM*, 91 L.R.R.M. 2841 (S.D. Fla. 1976) does not contradict these decisions of the Supreme Court. In *Marden*, employees were required to join the union (formal union membership), even though the union had a plan allowing employees to pay an agency fee instead of becoming union members. The *arden* court held that the union membership requirements, as implemented, "artificially induce[d] uninformed employees to become formal union members." *Id.* at 2843. Thus, the court required that adequate notice be given to new employees of the availability of the agency fee payor alternative.

⁹¹ See *Burns v. Southern Pacific Transp. Co.*, 11 FEP Cas. 1441 (D. Ariz. 1976) (union shop clause negotiated pursuant to Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1970), does not violate Title VII since offer of union and employer that employee pay an amount equal to dues and assessments, instead of requiring union membership, is a "reasonable accommodation"). *Cf.* *Yotts v. North Am. Rockwell Corp.*, 501 F.2d 398, 8 FEP Cas. 546 (9th Cir. 1974) (union shop clause negotiated pursuant to Section 8(a)(3) of the National Labor Relations Act does not violate Title VII since the requirement of "reasonable accommodation" regarding employees who refuse for religious reasons to pay union dues does not require such an accommodation where "undue hardship" on the union or the employer will result).

⁹² See *Turnpike Employee's Union v. Turnpike Auth.*, 123 N.J. Super. 461, 464, 303 A.2d 599, 601, 83 L.R.R.M. 2250, 2251 (1973), *aff'd*, 64 N.J. 579, 319 A.2d 224, 86 L.R.R.M. 2842 (1974); *Hopfl*, *supra* note 78, at 478-83. An agency shop arrangement is not an unfair labor practice under § 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3) (1970), and is not prohibited by that Act. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 735 (1963).

⁹³ Since the early 1960's, agency shop clauses have been gaining in popularity. See *Hopfl*, *supra* note 78, at 480-82.

agency shop provisions have been negotiated.⁹⁴

Some collective bargaining agreements contain modified agency shop clauses called fair share clauses. A fair share clause defines the amount of the fee as the actual (pro rata) costs of the union's services rather than union dues.⁹⁵ This actual cost fee can be more or less than dues. Both the agency shop and the fair share arrangement compensate the union for providing, as required under its duty of fair representation, full and equal protection to all employees in the bargaining unit, regardless of union membership status.⁹⁶

In this article, the term union security provision is confined to service fee arrangements⁹⁷—that is, arrangements which encompass both agency shop and fair share provisions.⁹⁸ Under such provisions all employees in the bargaining unit are required as a condition of continued employment to pay a service fee, but are not required to be members of the union or to pay union fines or assessments. The service fee is equal to either (1) the amount of union dues, or (2) the actual (pro rata) costs of the union's services.⁹⁹ As the Supreme Court

⁹⁴ Several states permit the parties to negotiate agency shop arrangements. *See, e.g.*, ALASKA STAT. § 23.40.110(b)(2) (1972) (state and local government employees; local opt out); CAL. GOV'T CODE §§ 3540.1(i)(2), 3546 (Supp. 1976) (West) (public school employees; employer may request separate vote on provision); ME. REV. STAT. § 1027(3) (Supp. 1975-76) (University of Maine employees); MICH. COMP. LAWS ANN. §§ 423.210(1)(c), (2) (Supp. 1975-76) (all state and local government employees except state civil service); MONT. REV. CODES ANN. § 59-1605(1)(c) (Supp. 1975) (state and local government employees; religious exemption available); ORE. REV. STAT. § 243.666(1) (1970) (state and local government employees; religious exemption available); VT. STAT. ANN. tit. 21, § 1726(a)(8) (Supp. 1975) (municipal employees); WASH. REV. CODE ANN. § 41.56.122 (Supp. 1975) (local employees; religious exemption available), *id.* § 41.06.150 (Supp. 1975) (state civil service; majority of bargaining unit employees must approve the provision; religious exemption available), *id.* § 41.59.100 (Supp. 1975) (public school employees; religious opt out), *id.* § 28B.16.100(1) (Supp. 1975) (state higher education personnel; majority of bargaining unit employees must approve the provision; religious exemption available); WIS. STAT. ANN. §§ 111.81(6), 111.85 (1974) (West) (state employees; referendum required), *id.* §§ 111.70(1)(h), 111.70(2) (1974) (municipal employees; referendum can be requested).

⁹⁵ *See* MASS. GEN. LAWS ANN. ch. 105E, § 12 (1974) (West) (fee "shall be proportionately commensurate with the cost of collective bargaining and contract administration."). In Wisconsin, the statute authorizes the negotiation of "fair-share agreements" but defines the proportionate share of contract administration and collective bargaining as "dues uniformly required of all [union] members." WIS. STAT. ANN. §§ 111.70(1)(h), 111.85(6) (1974) (West).

⁹⁶ *See* notes 67-74 *supra*.

⁹⁷ A model service fee clause is as follows: "All employees in the collective bargaining unit who are not and who do not become and remain union members shall, as a condition of employment, pay to the union a service fee equivalent to the amount uniformly required of its members."

⁹⁸ Some state statutes use the term "service fee" when defining permissible union security devices. *See, e.g.*, ALASKA STAT. § 23.40.110(b)(2) (1972); CAL. GOV'T CODE § 3540.1(i)(2) (Supp. 1976) (West); MASS. GEN. LAWS ANN. ch. 105E, § 12 (1974) (West).

⁹⁹ Rather than permitting the parties to negotiate, or requiring the employees to approve, a union security provision, some states provide that once a labor union is certified as the exclusive representative an automatic service fee can be exacted from nonmembers. *See, e.g.*, Conn. Pub. Acts No. 75-566, § 11(a) (July 7, 1975) (state employees); HAWAII REV. STAT. § 89-4 (Supp. 1974) (state and local employees); MINN.

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stated in determining whether section 8(a)(3) of the Taft-Hartley Act¹⁰⁰ prohibited such a service fee arrangement in the private sector: "[T]he burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership . . . may in turn be conditioned only upon payment of fees and dues."¹⁰¹ The same interpretation of "membership"—membership "whittled down to its financial core"¹⁰²—applies in the public sector.¹⁰³

B. *The Need for Public Sector Security Agreements*

The purposes of the union security provisions, as expressed in the legislative purpose clauses¹⁰⁴ and in the court

STAT. ANN. § 179.65(2) (Supp. 1975) (West) (state and local employees); R.I. GEN LAWS § 36-11-2 (Supp. 1975) (state employees). The Hawaii Public Employee Bargaining Law requires that employers:

upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all employees within its appropriate bargaining unit, deduct . . . the amount of service fees and remit the amount to the exclusive representative.

HAWAII REV. STAT. § 89-4 (Supp. 1974).

¹⁰⁰ 29 U.S.C. § 158(a)(3) (1970).

¹⁰¹ NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). *Accord*, NLRB v. Hershey Foods Corp., 513 F.2d 1083, 89 L.R.R.M. 2126 (9th Cir. 1975) (in context of union shop agreement, employee can only be required to tender to the union its lawful dues and cannot be required to participate in any union activities, nor be subject to union discipline or in any manner be considered a "member" of the union). *Cf.* Radio Officers' Union v. NLRB, 347 U.S. 17, 41-42 (1954); Union Starch & Refining Co. v. NLRB, 186 F.2d 1008, 1012-13, 27 L.R.R.M. 2342, 2345-46 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

¹⁰² NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). *See also* AFTRA and Buckley & Evans, 222 N.L.R.B. No. 34, 91 L.R.R.M. 1094, 1096 (1976) (union, pursuant to union shop provision authorized under § 8(a)(3) of the Taft-Hartley Act, cannot require performers be "full fledged members," but can only require "financial core" membership).

¹⁰³ *See, e.g.*, Tremblay v. Berlin Police Union, 108 N.H. 416, 422, 237 A.2d 668, 672, 68 L.R.R.M. 2070, 2073 (1968) (construing union shop agreement as an agency shop); Association of Capitol Powerhouse Eng'rs v. Division of Bldgs. & Grounds, 92 L.R.R.M. 2748, 2751 (Thurston County Super. Ct., Wash., 1976) (statute requiring membership means only financial obligation).

¹⁰⁴ *E.g.*, MONT. REV. CODES ANN. § 59-1601 (Supp. 1975); ORE. REV. STAT. § 243.656 (1973). The First Biennial Report to the 42nd Session of the Washington State Legislature of the Public Employees Bargaining Committee recommended authorizing public sector union security provisions. This recommendation was later enacted as WASH. REV. CODE ANN. § 41.06.150 (Supp. 1975). In that report, the committee stated:

These devices enable the employee organization to play a more responsible role by obviating the temptation to pressure non-members, and giving the organization some direction in the discipline of members who violate the agreements and rules. It makes less urgent the incentive to pursue an aggressive policy in order to maintain membership by assuring a stable in-

decisions,¹⁰⁵ are to avoid labor strife, to secure economic stability, to insure the efficiency and continuity of state and local governments, and to develop harmonious relationships between the public employer and its employees. Union security provisions are thought to achieve these goals by reducing the potential for conflict both among public employees and between public employees and their employers, which may arise where some employees obtain the benefits of unionization without contributing to its costs. The union member who supports the union with dues resents those who "ride the union train" without cost. The union viewpoint, supported by commentators¹⁰⁶ as well as by courts,¹⁰⁷ is that union security provisions prevent nonunion employees of the bargaining unit from enjoying a free ride.¹⁰⁸ The pressure for service fee arrangements and against the free rider comes not just from the leadership of the unions, but from rank-and-file union members.¹⁰⁹

come. . . . It further removes the inequity of permitting the non-member of the opportunity to refuse to pay for the benefits he enjoys as a result of the organization's bargaining efforts.

In 1973, the Michigan legislature specifically authorized union security in public employment. MICH. COMP. LAWS ANN. § 423.210 (Supp. 1975-76). The legislative intent was stated by the Chairman of the Labor Committee.

This bill is intended . . . to reaffirm the original legislative intent that if a public employer and a union representing its employees so negotiate, they can require an agency shop or service fee exactly the same in amount as the dues which [the] union requires of its members. . . . *This bill will contribute to fairness and stability of labor relations in the public sector*

28 Mich. H.R. Journal 598, cited in Sachs, *Labor Law*, 20 WAYNE L. REV. 515, 543-44 n.158 (1974) (emphasis added).

¹⁰⁵ See, e.g., *Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers Local 872*, — Minn. —, —, 239 N.W.2d 437, 443, 92 L.R.R.M. 2417, 2421-22 (1976), *U.S. App. pending sub. nom.*, *Threlkeld v. Robbinsdale Fed'n of Teachers Local 872*, 44 U.S.L.W. 3677 (1976); *Nagy v. Detroit*, 71 L.R.R.M. 2362, 2364 (Wayne County Cir. Ct., Mich. 1969).

¹⁰⁶ See, e.g., D. SULLIVAN, *PUBLIC EMPLOYEE LABOR LAW* 137-38 (1969); Blair, *supra* note 11, at 189-90.

¹⁰⁷ See, e.g., *Ball v. Detroit*, Civil No. 159-940 at 42 (Wayne County Cir. Ct., Mich. 1975), *appeal docketed*, No. 25586 (Mich. Ct. App. 1975); *Nagy v. Detroit*, 71 L.R.R.M. 2362, 2364 (Wayne County Cir. Ct., Mich. 1969). *Cf.* *North Kingstown v. North Kingstown Teachers Ass'n*, 110 R.I. 698, 706-07, 297 A.2d 342, 346, 82 L.R.R.M. 2010, 2013 (1972).

¹⁰⁸ A free rider is an individual who enjoys all the benefits of the collective bargaining agreement, yet does not pay the union for any of the costs of negotiating and administering the agreement. See cases cited in note 107 *supra*.

