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UNION SECURITY AGREEMENTS IN PUBLIC EMPLOYMENT

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The number of employees on the public payroll has more than doubled in the past two decades.[1] Public employee union membership has exhibited a commensurate growth record.[2] The recognition by federal and state governments of the right of public employees to bargain collectively has increased correspondingly. Although such uniform national legislation as the 1935 National Labor Relations Act (NLRA)[3] and the Railway Labor Act of 1926 (RLA),[4] which guarantee the right to bargain collectively in the private sector, has no counterpart in the area of public employment, both the federal government and a substantial majority of the states have acted to secure collective bargaining rights for their respective public employees.

At the federal level, Executive Order Number 11,491[5] and the Postal Reorganization Act of 1970[6] guarantee United States employees[7] the right to bargain collectively. Thirty-six states[8] also

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[1] U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 433 (94th ed. 1973).

[2] For a discussion of this growth in public employment and in public employee union membership, as well as a discussion of the development of collective bargaining in the public service, see Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees,* 26 VAND. L. REV. I-8 (1973).

[3] National Labor Relations Act, 29 U.S.C. §§ 141-87 (1970).

[4] Railway Labor Act, 45 U.S.C. §§ 151-63 (1970).

[5] 3 C.F.R. 191 (Comp. 1969), 5 U.S.C. § 7301 (1970), *as amended,* 3 C.F.R. 254 (1974). Executive Order Number 11,491 superseded Executive Order Number 10,988 (3 C.F.R. 521 (Comp. 1959-1963), 5 U.S.C. § 631 (1964)), issued by President John F. Kennedy on January 17, 1962, which first extended the right to bargain collectively to federal employees.

[6] 39 U.S.C. §§ 1201-09 (1970).

[7] Executive Order Number 11,491 applies only to employees in the executive branch of the federal government.

[8] ALA. CODE ANN. tit. 37, § 450(3) (Cum. Supp. 1973) (firemen); ALASKA STAT. § 14.20.560 (1971) (teachers); *id.* § 23.40.070 (1972) (public employees generally); CAL. EDUC. CODE § 13082 (West 1969) (teachers); CAL. GOV'T CODE § 3505 (West Supp. 1974) (municipal employees); *id.* § 3525 (state employees); CAL. LABOR CODE § 1962 (West 1971) (firemen); CAL. PUB. UTIL. CODE § 70120 (West 1973) (transit workers); CONN. GEN. STAT. REV. § 7-468 (1972) (municipal employees); *id.* § 10-153(d) (teachers); DEL. CODE ANN. tit. 2,

have enacted legislation permitting or mandating collective bargaining in the public sector. These laws vary considerably in scope from comprehensive, NLRA-type statutes to statutes which merely authorize collective bargaining by public employees.[9]

For states enacting collective bargaining legislation, the NLRA serves as a useful model.[10] That Act broadly defines the scope of

§ 1613 (Cum. Supp. 1970); *id.* tit. 19, § 802 (transportation workers); *id.* § 1302 (public employees generally); *id.* tit. 14, § 4001 (public school employees); FLA. STAT. ANN. § 447.20-.35 (Supp. 1974) (firemen); *id.* § 839.221 (1965) (public employees); HAWAII REV. STAT. § 89-3 (Supp. 1973) (public employees generally); IDAHO CODE § 44-1802 (Supp. 1973) (firemen); ILL. ANN. STAT. ch. 111 2/3, § 328a (Smith-Hurd 1966) (transit workers); IND. CODE §§ 20-7.5-1-1-7.5-1-14 (Supp. 1974) (teachers); KAN. STAT. ANN. § 72-5414 (1972) (teachers); *id.* § 75-4328 (Supp. 1973) (public employees except teachers); KY. REV. STAT. ANN. § 78.470 (Supp. 1973) (county policemen); *id.* § 345.030 (firemen); LA. REV. STAT. ANN. § 23.890 (Supp. 1973) (transit workers); ME. REV. STAT. ANN. tit. 26, § 965 (1964) (municipal employees); MD. ANN. CODE art. 64B, § 37(b) (1972) (transit workers); *Id.* art. 77, § 160 (Supp. 1973) (teachers); MASS. GEN. LAWS ANN. ch. 150E (Supp. 1973) (all public employees); MICH. STAT. ANN. § 17.455(9) (1968) (public employees); MINN. STAT. ANN. § 179.65 (Supp. 1974) (public employees generally); MO. ANN. STAT. § 105.510 (Vernon Cum. Supp. 1974) (all public employees except police, deputy sheriffs, and teachers); MONT. REV. CODES ANN. § 75-6119 (Supp. 1971) (teachers); *id.* § 59-1604 (Supp. 1974) (all public employees, except public school employees and nurses); NEB. REV. STAT. § 79-1287 (1971) (teachers); NEV. REV. STAT. § 288.150 (1973) (local government employees); N.H. REV. STAT. ANN. § 31:3 (1971) (municipal employees); *id.* § 98-C:2 (Supp. 1973) (state employees); *Id.* § 105-B:3 (Supp. 1973) (policemen); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1974) (all public employees); N.Y. CIV. SERV. LAW § 203 (McKinney 1973) (all public employees); N.D. CENT. CODE § 15-38.1-08 (1971) (teachers); OKLA. STAT. ANN. tit. 11, § 548.4 (Supp. 1973) (firemen, policemen, and municipal employees); *id.* tit. 70, § 509.2 (1972) (teachers); ORE. REV. STAT. § 243.730 (1971) (all public employees except teachers); *id.* § 342.450 (teachers); PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1974) (police and firemen); *id.* § 1101.401 (all public employees except police, firemen, and transit employees); *id.* tit. 53, § 39951 (transit workers); R.I. GEN. LAWS ANN. § 28-9.1-6 (Supp. 1973) (firemen); *id.* § 28-9.2-6 (policemen); *id.* § 28-9.3-4 (1969) (teachers); *id.* § 28-9.4-3 (municipal employees); *id.* § 36-11-1 (Supp. 1973) (state employees); S.D. COMPILED LAWS ANN. § 3-18-2 (Supp. 1973) (all public employees); TEX. REV. CIV. STAT. art. 5154c-1 (Supp. 1974) (firemen and policemen); VT. STAT. ANN. tit. 3, § 903 (Supp. 1974) (state employees); *id.* tit. 16, § 1982 (teachers); *id.* tit. 21, § 1721 (municipal employees); WASH. REV. CODE ANN. § 28A.72.030 (1970) (teachers); *id.* § 41.56.010 (1972) (municipal and state employees); *id.* § 53.18.020 (Supp. 1974) (port district employees); WIS. STAT. ANN. § 66.94(29) (1965) (transit workers); *id.* § 111.70(2) (1974) (municipal employees); *id.* § 111.82 (state employees); WYO. STAT. ANN. § 27-266 (1967) (firemen).