¹⁰⁹ *Richardson v. Communications Workers*, 530 F.2d 126, 91 L.R.R.M. 2506 (8th Cir. 1976), is an extreme illustration of this principle in the private sector. Richardson, a former employee of the Western Electric Company of Omaha, Nebraska, was for many years a member of Local 7495, Communications Workers of America. 443 F.2d 974, 977, 77 L.R.R.M. 2566, 2567 (8th Cir. 1971). In January, 1966, he resigned from the union but remained employed at Western Electric. *Id.* His fellow employees, however, did not take this action kindly. According to the allegations filed by Richardson, his co-workers engaged in such acts as refusing to work overtime with him, tripping, shoving, striking with fists, striking with footballs, cursing, and using epithets and obscenities. In September of that year, he became involved in an altercation with another employee and was discharged. *Id.* In December, he sued the company and the union

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Union organization and recognition often come hard, and once achieved are costly to maintain. Indeed, unions expend a large amount of financial and other resources in negotiating and administering collective bargaining agreements.¹¹⁰ Under the predominant type of state public employment collective bargaining legislation, the union that is the exclusive representative has a duty of fair representation with reference to *all* bargaining unit employees—union members and nonmembers alike.¹¹¹ Proponents of service fee arrangements argue that if employees cannot be forced to join the union as a condition of continued employment,¹¹² they should at least be required to share the costs of union representation—the costs of negotiating and administering the collective bargaining agreement which applies equally to them and from which they derive equal benefits.¹¹³ The requirement that all individuals who benefit from union activities contribute their fair share of the costs is but an application of the democratic concept in that the service fee arrangement “is analogous to all Americans being taxed for the costs of govern-

for failing to take steps to prevent harassment by his co-workers. Ten years later, the suit is still pending in the federal courts. There have been three jury trials and three appeals to the court of appeals. 530 F.2d at 128-29, 91 L.R.R.M. at 2507. See also 486 F.2d 801, 84 L.R.R.M. 2617 (8th Cir. 1973); 469 F.2d 333, 81 L.R.R.M. 2801 (8th Cir. 1971).

¹¹⁰ Examples of some of the more costly union functions include:

- 1) Payment of salaries and expenses for staff engaged in negotiation and administration of the contract;
- 2) Payment of general office and overhead expenses;
- 3) Maintenance of a research department which prepares local representatives for contract negotiations, prepares economic data, drafts contract language, and evaluates contract proposals;
- 4) Maintenance of a legal department or retained counsel which represents employees in arbitration, disciplinary proceedings, and negotiations; communicates significant legal developments in other parts of the country; and assists in significant legal cases;
- 5) Provision of training in grievance handling—including arbitration and communication of local employee needs to their immediate employer or relevant government bodies and to their community;
- 6) Provision of information on activities of affiliates around the country, and their varying solutions to common problems;
- 7) Provision of assistance in federal and state legislative efforts with respect to public employees—including revenue sharing, civil rights, minimum wage laws, unemployment compensation, pension legislation, health insurance, public jobs programs, and occupational health and safety.

¹¹¹ See notes and text at notes 67-74 *supra*.

¹¹² See notes and text at notes 97-103 *supra*.

¹¹³ See Palombo, *The Agency Shop in a Public Service Merit System*, 26 LAB. L. J. 409, 411-12 (1975). The free rider concept was discussed by the Minnesota Supreme Court in *Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers Local 872*, — Minn. —, —, 239 N.W.2d 437, 443, 92 L.R.R.M. 2417, 2421, U.S. App. Pending sub. nom. *Threlkeld v. Robbinsdale Fed'n of Teachers Local 872*, 44 U.S.L.W. 3677 (1976). The *Robbinsdale* court accepted the state's reasoning as to the interplay of the free rider concept and the duty of fair representation as a legitimate government interest sufficient to withstand an attack on the constitutionality of the Minnesota service fee statute. *Id. Robbinsdale* is discussed in the text at notes 189-93 *infra*.

ment expenditures and the benefits received therefrom."¹¹⁴

Union security arrangements also tend to stabilize labor relations between public sector employees and their employers.¹¹⁵ Absent union security, unions are faced with the necessity of constant persuasion to hold on to their present membership. The unions then

must demonstrate that they can "get something" for their members. They are driven to making excessive demands on the [employer] in negotiations and in processing unwarranted grievances as a tactical means of holding their constituency. Similarly, they find it advantageous to disparage management and to portray it as unmindful of employees' interests as a means of convincing workers of their need for a union. If union membership were made a simple condition of employment, the unions argue, it would be less necessary to engage in such propaganda, which admittedly has a harmful effect on the bargaining relationship.¹¹⁶

Furthermore, when unions do not have to use their resources to obtain and retain members, they can devote more time to bargaining and administration of the collective bargaining agreement.¹¹⁷ With service fee arrangements, unions can make concessions helpful to management and the public interest, even though some of the concessions may not be beneficial to the short-run interest of some bargaining unit employees. Thus, for example, a union could withstand employee demands for an immediate wage increase in a situation where a financially troubled employer could be driven out of business. Without the financial security of a service fee arrangement, the union would have to press for the wage increase demanded by the union members even though the result, the potential bankruptcy of the employer, would be to the over-all detriment of the union, the employer, and the public. As Professor Summer Slichter observed with respect to private sector labor relations: "[a]n assured status for the union is not a guarantee of successful union-employer relations but it is a prerequisite . . ."¹¹⁸ Thirty years later, similar sentiments were ex-

¹¹⁴ District Council 37, AFSCME, *An Agency Shop for Public Employees in New York City*, at 4 (unpublished research memorandum) quoted in Palomob, *supra* note 113, at 412. See also 3 New York State Commission on the Quality and Financing of Elementary Education 10-16 (Appendix 13C) (1972).

¹¹⁵ See Blair, *supra* note 11, at 189.

¹¹⁶ N. CHAMBERLAIN & D. CULLEN, *THE LABOR SECTOR* 173-74 (1971). See also Blair, *supra* note 11, at 189; Hopfl, *supra* note 78, at 501.

¹¹⁷ See generally DOL, *supra* note 8, at 97; Gotbaum, *Collective Bargaining and the Union Leader*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 84-85 (S. Zagoria ed. 1972).

¹¹⁸ S. SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT* 95 (1941). Private sector employers tend to favor union security agreements. The reasons for this preference, summarized in a National Industrial Conference Board study are as follows:

1. "elimination of friction and strife within the working force";
2. "Gives employees greater feelings of responsibility and interest in their jobs because they feel they have something to say about their conditions of work"; and

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pressed with respect to public sector labor relations:

an indispensable [sic] element in making collective bargaining produce peaceful settlements that both sides can live with is the capacity of the union to exercise its responsibilities with a meaningful sense of security. . . . It must . . . have the financial stability that flows from the fact that the costs entailed in exercising its responsibilities, as the bargaining representative for all employees in the bargaining unit, are being shared by all employees in that unit.¹¹⁹

Thus, the need for union security is as great in the public sector as it is in the private sector. In both areas, labor peace is furthered by reducing tensions among employees and between unions and management. Indeed, the need for union security may be even greater in the public sector where any breach of the labor peace has the potential of disrupting essential government services. Therefore, it is somewhat surprising that the validity of union security provisions, having been established in the private sector, should be challenged again in the public sector.¹²⁰

C. *The Validity of Public Sector Union Security Agreements*

Litigation challenging public sector union security provisions has increased in recent years.¹²¹ The attacks have focused primarily upon the constitutionality of both the collection and use of service fees. Many of the cases have not yet reached a final determination on the merits. Where they have, most of these attacks have failed. Still, challenges to the use of service fees have led public sector unions to develop rebate procedures in order to protect the constitutional rights of service fee payors.

1. Judicial Challenges to the Collection of Service Fees

Since there is no federal collective bargaining law for employees of states and their political subdivisions, the authority to negotiate service fee provisions in the public sector varies from jurisdiction to jurisdiction.¹²² Some jurisdictions have prohibited union security pro-

3. "[creates] more responsible unions. It does not have to struggle to hold its membership by repeatedly demonstrating its ability to obtain new advantages."

National Industrial Conference Board, *The Closed Shop*, 12 STUDIES IN PERSONNEL POLICY 7 (1939).

¹¹⁹ Gromfine, *Union Security Clauses in Public Employment*, N.Y.U. CONF. ON LAB. 285, 287-88 (1970) [hereinafter cited as Gromfine].

¹²⁰ For a discussion of two reasons for the large number of challenges to public sector union security agreements, see text at notes 12-15 *supra*.

¹²¹ These challenges have been frequently initiated and supported by the National Right to Work Foundation. See note 9 *supra*.

¹²² Because of the breadth of the topic—judicial challenges to union security provisions—this article will analyze only the validity of union security devices au-

visions by enacting broad right to work guarantees, either through legislative or constitutional mandate.¹²³ A typical right to work law can be found in Alabama. After declaring the policy of the state to be that "the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or organization,"¹²⁴ the statute states that "[n]o employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization."¹²⁵ When such prohibitions apply to public employees, public sector service fee arrangements cannot be negotiated. Absent such prohibitions, there are two methods by which to authorize union security arrangements: (1) state law may be silent on the issue of public sector union security—this may permit, but not require, negotiation of service fee provisions; or (2) state law may expressly authorize public sector union security—this may mean either that service fee provisions can be negotiated or that such provisions are automatic upon the request of the exclusively recognized union or upon a vote of the bargaining unit employees. Under both methods of authorization, the collection of service fees has been held to be constitutional.

a. When State Law is Silent

State law could be silent on the issue of public sector union security either because the state has no public sector collective bargaining statute at all, or because the state has a public sector collective bargaining statute that makes no mention of union security. If there is no public sector collective bargaining law in a state, the courts must determine if bargaining itself is permitted before determining whether a union security provision may be negotiated. The prevailing opinion appears to be that such bargaining is not permitted absent statu-

thorized by state statutes and will not discuss ordinances, board resolutions, and other sources of authority.

¹²³ *E.g.*, ALA. CODE tit. 26, § 375 (1958); ARIZ. CONST. art. XXV, ARIZ. REV. STAT. ANN. § 23-1302 (1971); ARK. CONST. amend. No. 34, § 1; FLA. CONST. art. 1 § 6; GA. CODE ANN. § 54-903 (1974); IOWA CODE ANN. §§ 736A.1 & .4 (1950); KAN. CONST. art. 15, § 12, KAN. STAT. ANN. § 44-831 (Supp. 1975); LA. REV. STAT. §§ 23:881-89 (1964) (West) (agricultural workers only); MISS. CONST. art. 7, § 198-A, MISS. CODE ANN. § 71-1-47 (1972); NEB. CONST. art. XV, §§ 13-15; NEV. REV. STAT. §§ 613.250 & .270 (1973); N.C. GEN. STAT. §§ 95-78 to -84 (1975) (not applicable to public employees, § 95-100 (1975)); N.D. CENT. CODE § 34-01-14 (1960); S.C. CODE ANN. §§ 40-46 to -46.8 (1962); S.D. CONST. amend. art. VI, § 2, S.D. Compiled Laws Ann. §§ 60-8-3 to -8-8 (1967); TENN. CODE ANN. §§ 50-208 to -213 (1966); TEX. REV. CIV. STAT. ANN. § 5207(a) (1970) (Vernon) UTAH CODE ANN. § 34-34-2 (1974); VA. CODE ANN. §§ 40.1-58 to -69 (1970); *as amended* by § 40.1-58.1 (Supp. 1975); and WYO. STAT. ANN. §§ 27-245.1 to -245.8 (1967). New Mexico prohibits union and agency shop provisions for state civil service employees. Section VIII G., Regulations of New Mexico State Personnel Board.

¹²⁴ ALA. CODE tit. 26, § 375(1) (1958).

¹²⁵ *Id.* at § 375(5).

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tory authorization.¹²⁶ One of the earliest and fullest developments of this opinion is contained in the Missouri case of *Springfield v. Clouse*.¹²⁷ After recognizing that "there is nothing improper in the organization of municipal employees into labor unions,"¹²⁸ the court held that collective bargaining was not permissible in the public sector because, in the absence of legislative authorization, such bargaining would "mean government by private agreement and not by laws made by the representatives of the people."¹²⁹ While this rule against common law collective bargaining is still mentioned frequently in dicta,¹³⁰ its practical significance has been eroded by two factors. First, over half of the state legislatures have now adopted statutes authorizing public sector collective bargaining.¹³¹ Second, a number of state courts have been willing to imply such legislative authorization in statutes dealing with the authority of local governmental bodies.¹³²

When a jurisdiction has enacted a public sector bargaining statute which is silent with respect to union security or when a jurisdiction has established public sector collective bargaining by judicial implication, the courts must first determine whether any form of union security provision can be negotiated. Most states which permit public sector collective bargaining mandate bargaining on "wages, hours, and other terms and conditions of employment."¹³³ A few courts have held that such language, absent other statutory prohibition, permits the negotiation of union security arrangements. For example, in the landmark case of *Tremblay v. Berlin Police Union*,¹³⁴ a municipal police department entered into a union shop agreement. Construing the agreement as an agency shop, the New Hampshire Supreme Court

¹²⁶ In *International Broth'd of Elec. Workers, Local 611 v. Town of Farmington*, 75 N.M. 393, 394, 405 P.2d 233, 235, 60 L.R.R.M. 2001, 2001-02 (1965), the court, while holding such an agreement valid, stated: "We recognize that, absent legislative authorization, the courts of other jurisdictions have generally viewed as invalid any agreement between government management and public employees consummated through a process of collective bargaining." See cases cited *id.* at 394-96, 405 P.2d at 234-35, 60 L.R.R.M. at 2002-03.

¹²⁷ 356 Mo. 1239, 206 S.W.2d 539 (1947).

¹²⁸ *Id.* at 1247, 206 S.W.2d at 542.

¹²⁹ *Id.* at 1249, 206 S.W.2d at 544.

¹³⁰ *E.g.*, *State v. Educational Ass'n*, 326 A.2d 868,874 (Del. Ch. 1974); *City of Haywood v. United Public Employees Local 390*, 54 Cal. App. 3d 761, 763, 126 Cal. Rptr. 710, 711, 91 L.R.R.M. 2898, 2899 (1st Dist. 1976).

¹³¹ See note 5 *supra*. In fact, the express holding of *Clouse* was changed by statute in Missouri. See *State v. Julian*, 359 Mo. 539, 222 S.W.2d 720,24 L.R.R.M. 2341 (1949).

¹³² *E.g.*, *Teachers' Ass'n v. Parish Sch. B'd.*, — La. —, 303 S.2d 564, (1974); *Fire Fighters Local 345 v. Burke*, 75 L.R.R.M. 2001 (Ky. Cir. Ct. 1970); *International Broth'd of Elec. Workers, Local 611 v. Town of Farmington*, 75 N.M. 393, 405 P.2d 233, 60 L.R.R.M. 2001 (1965). *But see* *Confederation of Police v. City of Chicago*, 382 F. Supp. 624 (N.D. Ill. 1974).

¹³³ This phrase, used in the private sector in the Taft-Hartley Act, § 8(d), 29 U.S.C. § 158(d) (1970), describes the general scope of negotiable subjects. Similar phrases have frequently been adopted in the public sector. *E.g.*, ALASKA STAT. § 23.40.250(1) (1972); MASS. GEN. LAWS ANN. ch. 150E, § 6 (1974).

¹³⁴ 108 N.H. 416, 237 A.2d 668, 68 L.R.R.M. 2070 (1968).

held that the police department could enter into a union security agreement with the union in the absence of state statutory approval. Although a municipal ordinance authorized recognition of unions for purposes of collective bargaining, the New Hampshire public employee statute was silent with respect to union security. The absence of conflicting state law or policy was an important factor in upholding the union security provision.¹³⁵ Similarly, in an early Michigan case, *Nagy v. City of Detroit*,¹³⁶ a lower court held that an agency shop provision was a valid subject for collective bargaining.¹³⁷ As in *Tremblay*, the absence of a prohibiting state statute¹³⁸ was a determinative factor. However, since the Civil Service Commission of Detroit was not a party to the negotiations the agreement reached was void.¹³⁹

Some courts have, however, concluded that a law authorizing collective bargaining alone will not support union security agreements. In *Foltz v. City of Dayton*,¹⁴⁰ the court, after stating that "employees of a city have a right to bargain collectively with the city,"¹⁴¹ invalidated an agency shop clause between the city and a public service union.¹⁴² The court reasoned that an agency shop clause, while it did aid the union, served no governmental purpose.¹⁴³ Further, by conditioning government employment on the payment of a fee, the agency shop clause violated the state civil service law which strictly governed the appointment, tenure, promotion, removal, transfer, and suspension of civil service employees.¹⁴⁴

As *Tremblay*, *Nagy*, and *Foltz* demonstrate, the crucial issue when a public sector collective bargaining law is silent as to union security is

¹³⁵ *Id.* at 422-23, 237 A.2d at 672-73, 68 L.R.R.M. at 2073-74.

¹³⁶ 71 L.R.R.M. 2362 (Wayne County Cir. Ct., Mich. 1969).

¹³⁷ 71 L.R.R.M. at 2369. *Cf.* Opinion Atty. Gen. 6449 (Ore. 1968) (union shop agreement within plain meaning of "wages, hours, and other terms and conditions of employment").

¹³⁸ Present Michigan law authorizes the negotiation of agency shop provisions. MICH. COMP. LAWS ANN. § § 423.210(1)(c) & (2) (1975). At the time of the *Nagy* suit this statutory provision had not been enacted.

¹³⁹ 71 L.R.R.M. at 2369-70. On April 15, 1970 defendants City of Detroit and Council 77, AFSCME entered in a Memorandum of Understanding altering the existing collective bargaining agreement by inserting agency shop provisions, subject to the conditions that Council 77 withdraw its appeal in *Nagy* and that the Civil Service Commission approve the agency shop provision. Both conditions were met.

¹⁴⁰ 27 Ohio App. 2d 35, 272 N.E.2d 169, 75 L.R.R.M. 2321 (1970).

¹⁴¹ *Id.* at 42, 272 N.E.2d at 173, 75 L.R.R.M. at 2324.

¹⁴² *Id.* at 42-43, 272 N.E.2d at 173, 75 L.R.R.M. at 2324.

¹⁴³ *Id.* at 38-39, 272 N.E.2d at 171, 75 L.R.R.M. at 2323.

¹⁴⁴ *Id.* at 41-42, 272 N.E.2d at 171, 75 L.R.R.M. at 2322-23. *Cf.* Op. of Att'y Gen. 743 (Mo. 1970), reported at 1970 GOV'T EMPL. REL. REP. (BNA), No. 370, B-8 (in absence of authorizing legislation, no authority exists to agree to a dues check-off provision or to grant an agency shop).

The *Foltz* court based its holding that union security provisions could not be negotiated under Ohio public sector collective bargaining law on *Hagerman v. City of Dayton*, 147 Ohio 313, 71 N.E.2d 246 (1947). Two concurring opinions in *Foltz* stated that conditions had changed since *Hagerman* was decided and that the Ohio Supreme Court should overrule it. 27 Ohio App. 2d at 43-44, 272 N.E.2d at 174-75, 75 L.R.R.M. at 2325.

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the effect of other statutory provisions. These provisions may guarantee public employees the right to join or not join a labor organization (right to refrain),¹⁴⁵ may prohibit discrimination in a manner which encourages or discourages union membership,¹⁴⁶ or may, as in *Foltz*, establish certain restrictions on the relations between government employers and employees. Thus, most successful challengers to the collection of service fees have seized upon such provisions and argued that they are inconsistent with union security in the public sector. An example of such a challenge based on the statutory right to refrain is *North Kingston v. North Kingston Teachers Association*.¹⁴⁷ In that case, the Rhode Island Supreme Court construed the statutory right to refrain¹⁴⁸ as prohibiting a union shop, yet it did not go so far as to find that that right required the invalidation of all public sector union security agreements. Indeed, the court stated that arrangements which required nonmembers to pay only for the actual costs of benefits received would not violate the employee's right to refrain.¹⁴⁹ The court further found that "it would be manifestly inequitable to permit those who see fit not to join the union to benefit from its services without at the same time requiring them to bear a fair and just share of the financial burdens"¹⁵⁰ The court thus expressly limited its approval of union security provisions to those which exact from the non-union member no more than a proportionate share of the costs of securing the benefits conferred upon all members of the bargaining unit.¹⁵¹ One year later, in *Local 194, New Jersey Turnpike Employees Union v. New Jersey Turnpike Authority*,¹⁵² the New Jersey Supreme Court affirmed a lower appellate court which had held that an agency shop agreement mandating employees to pay a fee equivalent to dues violated the state statute¹⁵³ protecting an employee's right to refrain from joining or assisting a union.¹⁵⁴ In so holding, the Supreme

¹⁴⁵ E.g., N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1976-77) (West); N.Y. CIV. SERV. LAW § 202 (1973) (McKinney); N.D. CENT. CODE § 34-12-02 (1972); and S.D. COMPILED LAWS ANN. § 3-18-2 (1974).

¹⁴⁶ See, e.g., FLA. STAT. § § 447.501(1)(b) & (2)(b) (Supp. 1975-76) and N.Y. CIV. SERV. LAW § 209-a(1)(c) (1973) (McKinney).

¹⁴⁷ 110 R.I. 698, 297 A.2d 342, 82 L.R.R.M. 2010 (1972).

¹⁴⁸ School Teachers' Arbitration Act, R.I. GEN. LAWS ANN. § 28-9.3-7, as enacted by Pub. L. 1966, ch. 146 § 1. This provision was amended in 1975 to mandate service fee arrangements upon certification of an exclusive bargaining representative. R.I. GEN. LAWS ANN. § 28-9.3-7 (Supp. 1975).

¹⁴⁹ 110 R.I. at 701-07, 297 A.2d at 343-46, 82 L.R.R.M. at 2011-13.

¹⁵⁰ *Id.* at 706, 297 A.2d at 346, 82 L.R.R.M. at 2013.

¹⁵¹ *Id.* at 707, 297 A.2d at 346, 82 L.R.R.M. at 2013.

¹⁵² 64 N.J. 579, 319 A.2d 224, 86 L.R.R.M. 2842 (1974), *aff'g* 123 N.J. Super. 461, 303 A.2d 599, 83 L.R.R.M. 2250 (1973).

¹⁵³ N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1976-77) (West) states: "[P]ublic employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity"

¹⁵⁴ 64 N.J. at 581, 319 A.2d at 225, 86 L.R.R.M. at 2842-43. *Accord*, Pennsylvania Labor Relations Bd. v. Zelem, — Pa. — , 329 A.2d 477 (1974) (statute prohibits "strict agency shop" provisions).

Court adopted the lower court's reasoning that such an agreement, by requiring non-union members to pay the "exact equivalent" of union members, had the "effect of inducing if not compelling, union membership, participation and assistance" ¹⁵⁵ The lower court, while expressly acknowledging the statement in *North Kingston* which suggested that a union security arrangement would be valid if it required nonmembers to pay the union a sum equal to the actual share of collective bargaining costs, ¹⁵⁶ did not rule on the validity of such an agreement, ¹⁵⁷ nor did the Supreme Court in affirming.

In California, a variation of the normal right to refrain statute has been held to invalidate an agency shop clause in the public sector. In *City of Hayward v. United Public Employees Local 390*, ¹⁵⁸ the California Court of Appeals recently held an agency shop clause requiring nonmembers to pay an amount equal to dues illegal in light of certain provisions of the Meyers-Milias-Brown Act (MMBA). ¹⁵⁹ The state statute was silent as to union security, but gave public employees the right to refrain and the right to represent themselves individually in their employment relations with the public agency. ¹⁶⁰ With respect to this right to refrain, the court, adopting the same rationale as the New Jersey court, ¹⁶¹ held that an agency fee equal to union dues would induce union membership. ¹⁶² The more unusual aspect of the court's decision lay in its analysis of the effect of amendments to the state's statute governing public teachers. The court stated that the statute governing public teachers had recently been amended to subordinate the right to individual representation where an exclusive bargaining representative had been recognized and to authorize the negotiation of agency shop provisions. ¹⁶³ The court considered this change as evidence of the fact that when the legislature has wanted to expand the power of public sector unions, it has done so with explicit language. ¹⁶⁴ Therefore, the court concluded that the MMBA did not authorize the negotiation of union security provisions because there was no language explicitly granting public sector unions and employers that power. ¹⁶⁵ Although viewed by the right to work forces as

¹⁵⁵ 123 N.J. Super. at 470, 303 A.2d at 604, 83 L.R.R.M. at 2253.