[9] As this author noted in a previous article,

> [s]ome states have a single statute that either authorizes or requires all state public employers to engage in collective bargaining. Other states divide their public employers into categories, such as school boards or fire departments, and by separate legislation authorize or require each different group to engage in collective bargaining. Still other states have enacted single public employer collective bargaining acts that authorize or require only a limited group of public employers to engage in collective bargaining.

Blair, *supra* note 2, at 3 n.17. For a discussion of the various kinds of statutes, see *id.* at 3-5.

[10] *See, e.g.*, CONN. GEN. STAT. REV. § 10-153 (Supp. 1973); MICH. STAT. ANN. § 17.455 (1968); N.Y. CIV. SERV. LAW § 200-14 (McKinney 1973); PA. STAT. ANN. tit. 43, § 1101.401 (Supp. 1974).

negotiable subjects as "wages, hours, and other terms and conditions of employment,"[11] a phrase that has been construed in an expansive manner by both the National Labor Relations Board (NLRB) and the courts in cases dealing with private sector industrial relations.[12] In drafting public employee bargaining laws, state legislatures must, therefore, confront the problem of determining the extent to which these laws should permit—or require—public employees and their employers to bargain collectively over substantially the same subjects now negotiable in the private sector under the NLRA. One of the most important of these subjects is union security. Whether union security should be within the scope of collective bargaining for public employees has been the subject of considerable disagreement.[13]

I

UNION SECURITY

As the phrase has come to be defined in the private sector, "union security" encompasses any agreement between an employer and a union acting as exclusive bargaining agent that requires every employee in the bargaining unit, as a condition of employment, to be a union member or to pay a specified amount to the union for its bargaining services.[14] The five basic forms of union security that have developed over the years in the private sector are the closed shop,[15] the union shop,[16] the agency shop,[17] the mainte-

[11] 29 U.S.C. § 158(d) (1970). Once raised at the bargaining table, subjects within this definition are mandatorily bargainable, which means that the parties must negotiate over them until an impasse is reached. In the private sector, subjects not within this definition are negotiable with the mutual consent of labor and management. *See* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

[12] *E.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); American Smelting & Ref. Co. v. NLRB, 406 F.2d 552 (9th Cir. 1969), *cert. denied*, 395 U.S. 935 (1969); Dolly Madison Indus., 182 N.L.R.B. No. 147, 74 L.R.R.M. 1230 (1970).

[13] *See, e.g.*, Address by D. Silvergleid, President of the National Postal Union, to the Federal Labor Relations Council, Oct. 6, 1970, in 370 GOV'T EMPL. REL. REP. A-6 (Oct. 12, 1970); notes 28 & 161 *infra*.

[14] *See generally* R. SMITH & L. MERRIFIELD, LABOR RELATIONS LAW: CASES AND MATERIALS 974-79 (5th ed. 1974).

[15] In a closed shop, the employer and union agree that the employer will hire only union members and that all employees so hired will remain union members as a condition of employment. *See id.* at 974.

[16] In a union shop, the employer and union agree that all employees must join the union within a prescribed time after their initial hiring and remain union members as a condition of employment. *See id.* at 975.

[17] In an agency shop, the employer and union agree that employees are free to refrain from union membership, but that all nonunion employees must pay to the union an amount equal to union dues and fees as a condition of employment. *See id.*

nance of membership agreement,[18] and the fair share agreement.[19]

In the private sector all forms of union security were mandatorily bargainable under the NLRA until 1947,[20] at which time the Act was amended to prohibit the closed shop[21] because of its numerous abuses by unions.[22] The union shop, agency shop, maintenance of membership agreement, and fair share agreement remain mandatorily bargainable,[23] however, although another amendment introduced into the NLRA in 1947 expressly validates state legislation prohibiting agreements requiring union membership as a condition of employment.[24] Similarly, although the RLA

[18] In a maintenance of membership agreement, the employer and union agree that employees are free to refrain from union membership, but that employees who elect to join the union must retain their union membership until the expiration of the collective agreement, as a condition of employment. *See id.* at 975-76.

[19] In a fair share agreement, the employer and union agree that employees are free to refrain from union membership, but that all employees must pay the union a prorata share of bargaining costs as a condition of employment or that union members must pay union dues and fees, while nonunion members must pay only their prorata share of bargaining costs. *See* ORE. REV. STAT. § 243.650(10) (1973).

[20] In Public Serv. Co. of Colorado, 89 N.L.R.B. 418 (1950), the NLRB indicated that the legislative intent of the Wagner Act was to permit any relationship between employer and employee then allowed under state law—including the closed shop. *See also* Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 307 (1949). Although these decisions were rendered after the NLRA was amended to prohibit the closed shop, they were made on the basis of the unamended Act.

[21] The 1935 version of the NLRA, known as the Wagner Act (ch. 372, 49 Stat. 449 (1935)), stated: "*Provided,* That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein." *Id.* § 8(3). In 1947 Congress enacted the Labor-Management Relations Act, or Taft-Hartley Act (ch. 120, 61 Stat. 136 (1947)), which added the following italicized language to the existing proviso:

> *Provided,* That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later* . . . .

Id. § 8(a)(3), *amending* 29 U.S.C. § 158(a)(3) (1946) (codified at 29 U.S.C. § 158(a)(3) (1970)). In NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Supreme Court construed that added language to forbid the closed shop.

[22] In its report on the amendment, the Senate Committee noted:

> Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons.

S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947).

[23] American Seating Co., 98 N.L.R.B. 800 (1952). *See also* NLRB v. General Motors Corp., 373 U.S. 734 (1963).

[24] Thus,

> [n]othing in this Act 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.

Act of June 23, 1947, ch. 120, § 14(b), 61 Stat. 151, *amending* 29 U.S.C. § 164 (1946) (codified at 29 U.S.C. § 164(b) (1970)).

was amended in 1934 to preclude all forms of union security,[25] a 1951 amendment permits bargaining over the same type of union security provisions that are bargainable under the NLRA.[26] As a result, eighty percent of the collective agreements negotiated today pursuant to the NLRA and RLA contain either a union shop, agency shop, maintenance of membership, or fair share provision.[27]

II

THE MERIT PRINCIPLE ARGUMENT

In spite of the acceptance of the principle of union security in the private sector, various groups vehemently oppose its introduction into the area of public employment.[28] One argument against authorizing bargaining in the public sector over union security devices of the type bargainable under the NLRA and RLA is that conditioning a person's continued employment on union membership or the payment of a sum of money to a union is contrary to the merit principle which now prevails in most governments —federal, state, and local.[29] That is, actual or constructive union membership has no relationship to the employee's successful performance of his job and, therefore, should not be a basis for discharge.

This argument against the propriety of union security devices of the type permitted in the private sector evinces a basic misunderstanding of the merit principle. The phrase "merit principle" is simply a popular description for the general notion underlying legislation, most of which was enacted initially in the early 1900's, requiring positions in a government's appointive service to be filled on the basis of an applicant's ability or "merit" and prohibiting a governmental employer from discharging employees on racial, religious, or political grounds.[30] The merit principle is today

[25] Act of June 21, 1934, ch. 691, § 2, 48 Stat. 1185, *amending* Railway Labor Act, ch. 347, § 2, 44 Stat. 577 (codified at 45 U.S.C. 151(a)-52 (1970)).

[26] Act of Jan. 10, 1951, ch. 1220, § 2, 64 Stat. 1238, *amending* Railway Labor Act § 2, 45 U.S.C. § 152 (1946) (codified at 45 U.S.C. § 152 (1970)).

[27] L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 194 (4th ed. 1964).