¹⁵⁶ See text at note 149 *supra*.

¹⁵⁷ *Id.* at 469, 303 A.2d at 604, 83 L.R.R.M. at 2253.

¹⁵⁸ 54 Cal. App. 3d 761, 126 Cal. Rptr. 710, 91 L.R.R.M. 2898 (1st Dist. 1976).

¹⁵⁹ CAL. GOV'T CODE § § 3500-3510 (1966), as amended (Supp. 1976) (West). Section 3502 gives public employees the right to form, join and participate in unions, as well as the right to refrain. It also gives public employees the right to represent themselves individually. Section 3506 prohibits employers and unions from interfering, intimidating, restraining, coercing or discriminating against public employees because of an exercise of § 3502 rights.

¹⁶⁰ CAL. GOV'T CODE § 3502 (1966), as amended (Supp. 1976) (West).

¹⁶¹ See text at note 155 *supra*.

¹⁶² 54 Cal. App.3d at 767, 126 Cal. Rptr. at 714, 91 L.R.R.M. at 2901.

¹⁶³ *Id.* at 767, 126 Cal. Rptr. at 713-14, 91 L.R.R.M. at 2900-01.

¹⁶⁴ *Id.* at 766, 126 Cal. Rptr. at 713, 91 L.R.R.M. at 2900.

¹⁶⁵ See *id.* at 768, 126 Cal. Rptr. at 715, 91 L.R.R.M. at 2902.

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a major victory against compulsory unionism, the *Hayward* decision may be unique because of the court's reliance on the interaction of California's public teachers' statute and the MMBA. Furthermore, the California decision, when determining the effect of the statutory right to refrain, did not discuss the validity of a clause requiring nonmembers to pay a sum equal to the actual cost of collective bargaining.

Union security provisions also have been challenged when a statute prohibits an employer from discriminating to encourage or discourage union membership and does not contain a provision specifically authorizing union security provisions. For example, in *Smigel v. Southgate Community School District*,¹⁶⁶ the Michigan Supreme Court held that an agency shop provision requiring nonmembers to pay an amount equal to dues violated the antidiscrimination provision of the Michigan Public Employment Relations Act.¹⁶⁷ According to the court, any union security clause which made no effort to relate the economic obligation of nonmembers to actual collective bargaining expenses, of necessity either encouraged or discouraged membership in a union.¹⁶⁸ A majority of the justices, however, did not decide whether a union security provision would be valid if it required payment by nonmembers of the actual costs of collective bargaining.¹⁶⁹

b. When State Law Authorizes¹⁷⁰

When a jurisdiction has not specifically authorized union security provisions absent another prohibiting statutory provision, many state courts have either upheld the challenged union security provision or have expressed a willingness to endorse an arrangement in which the service fee charged to nonmembers equals actual costs.¹⁷¹ Several

¹⁶⁶ 388 Mich. 531, 202 N.W.2d 305, 81 L.R.R.M. 2944 (1972). Cf. *Farrigan v. Helsby*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973).

¹⁶⁷ MICH. COMP. LAWS ANN. § 423.210(1)(c) (1967). At that time, the public sector law was silent as to union security, although the private sector law, Michigan Labor Mediation Act, MICH. COMP. LAWS ANN. § 423.1 *et seq.* (1967), authorized such provisions. Section 423.14 of the Mediation Act said in part: "Nothing in this act shall be construed to interfere with the right of an employer to enter into an all-union agreement with one labor organization . . ." The public sector law was amended by 1973 Mich. Pub. Acts No. 25, § 1, MICH. COMP. LAWS ANN. § 423.210 (Supp. 1975-76) to authorize service fee arrangements.

¹⁶⁸ 388 Mich. at 543, 202 N.W.2d at 308, 81 L.R.R.M. at 2955. *Accord*, *Farrigan v. Helsby*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39, 83 L.R.R.M. 3052 (3d Dep't 1973) (decision based on both antidiscrimination and right to refrain clauses).

¹⁶⁹ 388 Mich. at 541-543, 202 N.W.2d at 307-308, 81 L.R.R.M. at 2954-55. In 1973, the Michigan legislature, reacting to *Smigel*, expressly authorized the negotiation in the public sector of a service fee which could be "equivalent to the amount of dues uniformly required of members." 1973 Pub. Acts No. 25, § 1, MICH. COMP. LAWS ANN. § 423.210 (Supp. 1975-76).

¹⁷⁰ Many of the cases discussed in this subsection of the article also involved challenges to the use of such fees for "political" purposes. See notes and text at notes 242-57 *infra*.

¹⁷¹ *E.g.*, *Tremblay v. Berlin Police Union*, 108 N.H. 416, 237 A.2d 668, 68 L.R.R.M. 2070 (1968); *Nagy v. City of Detroit* 71 L.R.R.M. 2362 (Wayne County Cir.

states have followed this course legislatively by enacting statutes specifically permitting or mandating the collection of service fees.¹⁷² Although the United States Supreme Court has not yet ruled on the constitutionality of state statutes that authorize the collection of public sector service fees,¹⁷³ several state courts have upheld the constitutionality of such provisions and have tended to follow the reasoning employed by the United States Supreme Court in upholding the validity of union security provisions negotiated under the National Labor Relations Act and the Railway Labor Act.¹⁷⁴ For example, a lower court in the State of Washington has upheld the constitutionality of a state statute which required union membership of all bargaining unit employees, if, after certification of an exclusive representative, a majority of the bargaining unit employees voted to require such membership as a condition of employment.¹⁷⁵ In *Association of Capitol Powerhouse Engineers v. Division of Buildings and Grounds*,¹⁷⁶ plaintiffs alleged that the statute violated various provisions of the state and United States constitutions.¹⁷⁷ The court held that the statute as applied did not violate "the requirements for due process, freedom of speech, freedom of religion, right to assemble, and equal protection under the law, as guaranteed by the Constitution of the United States and the Constitution of this state."¹⁷⁸ The court did not have to reach the question of the constitutionality of requiring "actual" membership in the union because the Washington statute defines "membership" as "the payment of monthly or other periodic dues . . ."¹⁷⁹ Thus, the court was not faced with determining whether such an agreement created a closed shop, a type of union security outlawed under the National Labor Relations Act in the private sector.¹⁸⁰

Ct., Mich 1969); *North Kingston v. North Kingston Teachers Ass'n*, 110 R.I. 698, 297 A.2d 342, 82 L.R.R.M. 2010 (1972). See text at notes 126-70 *supra*.

¹⁷² See notes 87-94 *supra*. *Karchmar v. City of Worcester*, 1973 Mass. Adv. Sh. 1223, 301 N.E.2d 570, 84 L.R.R.M. 2410, involved the issue of who could be required to pay the service fee negotiated pursuant to such a statute. The plaintiffs sought declaratory relief to determine if the service fee requirement applied to all bargaining unit employees or to just the non-civil service employees. The court held that the statute, and therefore the agreement, was constitutional and that the provision applied to all employees in the unit, whether civil service or non-civil service. *Id.* at 1235, 30 N.E.2d at 578, 84 L.R.R.M. at 2416. Based on the reasoning in *Karchmar*, a service fee should apply to all employees, unless the state statute or the specific collective bargaining agreement excludes certain members of the bargaining unit.

¹⁷³ The Supreme Court has however, noted probable jurisdiction in a Michigan case which raises this issue. *Abood v. Detroit Bd. of Educ.*, 96 S. Ct. 1723 (1976). See notes and text at notes 182-87 *infra*.

¹⁷⁴ See text and notes at notes 88-91 *supra*.

¹⁷⁵ WASH.REV. CODE ANN. § 41.06.150 (Supp. 1975) (state civil service employees). Other Washington laws authorize the negotiation of union security provisions for different categories of public employees. See note 94 *supra*.

¹⁷⁶ 92 L.R.R.M. 2748 (Thurston County Super. Ct., Wash. 1976)

¹⁷⁷ *Id.* at 2753.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2751.

¹⁸⁰ See text at notes 79-82 *supra*.

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Other state courts have ruled on the constitutionality of legislation authorizing the negotiation of public sector union security provisions requiring payment of a service fee equal to dues. For example, in 1973, the Michigan Public Employment Relations Act was amended to authorize collective bargaining clauses requiring "a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative."¹⁸¹ In *Abood v. Detroit Board of Education*,¹⁸² city teachers challenged this statute. In granting summary judgment for the defendants, the trial court held that the amendment in question should be given retroactive effect, thus validating the agency shop clause entered into in 1969.¹⁸³ In a *per curiam* decision, the Michigan Court of Appeals, while reversing and remanding as to the retroactive application of the 1973 amendment,¹⁸⁴ suggested that the collection of service fees does not violate the first and fourteenth amendments as long as the monies collected are used for collective bargaining purposes.¹⁸⁵ The Michigan Supreme Court de-

In *Brenn v. Evans*, No. 49998 (Thurston County Super. Ct., Wash., Filed Oct. 8, 1975), a subsequent challenge to the Washington statute, the same court followed its decision in *Capitol Powerhouse*. Plaintiffs in *Brenn* alleged a deep-seated and long held belief that compulsory unionism in the public sector is wrong and a fear that their employment would be terminated if they chose not to join the recognized exclusive bargaining representative. The court granted defendants' motion to dismiss.

¹⁸¹ MICH. COMP. LAWS ANN. § 423.210 (Supp. 1975-76).

The amendment was occasioned by the decision in *Smigel v. Southgate Community School Dist.*, 388 Mich. 531, 202 N.W.2d 305, 81 L.R.R.M. 2944 (1972), which had interpreted an earlier version of the statute as not authorizing such provisions. See notes 166-69 *supra* and accompanying text.

¹⁸² 60 Mich. App. 92, 230 N.W.2d 322, 90 L.R.R.M. 2152 (1975) (appeal consolidated with *Warczak v. Detroit Bd. of Educ.*). The plaintiffs in *Warczak*, Detroit teachers, filed a complaint for a declaratory judgment on November 7, 1969 challenging the constitutional and statutory validity of the agency shop clause in the collective bargaining agreement. The history of the lawsuit is summarized in the Michigan Court of Appeals decision. *Id.* at 93-94, 230 N.E.2d at 332-24, 90 L.R.R.M. at 2153. The complaint in *Abood* is essentially the same as that in *Warczak*.

¹⁸³ *Id.* at 94, 230 N.W.2d at 324, 90 L.R.R.M. at 2153.

¹⁸⁴ *Id.* at 98, 102, 230 N.W.2d at 325, 327, 90 L.R.R.M. at 2154, 2156.

¹⁸⁵ *Id.* at 98-102, 230 N.W.2d at 325-27, 90 L.R.R.M. at 2154-56. Plaintiffs had also alleged that the use of funds collected under the statutorily authorized agency shop for noncollective bargaining purposes violated their first and fourteenth amendment rights. See text at notes 242-57 *infra*.

On the same day the Michigan Court of Appeals decided *Abood*, a lower state court upheld the same Michigan statute. In *Ball v. City of Detroit*, Civil No. 159-940 (Wayne County Cir. Ct., Mich., filed Mar. 31, 1975), *appeal docketed*, No. 25586 (Mich. Ct. App. 1975), the court held that the 1973 amendment did not violate the United States Constitution, the Detroit City Charter, or the civil service rules. *Id.* at 48, 51. The suit was brought in 1970, before the amendment was enacted, challenging an agency shop clause in a contract between AFSCME and the City. In upholding the Michigan law, the court stated that the union was entitled to service fees from July, 1973—the effective date of the amendment. Prior to that date, the negotiated union security clause was not enforceable in light of *Smigel*, 388 Mich. 351, 202 N.W.2d 305, 81 L.R.R.M. 2944 (1972).

Apart from the *Ball* litigation, there is a prior history of legal action regarding the City of Detroit and the AFSCME agency shop provisions. Ray Nagy, one of the *Ball*

nied review of the intermediate appellate court's decision,¹⁸⁶ but the plaintiffs appealed to the United States Supreme Court which has noted probable jurisdiction in the case.¹⁸⁷

plaintiffs, and others had filed suit in Wayne County Circuit Court against an agency shop clause entered into in 1968. *Nagy v. Detroit*, 71 L.R.R.M. 2362 (Wayne County Cir. Ct., Mich. 1969). See notes 114-16 *supra* and accompanying text. Due both to this litigation and to other outstanding injunctions, the defendant union was, from February 1969 until March 1975, totally enjoined from collecting an agency shop fee from the 1,500 to 2,000 nonmembers whom it represented. As a result, AFSCME and its affiliates has lost far in excess of \$500,000 over the six years. *Ball v. City of Detroit*, Civil No. 159-940 at 28 (Wayne County Cir. Ct., Mich., filed Mar. 31, 1975) (Findings of Fact).

¹⁸⁶ 395 Mich. 755 (1975).

¹⁸⁷ Probable jurisdiction noted, 96 S. Ct. 1723 (1976).

The Wisconsin statute, WIS. STAT. ANN. § § 111.70 (1)(h), (2) (1974) (West) (municipal employees), similar to the Michigan law, permits agreements under which nonmembers are required to pay the union an amount equal to dues. *Cf.* WIS. STAT. ANN. § § 111.80-.97 (1974) (West) (State employees). As in Michigan, the constitutionality of the law has been challenged in a series of suits. None of the Wisconsin challenges have been decided on the merits by the Wisconsin Supreme Court. The Wisconsin statute was upheld by a Wisconsin circuit court in *Gerleman v. Milwaukee Bd. of Educ.*, Civil No. 416-740 (Milwaukee County Cir. Ct., Wis., filed Dec. 27, 1974), reported at 1975 GOVT EMPL. REL. REP. (BNA), No. 592, B-16. Plaintiff teachers had sought to nullify a service fee arrangement alleging that the statute itself was unconstitutional and conflicted with other state statutes. Citing a favorable attorney general's opinion, 54 Op. Att'y Gen. 56 (Wis. 1965), and adopting the reasoning of the United States Court of Appeals for the Second Circuit in *Buckley v. AFTRA*, 496 F.2d 305, 86 L.R.R.M. 2103 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), noted in 16 B.C. IND. & COM. L. REV. 306 (1975), the *Gerleman* court rejected the constitutional argument. It stated that even if government action was involved in the union's requirement that nonmembers pay an amount equal to dues, the rights of freedom of speech and expression are not absolute. These rights may be indirectly affected if, as here, there is no "unwarranted abridgement." Civil No. 416-740 at 9. There are legitimate government interests served by enacting and enforcing such union security provisions sufficient to outweigh any resulting interference with the constitutional rights of individual employees. See text at notes 115-19, *supra*. The court also held that the statute did not violate or destroy the rights of the teachers as provided in other Wisconsin statutes. Civil No. 416-740 at 4-5. The provisions relied on by the plaintiffs were WIS. STAT. ANN. § 119.42(1) (1973) (teacher tenure); WIS. STAT. ANN. § 63.44 (Supp. 1975-76) (provision for removal not to apply to certain departments); and WIS. STAT. ANN. § 63.49 (Supp. 1975-76) (no promotion or demotion for making or failing to make political contributions).

Three other cases are presently pending in Wisconsin state courts. Although the facts and constitutional objections raised in the three suits differ from those in *Gerleman*, the challenged statute is the same. In the first case, *Browne v. Milwaukee Bd. of School Directors*, Civil No. 410-584 (Milwaukee County Cir. Ct., Wis., filed May 22, 1973), defendants filed a motion to dismiss which was denied. The Wisconsin Supreme Court did not rule on the merits, but did affirm the trial court's action. *Browne v. Milwaukee Bd. of School Directors*, 69 Wis. 2d 169, 230 N.W.2d 704, 90 L.R.R.M. 2412 (1975). The case is now before the circuit court awaiting trial. In the second case, *Johnson v. Milwaukee Bd. of School Directors*, Civil No. 411-578 (Milwaukee County Cir. Ct., Wis., filed July 19, 1973), a motion to dismiss was denied and responsive pleadings should be filed soon. In the third, *Flood v. Board of Educ., Joint School District No. 1, Village of Menomonee Falls*, Civil No. 31180 (Waukesha County Cir. Ct., Wis., filed May 21, 1974), the Supreme Court of Wisconsin affirmed the trial court's denial of a motion to dismiss. *Flood v. Board of Educ., Joint School District No. 1, Village of Menomonee Falls*, 69 Wis. 2d 184, 230 N.W.2d 711, 90 L.R.R.M. 2053 (1975).

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The Minnesota Public Employment Relations Act,¹⁸⁸ unlike the Michigan law, mandates that a service fee equal to the actual cost of collective bargaining and contract administration be deducted from nonmembers' wages at the request of the exclusive representative. In *Robbinsdale Education Association v. Local 872, Robbinsdale Federation of Teachers*,¹⁸⁹ the Minnesota Supreme Court, reversing the trial court, held that the service fee statute did not violate constitutional standards of procedural due process. The lower court had declared that the statute violated the Minnesota Constitution and the fourteenth amendment of the United States Constitution by failing to provide a procedure to contest the fee *prior* to its deduction from the salary of public employees.¹⁹⁰ Although neither the service fee provision nor any other provision of the Minnesota Public Employees Labor Relations Act¹⁹¹ specifically provides for a hearing prior to the imposition of the fee, the Minnesota Supreme Court interpreted the Act to impliedly provide that the public employee has the following due process protections:

(a) the right to notice of the amount of an impending fair share [service] fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withheld fee; (c) the right, under certain exigent circumstances, to have the collection of the fair share [service] fee enjoined; and (d) the right, in all circumstances and upon proper application, to a court hearing on the validity and proper amount of the fair share [service] fee.¹⁹²

¹⁸⁸ MINN. STAT. ANN. § 179.65(2) (Supp. 1975) (West). This provision, often referred to as the fair share proviso of the Minnesota Public Employment Relations Act, MINN. STAT. ANN. § § 179.61-.77 (Supp. 1975) (West), states *inter alia* that:

all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

MINN. STAT. ANN. § 179.65(2) (Supp. 1975) (West).

¹⁸⁹ — Minn. —, 239 N.W.2d 437, 92 L.R.R.M. 2417 (1976), *U.S. App. Pending Sub. nom.*, *Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 44 U.S.L.W. 3677 (1976).

¹⁹⁰ *Id.* at —, 239 N.W.2d at 439, 92 L.R.R.M. at 2418.

¹⁹¹ MINN. STAT. ANN. § § 179.61-.77 (Supp. 1975) (West).

¹⁹² — Minn. at —, 239 N.W.2d at 441, 92 L.R.R.M. at 2420. In determining that the statute complied with due process standards, the court examined the conflicting state and individual interests. The court concluded that the governmental interest in securing the financial stability of unions out-weighed the individual employee's interest in obtaining a prior determination of the validity of the fee. *Id.* at —, 239 N.W.2d at 411, 443, 92 L.R.R.M. at 2420-21.

In the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity could follow the actual withholding of the fee from nonmembers.¹⁹³ Although *Robbinsdale* upheld the Minnesota statute against an attack on procedural requirements, it did not dispose of other challenges to the law that had been filed in Minnesota state courts,¹⁹⁴ and it remains to be seen whether the Act will withstand a recent, broadly based challenge in federal court alleging violations of the first, ninth, tenth, thirteenth, and fourteenth amendments to the United States Constitution.¹⁹⁵

Thus the courts have generally upheld the collection of service fees in the public sector. To date, no court appears to have invalidated the collection of such a fee where a state statute explicitly permits the negotiation of public sector union security provisions. Indeed, when such statutes are present, the situation is seemingly no different than in the private sector where the NLRA and the RLA permit union security provisions. Such a statute in either sector is a legislative determination that union security is a useful means of maintaining labor stability. Since that legislative determination is more than reasonable and since labor peace, particularly in the public sector, is a permissible state objective, courts have upheld the collection of service fees pursuant to such statutes. However, courts have invalidated the collection of service fees where a state's public sector bargaining law was silent on the issue of union security. The crucial factor in such decisions appears to be the presence of state laws, such as

¹⁹³ *Id.* at —, 239 N.W.2d at 444, 92 L.R.R.M. at 2422.

¹⁹⁴ In *Beckman v. St. Louis County Bd. of Comm'rs*, — Minn. —, 241 N.W.2d 303, 92 L.R.R.M. 2449 (1976), the Minnesota Supreme Court held that the collection of such service fees prior to the amendment to MINN. STAT. ANN. § 179.65(2) in 1973 was illegal.

Two other cases, still pending after *Robbinsdale*, attack the amount of the service fee established by the union. *Litman v. Local 151 and Council 91, AFSCME*, Civil No. 407407 (Ramsey County Dist. Ct., Minn., filed Oct. 16, 1975); and *Schleck v. Fjone*, 88 L.R.R.M. 3525 (Freeborn County Conciliation Ct., Minn. 1975). In *Schleck*, the union was sued in a local small claims court by an employee. The court found that the employee was not given prior notice of the amount of the fee nor given an opportunity to be heard on the amount of the fee. This portion of the court decision was effectively overruled by *Robbinsdale*. The union is attacking the *Schleck* decision by pursuing its right to a new proceeding in the county court.

¹⁹⁵ *Knight v. Community College Faculty Ass'n*, Civil No. 4-74-659 (D. Minn., filed Dec. 19, 1974). Plaintiffs motion to convene a three-judge court was denied and as of this writing plaintiffs are seeking writs of mandamus in the United States Court of Appeals.

In Hawaii, like Minnesota, there have been attacks challenging the constitutionality of that state's law which automatically grants service fee deductions based on actual costs to the exclusive representative. HAW. REV. STAT. § 89-4 (Supp. 1975). As of this date, no judicial determination on the merits has been rendered in Hawaii. Motions to dismiss were granted in *Nunn v. Trask*, Civil No. 75-231 (D. Hawaii, Filed July 6, 1975), a suit in federal court challenging the constitutionality of the Hawaii union security law. In a second case, *Jensen v. Yonamine*, Civil No. 75-405 (D. Hawaii, Filed Dec. 3, 1975), a group of state teachers filed a complaint against the Board of Education, the Hawaii State Teachers Association and others attacking the service fee statute. A motion to dismiss was filed on February 13, 1976.

state right to work or civil service laws, which could be violated by the collection of service fees.

2. Challenges to the Use of Service Fees

In addition to challenging the constitutionality of the *collection* of service fees, opponents of unionization have challenged union security provisions, first in the private and now largely in the public sector, by attacking the union's *use*, for political purposes, of these fees. Challengers have asserted that unions, by using service fees for political purposes, have infringed upon their constitutional rights by forcing them to support candidates, parties, and ideologies to which they are opposed. Unions, in an attempt to forestall such challenges, are now increasingly adopting internal union rebate procedures to protect the rights of the dissenter. To better understand the nature of the attack and the response of unions, it is helpful to discuss first, the political nature of public employee unions; second, the litigation in both the private and public sectors; and third, an example of a union rebate plan in operation.

a. The Political Nature of Public Employee Unions

Challengers to the use of service fees implicitly assume that a distinction can be drawn between collective bargaining and political activities. In the private sector, where collective bargaining decisions are based primarily on market forces, attempts to draw such a distinction may well be valid. In the public sector, however, collective bargaining decisions affecting wages and working conditions are also made through the political process,¹⁹⁶ for the public employer's ability to pay for increased wages and benefits always depends on legislative actions regarding appropriations and taxes.¹⁹⁷ Under some public employment bargaining statutes the employer immediately involved in collective bargaining lacks the power to negotiate certain benefits or to reach final agreement with the union.¹⁹⁸ In these situations, collective bargaining agreements negotiated with the particular union are tentative in nature and must be presented to the jurisdiction's legislature for final approval or rejection. To ensure that the employees' interests receive adequate consideration by legislators, public employees and

¹⁹⁶ See Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1156-68 (1974) [hereinafter cited as Summers]; Anderson, *The Impact of Public Sector Bargaining*, 1973 WIS. L. REV. 986, 1005-07.