[28] *See, e.g.*, Advisory Comm'n on Intergovernmental Relations, *Conclusions and Recommendations on Labor Relations*, 342 GOV'T EMPLOYEE REL. REP., March 30, 1970, at E-1; NATIONAL RIGHT TO WORK COMM., REPORT: A BASIC AND PRECIOUS RIGHT (1973); W. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE (1966).

[29] *See, e.g.*, H. KAPLAN, THE LAW OF THE CIVIL SERVICE 331 (1958); TASK FORCE, REPORT: A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961).

[30] Prior to 1883 job appointments in the public sector generally were made on the basis

merely one component of a larger complex of laws that regulate various aspects of a government's relations with its employees and are enforced by a commission operating independently of the immediate government employer.[31] Those laws and the commission constitute what is frequently referred to as the civil service system of employment.

One important function of the civil service system is the regulation of discharges in order to protect employees from arbitrary action by their employer and to insure that the government does not lose competent employees without adequate justification.[32] But the civil service system has always recognized that employees who are totally competent in their job performance may nevertheless be discharged if the grounds for discharge further a legitimate public policy.[33] Therefore, if a legitimate public policy is served by conditioning continued government

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of patronage, as the recognized reward for loyal service to a victorious political party. *See* Friedrich, *The Rise and Decline of the Spoils Tradition,* 189 AM. ACAD. OF POL. & SOC. SCI. ANNALS 10, 13 (1937). The interest of the people in having only qualified personnel on the public payroll, however, was recognized by statute in 1883 when Congress passed the Pendleton Act (Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (codified in scattered sections of 5 U.S.C.)), which required that appointive positions in the federal service, with certain exceptions, be filled on the basis of an applicant's ability or merit, measured by open, competitive examinations. 5 U.S.C. § 3304 (1970). The Act also established the Civil Service Commission, which is charged with overseeing the implementation of the Act's provisions. *Id.* § 1101.

Since the passage of the Pendleton Act, 31 states and most municipalities have enacted similar laws, adopting what is now popularly described as the merit principle. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 176-79 (1952). Most of those state and local merit laws, however, as well as the federal Pendleton Act, exempt a myriad of governmental appointive positions from the operation of the merit principle. *See, e.g.,* 5 U.S.C. §§ 3302, 3324 (1970). The reasons for exempting certain positions from a merit requirement may be purely political in nature, although more frequently they stem from a belief that the abilities necessary for the adequate performance of some jobs cannot be measured by examinations or that some jobs require no special skills for their adequate performance.

[31] Civil Service Commission members are ordinarily appointed by a government's chief executive officer. Most commissions have either four or six members, only half of whom can be from the same political party. A. SAGESER, FIRST TWO DECADES OF THE PENDLETON ACT—A STUDY OF CIVIL SERVICE REFORM (1935).

[32] For discussion of the functions of civil service commissions, see W. CARPENTER, THE UNFINISHED BUSINESS OF CIVIL SERVICE REFORM (1952); COMM'N OF INQUIRY ON PUBLIC SERVICE PERSONNEL, PROBLEMS OF THE AMERICAN PUBLIC SERVICE (1935); A. SAGESER, *supra* note 31; Kaplan, *Civil Service Seventy-Five Years,* 47 NAT'L MUN. REV. 220 (1958).

[33] *See, e.g.,* N.Y. CIV. SERV. LAW § 50(4)(d) (McKinney Supp. 1974). That statute provides for the discharge of civil service employees for the conviction of any crime, even though the particular crime does not affect job performance. Other civil service acts require municipal employees to reside within the city for which they work as a condition of continued employment, although residency does not affect job performance. *See, e.g.,* MASS. ANN. LAWS ch. 31, § 48A (1973). It should be noted, however, that laws prohibiting civil service employment of convicts have encountered constitutional challenges recently. *See, e.g.,* Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974).

employment on union membership or on the payment of a bargaining fee to the union, union security devices are not contrary to the merit principle or civil service system.

Moreover, the same reasons that justify legislation authorizing agreements between unions and private employers for the discharge of employees who fail to contribute at least some money to the support of their bargaining agent apply equally well where a government employer is involved. These reasons are two-fold. First, under the predominant type of state public employee bargaining legislation,[34] as well as under the NLRA and RLA,[35] a union selected as bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit —union and nonunion alike—in a nondiscriminatory manner. Unless the employees in the unit who remain nonunion can be compelled to contribute to the costs of union representation, which may be considerable, the nonunion employees will enjoy the benefits of the bargaining process while union members are forced to assume the entire burden of paying for it.[36] Second, since the union members in a bargaining unit may be unable to finance adequately the negotiation and administration of a collective bargaining agreement without some monetary contribution from the nonunionists, the resulting financial instability of the duly-elected bargaining agent may jeopardize meaningful collective bargaining by encouraging the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support. This instability also encourages the employer to be obstinate, in hopes of forcing a favorable agreement from a weak union.

The desire to encourage financial stability in unions acting as exclusive bargaining agents, coupled with the desire to eliminate the patent unfairness that exists when a union is required by law to represent nonunion employees without any remuneration, led to the NLRA and RLA provisions authorizing bargaining over union security devices in the private sector.[37] These same policies are

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[34] *See* CONN. GEN. STAT. REV. § 7-468(b), (c) (1972); HAWAII REV. STAT. § 89-8 (Supp. 1973); MICH. STAT. ANN. § 17.455(11) (1968); N.J. STAT. ANN. § 34:13-A-5.3 (Supp. 1974).

[35] 29 U.S.C. § 159(a) (1970); 45 U.S.C. § 152 (1970). For a recognition of the duty of fair representation under the NLRA, see Syres v. Oil Workers, Local 23, 350 U.S. 892 (1955). *See also* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (recognition of that duty under RLA).

[36] The classic denunciation of such "free-riders" has been made on several occasions by Samuel Gompers. *See, e.g.*, Gompers, *Talks on Labor*, 12 AM. FEDERATIONIST 221, 222 (1905).

[37] 96 CONG. REC. 16,279 (1950) (remarks of Senator Hill); S. REP. No. 105, 80th Cong.,

equally applicable in public employment, where laws require a union selected by the majority of workers in an appropriate unit to represent all employees in the unit regardless of their union affiliation. At the least, these policies support legislative authorization of bargaining over union security devices that require all public employees in the unit to bear their fair share of bargaining expenses, in what is termed a "fair share agreement."

In the private sector, the NLRA and RLA, however, authorize more than fair share agreements. Under these acts the parties may negotiate "agency shops," which require all nonunion employees in the bargaining unit to pay a sum of money equivalent to union dues, fees, and assessments as a condition of employment, even though that sum may be more than the employee's fair share of bargaining costs.[38] The NLRA and RLA also permit union shops, which require all employees in the unit to become union members, and maintenance of membership agreements, which require employees who elect to become union members to retain their union membership until expiration of the collective bargaining agreement.[39] As is the case with the agency shop, under the union shop and maintenance of membership agreement an employer cannot discharge an employee other than for his failure to pay union dues, fees, and assessments.[40] Because enforceable membership obligations of the union shop and maintenance of membership agreement are limited by the NLRA and RLA to the payment of union dues, fees, and assessments, the union shop, maintenance of membership agreement, and agency shop have become the practical equivalent of one another in the private sector.[41]

III

First, Fifth, and Fourteenth Amendment Considerations

The opponents of public sector union security arrangements increase in both vociferousness and number when that phrase is

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1st Sess. 6-7 (1947). As Senator Hill put it, "[t]he question . . . is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions." 96 Cong. Rec. 16,279 (1950).

[38] 29 U.S.C. § 158(a)(3) (1970); 45 U.S.C. § 152 (1970).

[39] 29 U.S.C. § 158(a)(3) (1970); 45 U.S.C. § 152 (1970).

[40] Under the NLRA (29 U.S.C. § 158(a)(3) (1970)), the enforceable obligations of union membership do not include the payment of assessments, but instead are limited to the payment of "periodic dues and the initiation fees." Under the RLA (45 U.S.C. § 152 (1970)), the enforceable obligations of union membership are limited to the payment of "periodic dues, initiation fees, and assessments (not including fines and penalties)."

[41] *See* NLRB v. General Motors Corp., 373 U.S. 734, 741 (1963); Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 99 (1963).

not limited to the fair share agreement, but, instead, is expanded to encompass the union shop, agency shop, and maintenance of membership agreement approved for the private sector by the NLRA and RLA. That same opposition also surfaces periodically in the private sector in spite of the long entrenchment of those agreements.[42] One reason for the continuing opposition in the private sector and the attempt to prevent the expansion of union security devices into public employment is the possibility that union shop, agency shop, and maintenance of membership agreements may infringe an objecting employee's freedom of speech and association as protected by the first and fourteenth amendments to the United States Constitution, and deprive him of his right to work as protected by the due process clauses of the fifth and fourteenth amendments. Indeed, even the more limited fair share agreement has been opposed on these grounds.[43]

The constitutionality of union security devices was first examined by the United States Supreme Court in *Railway Employees' Department v. Hanson.*[44] After finding that union security agreements negotiated pursuant to congressional authorization in the RLA involved the requisite governmental action for invoking the tenets of the Constitution,[45] the Court sustained those agreements against attacks leveled under the first and fifth amendments. It held that a union shop agreement negotiated under the RLA, which limits the enforceable obligations of union membership to the payment of "dues, initiation fees and assessments,"[46] on its face neither deprived objecting employees of their right to work as protected by the due process clause of the fifth amendment, nor infringed their right of free speech or freedom of association as guaranteed by the first amendment. The Court, however, carefully limited its holding, stating:

> [I]f the exaction of union dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. . . . We only hold that the requirement for financial support of the collective-bargaining

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[42] *See, e.g.,* NATIONAL RIGHT TO WORK COMM., REPORT, *supra* note 28.