¹⁹⁷ See Summers, *supra* note 196 at 1162-68. Summers states that: "In the absence of collective bargaining, the budget-making process . . . leaves public employees unable to protect their interests adequately against those whose interests are opposed." *Id.* at 1168.

¹⁹⁸ E.g., KAN. STAT. ANN. § 75-4330(c) (Supp. 1975); WIS. STAT. ANN. § 111.81(16) (1974) (West) See generally Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618, 621 (1972).

their unions may engage in lobbying and political activity.¹⁹⁹ Indeed, as one commentator has suggested, "[w]hat the public employee union is able to do in the legislative halls may often play a more important role in fashioning the conditions under which its members work and live than what it is able to do at the bargaining table."²⁰⁰

The recent legislative and legal activities of the American Federation of State, County, and Municipal Employees (AFSCME) provide an example of the political nature of public employee unions. On the local legislative level, AFSCME has sought emergency financial aid for cities, such as New York, which are in severe fiscal difficulty. In addition, AFSCME has been involved in other issues arising from budgetary problems of cities—such as, responding to layoffs, cut-backs, and subcontracting; and using employee trust funds to aid localities. On the national level, AFSCME has lobbied in the United States Congress to extend federal minimum wage laws to public sector workers,²⁰¹ to establish minimum workplace safety standards, to extend unemployment compensation to public workers, to improve health insurance, and to increase the amount of revenue sharing or other federal monies available to cities, counties and states. Besides these legislative efforts, AFSCME has also obtained employee protection not limited to members only, by initiating lawsuits to block the use of patronage,²⁰² to prohibit the contracting out of work previously done by public employees,²⁰³ to seek a more favorable federal tax

¹⁹⁹ Blair, *supra* note 11, at 195.

²⁰⁰ Gromfine, *supra* note 119, at 298.

Some state public employee relations statutes imply that unions will be actively involved in legislative efforts. For example, the Minnesota statute authorizes a written collective bargaining agreement between the employer and the exclusive representative of the employees; the employer is obligated to "implement the terms of the contract in the form of an ordinance or resolution. If the implementation of the terms of the contract require the adoption of a law, ordinance, or charter amendment, the employer shall make every reasonable effort to prepare and secure the enactment of such law, ordinance, resolution, or charter amendment." MINN. STAT. ANN. § 179. 70 (2) (Supp. 1976) (West). Thus, Minnesota public employee unions, in order to secure the advantages won at the negotiating table, will expend funds and engage in lobbying efforts to bolster the chances of passage of any such bill proposed by the employer.

Besides the above described activities, public employee unions engage in lobbying to achieve a number of different goals including collective bargaining legislation, non-negotiable topics and benefits excluded from negotiation by law or tradition (the right to moonlight), limits on working conditions (maximum working hours per week), and "end run" lobbying. Moskowitz, Loewenberg & Koziara, LOBBYING, IN COLLECTIVE BARGAINING IN GOVERNMENT: READINGS AND CASES 218-20 (J. Loewenberg & M. Moskowitz eds. 1972).

²⁰¹ *But see* National League of Cities v. Usery, 96 S. Ct. 2465 (1976).

²⁰² Illinois State Employee Union, Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 & 943 (1973) (litigation to reinstate public employees discharged on the basis of party affiliation or for failure to support the political activities of their supervisors); AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971) (litigation to prevent the mass dismissal of state employees in order to allow a newly elected Democratic Governor to replace the employees with Democrats and party supporters).

²⁰³ *E.g.*, Van Buren Pub. School Dist. v. Wayne County Circuit Judge, 90

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ruling on the taxability of certain retirement contributions on behalf of public employees,²⁰⁴ and to protect the rights of institutional workers on the job.²⁰⁵

Thus, if "political" is defined as "relating to . . . the conduct of government,"²⁰⁶ the entire collective bargaining process in the public sector would seem to be political in nature, since its outcome will determine the relationship of the particular government employer to its employees and their union.²⁰⁷ Consequently, a union is engaged in "collective bargaining" when it testifies and lobbies on matters that will benefit all public employees. The same is true when a union acts within a civil service appeals system or pursues litigation, either directly or through amicus curiae participation, to secure procedural rights for employees threatened with disciplinary actions or lay-offs or to obtain other employee protection. These efforts and the concomitant expenditures of funds and resources are an integral part of improving the working conditions of public employees in every bargaining unit—and of *all* such employees, not just members of the labor organization. Consequently, when considering challenges to a public sector union's use of service fees, courts should distinguish between political activities which are partisan or ideological and political activities which are necessary for effective collective bargaining.²⁰⁸

b. Litigation in the Private and Public Sectors

1. *Private Sector.* In the words of Mr. Justice Rutledge in *United States v. CIO*:²⁰⁹ "To say that labor unions as such have nothing of

L.R.R.M. 2615 (1975); *Cunningham v. Community College No. 3*, 79 Wash. 2d 793, 489 P.2d 891 (1971); Connecticut Bd. of Lab. Rel., Case No. MPP-2619 (May 10, 1974), reported at 1974 GOVT EMPL. REL. REP. (BNA), No. 566, B-13; Connecticut Bd. of Lab. Rel., Case No. MPP-2605 (Jan. 18, 1974), reported at 1974 GOVT EMPL. REL. REP. (BNA), No. 566, B-13.

²⁰⁴ *E.g.*, *Hogan v. United States*, 367 F. Supp. 1022 (E.D. Mich.) (dismissed), *dismissal aff'd*, 513 F.2d 170 (6th Cir.), *cert. denied*, 423 U.S. 836 (1975), (litigation to bring about the exclusion from taxable income for the year in which an individual contributed compulsory public employee contributions to government pension plans).

²⁰⁵ *E.g.*, *AFSCME v. Walker*, 27 Ill. App. 3d 883, 327 N.E.2d 568 (1975) (litigation to require changes in state institution for mental retardates in order to prevent residents from assaulting employees and other residents).

²⁰⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1755 (1961).

²⁰⁷ Blair, *supra* note 11, at 195-96.

²⁰⁸ Various definitions of "partisan political or ideological" have been suggested. The AFSCME Judicial Panel recently interpreted "partisan political" as used in the AFSCME Constitution and stated that the most common meaning of the phrase is that used in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961):

Partisan: "composed of, based upon, or controlled by a single political party or group."

Political: "of, relating to, or concerned with politics; of, relating to, or involved in party politics."

Judicial Panel Decision No. 74-30, at 6 (Dec. 9, 1975).

²⁰⁹ 335 U.S. 106, 144 (1948) (Rutledge, J., concurring). *Cf.* *United States v. UAW*, 352 U.S. 567, 588-89 (1957).

value to contribute to [the electoral] process and no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society." A union that participates in partisan political or ideological activities endorsed by its majority is, except as specifically limited by statute,²¹⁰ engaged in a normal and permissible activity.²¹¹ In political or ideological activities, as in other areas, the majority of union members have "an interest in stating [their] views without being silenced by the dissenters."²¹² Thus, engaging in these lawful political activities for which the union spends monies collected from dues and service fees does not necessarily invalidate union security agreements although such activities may entitle dissenters to a rebate of a portion of their service fee or dues.

In the landmark cases of *IAM v. Street*²¹³ and *Brotherhood of Railway Clerks v. Allen*,²¹⁴ the United States Supreme Court considered the legality of a union's using dues and fees for political and ideological expenditures objectionable to certain employees. Both cases arose under the Railway Labor Act.²¹⁵ In both cases, railway employees alleged that they were required to pay union dues and that a portion of their dues was used to support political candidates and causes which they opposed. They requested the courts to enjoin the enforcement of the union security agreement or to relieve them from the obligation to pay dues. The *Street* Court did not decide whether the use of such money for political purposes was violative of constitutional rights. The Court held, based on statutory interpretation, that Congress contemplated requiring all employees to share the costs of negotiating and administering collective bargaining agreements and the cost of handling grievances, but did not intend to provide the unions with a means of requiring employees, over their objection, to support political causes which they oppose.²¹⁶ The Court refused to invalidate the statute authorizing the payment of dues or fees, to prohibit the fee

²¹⁰ E.g., 18 U.S.C. § 610 (1970), as amended (Supp. V, 1975), which provides in part:

It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . .

²¹¹ Section 610, see note 210 *supra*, has been interpreted by the Supreme Court and other federal courts. E.g., *Pipefitters, Local 562 v. United States*, 407 U.S. 385 (1972); *United States v. UAW*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948); and *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973). See generally notes 196-205 *supra* and accompanying text.

²¹² *IAM v. Street*, 367 U.S. 740, 773 (1961).

²¹³ 367 U.S. 740 (1961).

²¹⁴ 373 U.S. 113 (1963).

²¹⁵ 45 U.S.C. §§ 151-88 (1970). The specific provision of the Act which was interpreted was the union security provision, § 152, Eleventh.

²¹⁶ *Street*, 367 U.S. at 763-64.

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collection²¹⁷ or to issue a blanket injunction against all use of the funds for the disputed purposes.²¹⁸

In *Allen*, the Supreme Court did suggest two remedies that would reconcile the majority and dissenting interests while following *Street's* instruction to protect both "to the maximum extent possible without undue impingement of one on the other."²¹⁹ The Court indicated that a court could issue a decree ordering a refund of the exacted funds in the proportion that union political expenditures bear to total union expenditures and a reduction of future exactions by the same proportion.²²⁰ As an alternative to this judicially imposed restitution, the *Allen* Court encouraged unions to:

consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy. . . . If a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted.²²¹

The *Street* and *Allen* decisions seemingly demonstrate a clear attempt by the United States Supreme Court to create a workable balance: the minority union member or service fee payor cannot handcuff the majority of the union if it wishes to engage in partisan political or ideological activities; on the other hand, neither can the majority compel dissenters to contribute to those activities when their disapproval and objection is duly noted.²²² While *Street* and *Allen* directly pertained only to union security provisions negotiated pursuant to the Railway Labor Act, other cases have adopted the *Street-Allen* rationale with respect to such provisions negotiated pursuant to the Taft-Hartley Act.²²³

²¹⁷ *Street*, 367 U.S. at 772. *Accord*, *Allen*, 373 U.S. at 119-20. *But cf.* *Ellis v. Brotherhood of Ry. Clerks*, 91 L.R.R.M. 2339 (S.D. Cal. 1976).

²¹⁸ *Street*, 367 U.S. at 772.

²¹⁹ *Id.* at 773.

²²⁰ *Allen*, 373 U.S. at 122-24; *cf.*, *Street*, 367 U.S. at 774-75.

²²¹ *Allen*, 373 U.S. at 122-23. In order to be entitled to any remedy, dissenters must make their objection known to the union; dissent is not to be presumed. The union, in justifying any rebate, has the burden of establishing what percentage of its total expenditures are for partisan political purposes. *Id.* at 119 & n.6, 122; *Street*, 367 U.S. at 771, 774.

²²² The Supreme Court has treated the judicial complaint as a timely and adequate objection in federal litigation. *Allen*, 373 U.S. at 119 n.6. See note 250 *infra*.

²²³ *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1128 n.3, 92 L.R.R.M. 2063, 2064 n.3 (9th Cir. 1976) (*Seay* II); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003, 74 L.R.R.M. 2600, 2606 (9th Cir. 1970) (*Seay* I); *Reid v. UAW*, 479 F.2d 517, 520, 83 L.R.R.M. 2406, 2408 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973) (*Reid* II); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411, 77 L.R.R.M. 2609, 2612 (10th Cir. 1971) (*Reid* I).