[43] *Id.*

[44] 351 U.S. 225 (1956) (nonunion employee challenge of union shop agreement on first and fifth amendment grounds).

[45] The Court found the enactment of the federal statute authorizing union shop agreements to constitute "the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Id.* at 232.

[46] 45 U.S.C. § 152 (1970).

> agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments.[47]

The Court also noted that the "financial support" which it found to be constitutionally unobjectionable in *Hanson* "relates . . . to the work of the union in the realm of collective bargaining."[48] Hence, in *Hanson,* the Court gave its approval to union security devices under which the only enforceable obligation of union membership is the payment of union dues, fees, and assessments and under which all sums collected are utilized to defray the costs of collective bargaining.

Under union shop, agency shop, and maintenance of membership agreements, however, sums collected from employees are often in excess of what is necessary to defray the costs of collective bargaining, with the additional moneys being utilized to further other union activities. Those union activities are often political in nature, such as lobbying for legislative programs and supporting candidates for elective offices, or they may be nonpolitical in nature, but unrelated to the collective bargaining process, such as contributions to employee sick funds.[49] Indeed, it is only the fair share agreement that limits employees' payments to their union to the exact amount necessary to cover the costs of collective bargaining, with each employee paying his fair share of these costs.[50]

The constitutional permissibility of using moneys collected under union security agreements to support political causes which are contrary to the views of dissenting employees was questioned in *International Association of Machinists v. Street.*[51] In *Street,* the employees alleged before a Georgia trial court that the money each was forced to pay under a union shop agreement negotiated pursuant to the RLA was used in substantial part to support political campaigns, economic ideologies, and legislative programs opposed by them. The trial court found that the various political expenditures made by the union were not germane to the collective bargaining process and that the enforcement of the union shop agreement violated the United States Constitution to the extent the funds exacted from employees under the agreement were used to finance

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[47] 351 U.S. at 238.

[48] *Id.* at 235.

[49] For a discussion of the types of activities that unions might finance through union dues and fees, see Hopfl, *The Agency Shop Question,* 49 CORNELL L.Q. 478, 480 (1964).

[50] This limitation is inherent in the definition of a fair share agreement. *See* note 19 *supra.*

[51] 367 U.S. 740 (1961).

political activities opposed to the views of the dissenting employees. The Supreme Court of Georgia affirmed.[52]

On appeal, the majority of the United States Supreme Court circumvented all federal constitutional issues by construing the relevant section of the RLA[53] "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[54] Four Justices, however, refused to ignore the first amendment implications of the challenged expenditures. Justice Frankfurter, whom Justice Harlan joined in a dissenting opinion, found that the first amendment rights of objecting employees are not infringed by a union's expending funds collected under a union security agreement to finance political activities.[55] Justice Black reached a contrary conclusion in his dissenting opinion, agreeing with the minority employees that such use of "extorted" funds was contrary to the dictates of the first amendment.[56] Justice Douglas, although concurring in the majority opinion, adopted the same reasoning as Justice Black on the first amendment implications of the challenged expenditures.[57]

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[52] 215 Ga. 27, 108 S.E.2d 796 (1959).

[53] 45 U.S.C. § 152 (1970); *see* note 58 *infra.*

[54] 367 U.S. at 768-69.

[55] According to Justice Frankfurter,

> [t]he gist of the complaint here is that the expenditure of a portion of mandatory funds for political objectives denies free speech—the right to speak or to remain silent—to members who oppose, against the constituted authority of union desires, this use of their union dues. No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.

Id. at 806 (dissenting opinion).

[56] There can be no doubt that the federally sanctioned union-shop contract here, as it actually works, takes a part of the earnings of some men and turns it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law. This injects federal compulsion into the political and ideological processes, a result which I have supposed everyone would agree the First Amendment was particularly intended to prevent. And it makes no difference if, as is urged, political and legislative activities are helpful adjuncts of collective bargaining. . . .

> [T]he First Amendment bars use of dues extorted from an employee by law for the promotion of causes, doctrines and laws that unions generally favor to help the unions, as well as any other political purposes.

Id. at 789-91 (dissenting opinion).

[57] *Id.* at 775-79.

> This means that membership in a group cannot be conditioned on the individual's acceptance of the group's philosophy. Otherwise, First Amendment rights are required to be exchanged for the group's attitude, philosophy, or politics. I do not see how that is permissible under the Constitution. Since neither Congress nor the state legislatures can abridge those rights, they cannot grant the power to

It is unlikely that the first amendment issues raised by political expenditures of forced contributions under union security agreements will be resolved in the private sector. The issue under the RLA has been mooted by *Street,* and the NLRA, which governs most other private employees, contains language authorizing union security agreements that is almost identical to that of the RLA.[58] Since the Supreme Court interpreted the RLA as prohibiting political expenditures, thereby avoiding all first amendment questions, it would be almost certain to place a similar interpretation on that language in the NLRA.[59]

The first amendment problems created by political expenditures from funds collected under union security agreements cannot be avoided in the public sector, however, because of the lack of federal legislation susceptible of an interpretation like that placed on the RLA by the Supreme Court in *Street,* and because so many of these agreements are now being negotiated covering public employees.[60] If the Court were to adopt the Black-Douglas view that the first amendment bars the use of funds obtained under union security agreements to support political activities, over an employee's objection, the negative impact on the collective bargaining process would be far greater where public employee unions are involved than it would be in the case of private employee unions.[61]

In the private sector, the primary determinant of whether a union will attain its demands on conditions of employment is the willingness of management to make concessions, and not prior political decisions made by legislators and executive officials outside the collective bargaining process. Instead, legislation and ex-

private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly.

Id. at 777 (concurring opinion).

[58] 29 U.S.C. § 158(a)(3) (1970). Like the RLA, the NLRA forbids discrimination against a nonunion employee if membership was not available to that employee on the same terms as to other employees, or membership has been denied that employee on grounds other than nonpayment of dues. *See* 29 U.S.C. § 158(a)(3) (1970); 45 U.S.C. § 152 (1970).

[59] The Ninth Circuit Court of Appeals construed the NLRA in precisely this fashion in Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1000, 1003-04 (9th Cir. 1970). *Accord,* Reid v. McDonnell Douglas Corp., 443 F.2d 408, 411 (10th Cir. 1971).

[60] In 1972, for example, the Michigan Education Association reported that it had agency shop clauses in about one-half of its 530 contracts with local school boards. 512 GOV'T EMPLOYEE REL. REP., July 16, 1973, at B-1.

[61] Public employees at the federal level are already subject to certain legal restraints on their political activities under the Hatch Act (5 U.S.C. § 7324 (1970)), which provides that an employee of an executive agency may not: "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or (2) take an active part in political management or in political campaigns." *Id.*

ecutive decisions generally regulate only the manner in which collective bargaining must be conducted and rarely have any direct impact on the terms finally included in a collective agreement. In contrast, in the public sector unions are forced to bargain with employers who are themselves public officials and who are designated under public employment bargaining laws to represent the government in the collective bargaining process. Generally the public officials so designated are the heads of various government agencies.[62] Under some state public employment bargaining laws, agency heads actually have the authority to negotiate binding collective bargaining agreements covering the employees in their respective agencies.[63] Nevertheless, the terms of these collective agreements are directly affected by prior "political" decisions, such as the approval of an agency budget or the allocation of tax moneys, made by the government's legislative body or by its chief executive official outside the collective bargaining process.[64] If the first amendment is construed to prohibit public employee unions from expending, over an employee's objection, money collected under union security agreements to finance lobbying and other similar activities aimed at promoting decisions on such "political" matters favorable to their bargaining demands, the unions' ability to achieve their demands when collective bargaining actually occurs would be severely limited.

Further, under some public employment bargaining laws, the officials who represent the government in collective bargaining do not possess the authority to conclude binding collective bargaining agreements. Instead, the collective agreements negotiated by those officials with the relevant unions are only tentative in nature and must subsequently be presented to the government's legislative body for its final approval or rejection.[65] Although lobbying a legislative body traditionally has been deemed to be a purely political activity, in this instance lobbying is not only germane to the collective bargaining process, but it is also an integral part of it. Indeed, if "political" is defined as "pertaining to . . . the conduct of

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[62] *See, e.g.*, DEL. CODE ANN. tit. 19, § 1309 (Supp. 1970); R.I. GEN. LAWS ANN. § 28-9.1-5 (Supp. 1973).

[63] *See* statutes cited note 62 *supra*.

[64] For an analysis of the relationship between governmental budget-making and the collective bargaining process, see Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1172-76 (1974).

[65] *See, e.g.*, KAN. STAT. ANN. § 75-4330 (Supp. 1973); WIS. STAT. ANN. § 111.81(16) (1974).

government,"[66] the entire collective bargaining process in the public sector is political in nature, since its outcome will determine the relationship of a government to its employees and, at least where financial matters are negotiated, will likely determine the funds that will be available for all other governmental programs. Hence, under the Black-Douglas view that the first amendment bars the use of funds obtained under union security agreements to finance political activities despite an employee's objection, union security agreements would automatically be unconstitutional in the public sector, since the primary purpose of a union security agreement is to force objecting employees to contribute to the costs of collective bargaining—a political activity.