In addition to these direct attacks on the use of service fees collected pursuant to the Railway Labor Act and the Taft-Hartley Act, indirect attacks have been made

In *Reid v. McDonnell Douglas Corp.*,²²⁴ for example, non-union employees brought suit against the employer and the UAW challenging the union's expenditure of monies collected under an agency shop agreement for the support of political and economic doctrines, ideologies and legislative programs to which the plaintiffs were opposed and which were not reasonably necessary to collective bargaining.²²⁵ The plaintiffs alleged that by using these monies for political purposes, the UAW was violating its duty of fair representation.²²⁶ During the pendency of the litigation, in 1968, the UAW amended its constitution to provide an internal union rebate procedure under which dissenters, both union members and agency fee payors, could obtain a pro rata rebate of monies expended for "activities or causes primarily political in nature."²²⁷ Subsequently, in

through the Internal Revenue Code and the Labor-Management Reporting and Disclosure Act. In *Marker v. Connally*, 337 F. Supp. 1301, 79 L.R.R.M. 3089 (D.D.C. 1972), *aff'd sub nom.*, *Marker v. Schultz*, 485 F.2d 1003, 83 L.R.R.M. 3026 (D.C. Cir. 1973), plaintiffs alleged that to the extent that unions engage in political activity, the tax exemption granted to unions under I.R.C. § 501(c)(5), constitutes an indirect subsidy by the federal government of union political activity and therefore is violative of the dissenters' first and fifth amendment rights. 337 F. Supp. at 1302, 79 L.R.R.M. at 3089-90. The suit sought to compel the Secretary of the Treasury to withdraw the tax exemptions. The District Court for the District of Columbia rejected this indirect attempt to restrain the political actions of unions. *Id.* at 1304, 79 L.R.R.M. at 3091.

In *McNamara v. Johnston*, 360 F. Supp. 517, 83 L.R.R.M. 2497 (N.D. Ill. 1973), *aff'd*, 522 F.2d 1157, 90 L.R.R.M. 2401 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1506 (1976), plaintiffs alleged a breach of the union's fiduciary obligations under § 501 (a) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 501(a) (1970). Plaintiffs in *McNamara* claimed, as members of a UAW local union in Illinois who paid monthly dues to the union, that the union "unlawfully and wrongfully diverted a large part of [the membership dues] . . . for various political expenditures and purposes totally unrelated to the interests and welfare of the union and its members . . ." 360 F. Supp. at 519, 83 L.R.R.M. at 2497. The district court dismissed the suit because the expenditures in question had been lawfully authorized by the UAW constitution and the majority vote of the union members. The court held that as a matter of settled law: "It is clear that political expenditures of union funds which are authorized by its constitution, bylaws, and any pertinent resolution of its governing body is not within the prohibition of Section 501 of the Act." *Id.* at 524, 83 L.R.R.M. at 2500. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed and held that the plaintiffs who objected to the contributions by the union officers could not sue the officers under the LMRDA. 522 F.2d at 1167, 90 L.R.R.M. at 2408.

²²⁴ 443 F.2d 408, 77 L.R.R.M. 2609 (10th Cir. 1971) (Reid I). In *Reid I*, the court of appeals affirmed the district court dismissal as to the employer, but reversed and remanded the dismissal as to the union. *Id.* at 413, 77 L.R.R.M. at 2613.

²²⁵ *Id.* at 409, 77 L.R.R.M. at 2610.

²²⁶ *Id.* See notes and text at notes 67-74 *supra*.

²²⁷ International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), International Constitution art. 16, § 7 (1968), *quoted in Reid II*, 479 F.2d at 518 n.1, 83 L.R.R.M. at 2470 n.1, read:

Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximate proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board.

1972, the United States District Court for the Northern District of Oklahoma granted the defendant's motion for summary judgment.²²⁸ The United States Court of Appeals for the Tenth Circuit, in affirming summary judgment, accepted the UAW rebate review procedure as negating the allegation of denial of fair representation.²²⁹

Seay v. McDonnell Douglas Corp.,²³⁰ a companion case to *Reid*, was filed in 1967 against the same employer and against the International Association of Machinists, AFL-CIO (IAM). Plaintiffs, nonunion employees of the bargaining unit, again alleged a violation by the union of its duty of fair representation. The *Seay* plaintiffs, pursuant to union security provisions in the collective bargaining agreements applicable to their bargaining unit, were required to pay to the IAM a monthly agency fee equal to the monthly dues paid by union members.²³¹ As in *Reid*, the plaintiffs in *Seay* claimed that the agency fees had been used in part to "propagate political and economic doctrines, concepts, ideologies, and legislative programs."²³² During the pendency of the litigation IAM adopted a rebate plan for dissenters similar to the UAW plan with the exception that the IAM procedure provides that final appeal for both members and nonmembers is to

The member may perfect his objection by individually notifying the International Secretary-Treasurer of his objection by registered or certified mail; provided, however, that such objection shall be timely only during the first fourteen (14) days of Union membership and during the fourteen (14) days following each anniversary of Union membership. An objection may be continued from year-to-year by individual notifications given during each annual fourteen (14) day period.

(b) If an objecting member is dissatisfied with the approximate proportional allocation made by the committee of the International Executive Board, or the disposition of his objection by the International Secretary-Treasurer, he may appeal directly to the full International Executive Board and the decision of the International Executive Board shall be appealable to the Public Review Board or the Convention at the option of said member.

Article 6, § 20 defines the rights of nonmembers who are agency fee payors. Thus, the UAW rebated plan provides for review either of the proportional allocation or the disposition of the dissident's objection. Review can be taken to the union convention by members or to a Public Review Board of nonmembers.

²²⁸ 80 L.R.R.M. 2886 (N.D. Okla. 1972).

²²⁹ *Reid* II, 479 F.2d at 520, 83 L.R.R.M. at 2408. The Tenth Circuit stated:

Plaintiffs, by speculative, conclusionary, and argumentative statements condemn the Union remedy as unfair, unreasonable, and unworkable. Those statements do not suffice to create an issue of fact. We have no concrete particulars to sustain any of the elements which the Supreme Court says are pertinent to a claim of unfair representation. At the most the statements are conjectures as to how the union remedy might work in imagined circumstances.

Id. (citations omitted). *Contra*, *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 92 L.R.R.M. 2063 (9th Cir. 1976) (*Seay* II).

²³⁰ 427 F.2d 996, 74 L.R.R.M. 2600 (9th Cir. 1970) (*Seay* I).

²³¹ 371 F. Supp. 754, 756, 85 L.R.R.M. 2007, 2007 (C.D. Cal. 1973), *rev'd and remanded*, 533 F.2d 1126, 92 L.R.R.M. 2063 (9th Cir. 1976) (*Seay* II).

²³² *Id.*

the union convention.²³³ The district court then dismissed the suit and held that this self-imposed union rebate plan was "a good faith effort to comply with *Street* and *Allen*. It [was], at least on its face a fair, reasonable and adequate intra-union procedure"²³⁴

The United States Court of Appeals for the Ninth Circuit, in deciding the appeal of the district court dismissal, stated that the union security arrangement permitting collection of a service fee equal to dues was valid.²³⁵ However, the court reversed the summary judgment, saying there was no assurance that the union would continue to abide by the provisions of its rebate plan once the litigation was terminated. It pointed out that the IAM rebate plan was not instituted until 12 years after *Street* was decided and until six years after *Seay* was filed.²³⁶ The court remanded the case to the district court for a hearing on the factual question of whether the union would administer the rebate plan fairly.²³⁷ By remanding, the court expressly declined to follow the Tenth Circuit decision in *Reid* which had held that the plaintiffs' conclusory statements condemning the UAW rebate plan as unfair, unreasonable and unworkable were not sufficient to create an issue of fact.²³⁸

Although the *Reid* and *Seay* courts clearly rejected the plaintiffs' attacks on the *concept* of internal union rebate procedures, the *Seay* decision indicates the possibility of judicial scrutiny of the actual operation of union plans. Thus, if unions fail to protect the rights of the protesting dissenter, a court might adopt the second remedy suggested in *Allen*—the judicial decree.²³⁹ Unions, as well as Congress,

²³³ Machinists Official Circular 669, adopted on June 28, 1973 (effective July 1, 1973). The plan was available retroactively to all dues payors, including plaintiffs in *Seay*, who notified the union of their objections. Pertinent parts of the plan are reproduced in *Seay* 11, 533 F.2d at 1128-29, 92 L.R.R.M. at 2064-65.

²³⁴ 371 F. Supp. at 763, 85 L.R.R.M. at 2012.

²³⁵ 533 F.2d at 1128 n.2, 92 L.R.R.M. at 2064 n.2.

²³⁶ *Id.* at 1132, 92 L.R.R.M. at 2067.

²³⁷ *Id.* at 1132-33, 92 L.R.R.M. at 2067-68.

²³⁸ *Id.* at 1130 n.6, 92 L.R.R.M. at 2066 n.6. The *Reid* court, unlike the *Seay* court, attached no significance to the fact that the union rebate plan was adopted after *Street* was decided and after the suit by the McDonnell Douglas employees was filed. 479 F.2d at 520, 83 L.R.R.M. at 2408-09. See note 229 *supra*.

Another recent case, *Ellis v. Brotherhood of Ry. Clerks*, 91 L.R.R.M. 2339 (S.D. Cal. 1976), held that the union breached its duty of fair representation by using fees and dues for noncollective bargaining purposes and activities over the protests of employees. According to the court, the union further breached its duty by failing to comply with its own constitutional provisions on dues reductions and by excluding nonmembers from eligibility for such reductions. *Id.* at 2343.

²³⁹ In discussing this remedy in *Allen*, 373 U.S. 113, 122-24 (1963) (emphasis added), the Court stated:

We recognize that practical difficulties may attend a decree The difficulties in judicially administered relief . . . should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan If a union . . . made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them . . . *prolonged and expensive litigation might well be*

have long been opposed to the unnecessary intervention of courts into labor disputes. Indeed, one of the primary purposes behind limiting the injunctive powers of the federal courts in the Norris-La-Guardia Act of 1932²⁴⁰ was "the proposition that judges were ill-equipped to pass judgment upon the social and economic issues involved in labor disputes."²⁴¹ For this reason, unions are well-advised to adopt union rebate procedures available to members and nonmembers and to implement these procedures fairly.

2. *Public Sector.* A series of suits in the public sector, centered in the states of Michigan and Washington, are attempting to relitigate the law settled in the private sector by the Supreme Court in *Street* and *Allen*. The few cases decided by state courts evidence a trend toward adopting the private sector law.²⁴²

For example, in *Abood v. Detroit Board of Education*,²⁴³ the Michigan Court of Appeals considered whether monies collected pursuant to a service fee provision in a collective bargaining agreement between a public employer and the union could constitutionally be used to support political activities opposed by nonmembers.²⁴⁴ The court stated that since the Michigan Public Employment Relations Act provides for a service fee equal to dues²⁴⁵ and since it can be assumed that a portion of every union's budget goes to political activities, the statute sanctions the use of nonmembers' fees for purposes other than collective bargaining.²⁴⁶ According to the *Abood* court, the Michigan law, unlike the Railway Labor Act under consideration in *Street*²⁴⁷, could not be construed to deny public sector unions the right, over employee objection, to use service fees to support political causes opposed by the employee.²⁴⁸ In rejecting the statutory approach used in *Street*, the *Abood* court concluded that the service fee clause "could violate plaintiffs' First and Fourteenth Amendment rights."²⁴⁹ The court avoided the constitutional issue in the case before it by holding

averted The courts will not shrink from affording what remedies they may, with due regard for the legitimate interests of all parties; but it is appropriate to remind the parties of the availability of more practical alternatives to litigation for the vindication of the rights and accommodation of interests here involved.

²⁴⁰ 29 U.S.C. §§ 101-15 (1970).

²⁴¹ A. COX & D. BOK, CASES AND MATERIALS ON LABOR LAW 904 (7th ed. 1969).

²⁴² Although there is no United States Supreme Court decision concerning the use of service fees by public employee unions for partisan political or ideological purposes, the Supreme Court has noted probable jurisdiction in *Abood v. Detroit Bd. of Educ.*, 60 Mich. App. 92, 230 N.W.2d 322, 90 L.R.R.M. 2152 (1975), *probable jurisdiction noted*, 96 S. Ct. 1723 (1976). See notes and text at notes 182-87 *supra*.

²⁴³ 60 Mich. App. 92, 230 N.W.2d 322, 90 L.R.R.M. 2152 (1975), *probable jurisdiction noted*, 96 S. Ct. 1723 (1976).

²⁴⁴ *Id.* at 98-99, 230 N.W.2d at 326, 90 L.R.R.M. at 2154-55.

²⁴⁵ MICH. COMP. LAWS ANN. § 423.210 (Supp. 1975-76).

²⁴⁶ 60 Mich. App. at 99, 230 N.W.2d at 326, 90 L.R.R.M. at 2155.

²⁴⁷ See text at note 216 *supra*.

²⁴⁸ 60 Mich. App. at 99-100, 230 N.W.2d at 326, 90 L.R.R.M. at 2155.

²⁴⁹ *Id.* at 100, 230 N.W.2d at 327, 90 L.R.R.M. at 2156 (emphasis added).

that none of the plaintiffs had alleged that they specifically protested the expenditure of funds for political purposes.²⁵⁰ According to the Michigan Court of Appeals, however, if such a protest had been made, the remedy suggested in *Street* and *Allen* of judicially ordered restitution²⁵¹ would be the appropriate method to protect the rights of the dissenter.²⁵² Thus, the *Abood* court's finding of a potential constitutional, as opposed to statutory, violation would have no effect on the remedy ultimately provided dissenters. Both approaches, then, sustain the non-political uses of service fees.

A Washington court has endorsed the concept of rebate procedures to protect the rights of public sector employees, an approach similar to the Michigan courts' approval of judicially imposed restitution or internal union rebate plans as alternative remedies for protecting the rights of nonmembers. In *Association of Capitol Powerhouse Engineers v. Division of Buildings & Grounds*,²⁵³ plaintiffs, who were members of the union, brought suit challenging on constitutional grounds the Washington statute²⁵⁴ authorizing union security. In upholding the constitutionality of the statute, the court, while noting that a portion of each service fee went for political purposes, stated that "an easily accessible procedure has been established for return of that portion, upon application by an employee who disagrees with such utilization of funds; and that procedure is publicized in newspapers sent to each member's residence."²⁵⁵ Thus, the Washington court, while not indicating whether the political use of service fees would be a statutory or constitutional violation, has also suggested that the appropriate

²⁵⁰ *Id.* at 102, 230 N.W.2d at 327, 90 L.R.R.M. at 2156. In their appeal to the United States Supreme Court, the *Abood* plaintiffs contend the Michigan Court of Appeals erred in holding that the judicial complaint itself was not a sufficient allegation of protest. See Petitioner's Jurisdictional Statement at 22-23, *Abood v. Detroit Bd. of Educ.*, probable jurisdiction noted, 96 S. Ct. 1723 (1976). The Supreme Court in *Allen*, 373 U.S. at 119 n.6, did treat the judicial complaint as a timely and adequate protest in federal litigation, but it did not hold that state courts could not require protests directly to the union as a prerequisite to invoking their judicial machinery.

²⁵¹ See text at notes 219-21 *supra*.

²⁵² 60 Mich. App. at 102, 230 N.W.2d at 237, 90 L.R.R.M. at 2156.

In *Ball v. City of Detroit*, Civil No. 159-940 (Wayne County Cir. Ct., Mich. Mar. 31, 1975), appeal docketed, No. 25586 (Mich. Ct. App. 1975), a lower court, unlike the court of appeals in *Abood*, construed the Michigan law to deny the union the right, over an employee's objection, to use the fees to support political causes opposed by the employee. *Id.* at 41-43. Notwithstanding the finding that the union in *Ball* violated the Michigan Act by using funds exacted from members and service fee payors for certain political programs, the court held that the statute and the negotiated agency shop agreement were lawful. The court adopted the *Street-Allen* rationale and held that certain dissenting employees were entitled to a proportional rebate from the union. *Id.* at 51-52. While *Ball* is inconsistent with that part of *Abood* that based liability on a constitutional, as opposed to statutory, violation, *Ball's* remedy appears to be in accord with that suggested in *Abood*.

²⁵³ 92 L.R.R.M. 2748 (Thurston County Super. Ct., Wash. 1975). See notes and text at notes 176-80 *supra*.

²⁵⁴ WASH. REV. CODE ANN. § 41.06.150 (Supp. 1975) (state civil service employees).

²⁵⁵ 92 L.R.R.M. at 2752.

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remedy is the return of a portion of the fee collected.

In the few cases, then, that have discussed the use of dues and fees by public employee unions for political or ideological purposes, no state court has yet invalidated a statute authorizing union security provisions. Rather, the courts have suggested that public sector unions, like their private counterparts, either adopt internal rebate procedures or be subject to injunctions designed to accommodate the right of the union to engage in political activity with the right of the dissenter. Such a result seems logical. The rationale behind the *Street* and *Allen* approach in the private sector is to prevent the majority from being silenced by the minority. None of the distinctions between private and public employment warrant granting the minority more strength in the public sector union. Indeed, the major difference between the use of service fees in the public and private sectors, one that the current litigation has not addressed, is what are rebatable, political expenditures in the public sector. While the distinction between political and collective bargaining expenses is not always clear in the private sector,²⁵⁶ the distinction is even more cloudy in the public

²⁵⁶ It is beyond the scope of this article to delineate what are rebatable expenditures. As a federal district court in an early *Seay* decision noted, it is often difficult to separate union expenditures germane to collective bargaining from those which are political or ideological and from which dissenters might receive a rebate.

Quite obviously, this is a difficult question to decide. The Supreme Court was not called upon to decide it in *Street* and *Allen*. Furthermore, I know of no cases in which lower courts have tried to answer that question. Therefore, this is a problem that this court needs to face up to.

And just to make a few observations, it seems to me that *where the line is drawn has very serious implications for the activities of the American labor movement and for the future of that movement*. It appears to me that one would have to be blind to history not to understand that *political activities in a sense are the blood and sinew of the American labor movement*.

In my view, *political activities are germane to collective bargaining in many ways*. I think that when labor sits down at the bargaining table with management, part of each side's bargaining strength is based on its political strength, on the legislation under which it operates, and on its political support in Congress and in State legislatures and in the city councils. This applies, of course, to both labor and management.

...
... In a sense, there is an ecological balance that exists in this country between labor and management. I feel that any case which would have the effect of seriously disturbing that balance ought to be considered with great caution and with great deliberation. In a sense, I feel, that balance has made this country great and strong and prosperous.

... [T]his is where I am thinking of drawing the line. Dissenting employees in an agency fee situation should not be required to support financially union expenditures as follows:

One, for *payments to or on behalf of any candidate for public office in connection with his campaign for election to such public office, or*

Two, for *payments to or on behalf of any political party or organization, or*

Three, for the *holding of any meeting or the printing or distribution of any literature or documents in support of any such candidate or political party or organization.* ...

sector where union and governmental activities are so closely associated.²⁵⁷ Future challenges to the political use of public sector service fees, therefore, should be directed at distinguishing between political uses for collective bargaining purposes and political uses for partisan or ideological purposes.

c. A Union Rebate Procedure in Operation: The AFSCME Plan

The willingness of courts to accept and even to encourage the use of rebate procedures in the public sector makes it essential for public sector unions to develop and adopt such plans. The rebate procedure adopted by the American Federation of State, City, and Municipal Employees provides a useful example of the provisions such plans should include. In addition, the AFSCME plan demonstrates the operation of such a plan.

AFSCME amended its constitution in 1974 to provide for a pro rata rebate from the International and any involved subordinate body to dissenters who timely and properly object to expenditures for partisan political or ideological purposes.²⁵⁸ The plan, available to members and nonmembers who have paid dues or a service fee to the union, provides for review of the amount of the rebate to the Judicial Panel. If an objector is dissatisfied with the decision of the Judicial Panel, a further appeal may be taken as follows: (1) members may appeal to the next International Convention; and (2) nonmembers may appeal to a Review Panel composed of prominent citizens outside of AFSCME.²⁵⁹

Recently, the International Judicial Panel issued its first decision in an appeal under this provision.²⁶⁰ The appeal involved a challenge by ten secretarial employees of the Milwaukee School Board who are nonmember service fee payors to AFSCME Local 1053 and Council 48. The AFSCME International Secretary-Treasurer had developed a method for calculating the rebate, as he is required to do under Article IX, Section 9 of the Constitution, and his formula produced a rebate of 86¢ per dissenter for fiscal year 1974. The plaintiffs challenged the formula and the accuracy of the computation of the rebate for fiscal year 1974.²⁶¹ In its decision, the Judicial Panel approved the method used by the Secretary-Treasurer but found that its application

Now, as to expenditures for other purposes, regardless of their political nature, if that is the proper characterization, I feel that they are sufficiently germane to collective bargaining to require dissenting employees who are subject to union shop or agency fee agreements to bear their share of that burden.

Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 761-62 n.7, 85 L.R.R.M. 2008, 2011 n.7 (C.D. Cal. 1973), *rev'd and remanded on other grounds*, 533 F.2d 1126, 92 L.R.R.M. 2063 (9th Cir. 1976) (emphasis added).

²⁵⁷ See notes and text at notes 206-08 *supra*.

²⁵⁸ AFSCME Internat'l Const. art. IX, § 9.

²⁵⁹ *Id.*

²⁶⁰ Judicial Panel Decision No. 74-30.

²⁶¹ *Id.* at 2-3.

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should have produced an amount increased by 6¢ per dissenter.²⁶² As nonmembers, the plaintiffs exercised their right to appeal to the Independent Review Panel.²⁶³ The Review Panel has not yet issued its decision.²⁶⁴

This example of the AFSCME plan's operation emphasizes the importance of determining what are rebatable, political expenditures in the public sector. If the Review Panel sustains the Judicial Panel, the dissenters will receive a rebate of less than one dollar a year. Those dissenters motivated by particularly strong principles would probably seek rebates regardless of the amount actually returned. Many dissenters, however, would probably feel that a dollar a year does not justify seeking a rebate. Thus, if a court were to uphold the union's allocation between collective bargaining expenses and partisan or ideological expenses, the number of dissenters seeking rebates would be greatly reduced.

CONCLUSION

As more and more jurisdictions enact public sector bargaining laws, those who oppose unionization have focused their attack on the concept of union security and the collection and use of service fees. Courts have rejected these challenges and upheld union security clauses and statutes authorizing such provisions. To protect the rights of the minority without destroying the rights of the majority, some unions have developed and implemented the concept of rebates to dissenters who object specifically to the use of service fees for certain partisan political activities. The right to work forces are financing dissident employee litigation that attacks the operation of union rebate plans by asserting that unions are not accurately computing rebates and by alleging that *all* union expenditures except the direct costs of negotiating and administering the contract for the particular bargaining unit are rebatable.²⁶⁵ However, courts have found that the scope of permissible union expenditures that can be charged to service fee payors is not so narrow. To protect adequately bargaining unit employees—union members and nonmembers alike—public employee unions must be involved in the legislative process and must expend union funds for certain political activities. These activities are not *partisan* political or ideological activities, but are efforts that benefit all bargaining unit employees, that are integral to the process of public sector collective bargaining, and whose costs should be shared by

²⁶² *Id.* at 18.

²⁶³ See text at note 259 *supra*.

²⁶⁴ The Independent Review Panel hearing was held on March 26, 1976.

²⁶⁵ See, e.g., *Ellis v. Brotherhood of Ry. Clerks*, 91 L.R.R.M. 2339, 2342-43 (S.D. Cal. 1976) (private sector; Railway Labor Act); *Ball v. City of Detroit*, Civil No. 159-940 (Wayne County Cir. Ct., Mich. Mar. 31, 1975), *appeal docketed*, No. 25586 (Mich. Ct. App. 1975) (public sector); *Brenn v. Evans*, Civil No. 49998 (Thurston County Super. Ct., Wash. Oct. 8, 1975) (public sector).

members and nonmembers. Thus, if public sector employees are to gain the same degree of freedom as their private counterparts, public sector unions need the financial stability that flows from the enforcement of union security provisions.

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