Yet it is exceedingly unlikely that such a result was ever foreseen by Black or Douglas. Implicit in *Hanson,* a decision written by Douglas, was a recognition of the societal interests in furthering collective bargaining and the need for devices to finance it adequately.[67] The courts are almost certain to continue to recognize that need where public employees are involved. The possible first amendment problems created by union security devices, therefore, cannot be resolved through the political expenditure-collective bargaining expenditure dichotomy suggested by Black and Douglas, because political overtones permeate the entire bargaining process in the public sector. Instead, when the activities of a union are absolutely essential to meaningful collective bargaining in the public sector, a court is likely to sustain against constitutional attack the financing of these activities through compulsory union dues notwithstanding the political overtones, just as the Supreme Court, in *Hanson,* upheld the use of compulsory dues to defray the costs of collective bargaining in the private sector.

On the other hand, even in the public sector certain types of activities carried on by unions are so traditionally and purely political in nature and so tangentially related to the collective bargaining process that the financing of these activities through compulsory union dues should be viewed as an infringement of first amendment rights. These activities would include campaign contributions and the support of legislative programs that are not an integral part of the collective bargaining process. For a government, which is an actual party to a union security agreement in the public sector, to extract funds from its employees to be used by unions for such purposes runs counter to one of the basic tenets of

[66] WEBSTER'S NEW INTERNATIONAL DICTIONARY 1909 (2d ed. 1934).

[67] 351 U.S. at 233-34.

the first amendment—that an individual is free to speak or not to speak on matters that are purely political in nature. To respond, as Justice Frankfurter did in his dissent in *Street,* that a union security agreement does not prevent one from asserting his own ideas[68] ignores the fact that by forcing one to contribute financial support to political views contrary to his own, such an agreement compels one to speak on political issues.

The Supreme Court has never discussed the constitutionality of union security agreements that condition initial or continuing employment on full union membership, which would entail not only payment of union dues and fees, but also adherence to other union rules governing employee conduct with respect to management and the union organization itself.[69] Union security agreements of that type, which include the closed shop, true union shop, and maintenance of membership agreement,[70] on their face raise serious freedom of association questions under the first amendment. Since those agreements are now invalid under the NLRA and RLA,[71] which govern most private sector employees, any dispute over their constitutionality is likely to arise in the public sector under recently enacted public employment bargaining laws. As already noted, the first amendment problems are magnified in the public sector because a government agency is an actual party to the agreement.

When a person's ability to obtain or retain employment is conditioned on his assuming the full obligations of union membership, his freedom to associate or not to associate with whom he chooses is obviously impaired. That impairment may not violate the right to freedom of association as guaranteed by the first

[68] *See* note 55 *supra.*

[69] One common union rule requires all members to attend regularly scheduled union meetings. Another requires all members to participate in strikes that are authorized by the majority of union members. Strikes by public employees, however, are illegal at the federal level and in all states except Hawaii, Pennsylvania, and Vermont, which recognize a limited right to strike by public employees when the strike will not endanger the public health or safety. *See* HAWAII REV. STAT. § 89-12 (Supp. 1973); PA. STAT. tit. 43, § 1101.1003 (Supp. 1974); VT. STAT. ANN. tit. 21, § 1730(3) (Supp. 1974). For a general discussion of union rules and discipline, see Summers, *Legal Limitations on Union Discipline,* 64 HARV. L. REV. 1049 (1951).

[70] In either a true union shop or a maintenance of membership agreement, the membership requirement upon which employment is conditioned is actual union membership, with its full obligations. In the union shop and maintenance of membership agreement authorized under the NLRA, the obligations of union membership upon which employment may be conditioned are expressly limited to the payment of union dues and fees (29 U.S.C. § 158(a)(3) (1970)), and under the RLA to the payment of union dues, fees, and assessments. 45 U.S.C. § 152 (1970); *see* note 40 *supra.*

[71] 29 U.S.C. § 158(a)(3) (1970); 45 U.S.C. § 152 (1970).

amendment, however, if there is a compelling state interest to justify it.[72]

One possible justification for closed shop, union shop, and maintenance of membership agreements is that by requiring all employees in the bargaining unit to abide by union rules as a condition of employment, the union can exert extensive control over employee conduct during the bargaining process. Such control can be used to ensure that bargaining demands authorized by a majority of employees in the bargaining unit will be supported by all employees in the unit, thereby contributing to a union's negotiating strength. That strength is essential to meaningful participation by employees in collective bargaining, a societal interest recognized by the Supreme Court in *Hanson.*[73] When organized labor was in its infancy, the societal interest in encouraging the development of strong unions to facilitate meaningful collective bargaining may have been sufficiently compelling to justify state action forcing objecting employees to become full participating members in majority unions. Today, however, unions are potent forces at the bargaining table in both the public and private sectors.[74] In fact, most of the unions representing public employees are large, well-established private sector unions that have assumed representation in the public sector.[75] Hence, the state interest in encouraging the development of strong unions can no longer be deemed sufficiently compelling[76] to justify the impairment of the right to freedom of association that necessarily results from closed shop, union shop, and maintenance of membership agreements.

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[72] The Supreme Court, on occasion, has sustained serious invasions of first amendment rights when the competing state interest was sufficiently compelling. For an analysis of the Supreme Court decisions that balance the claims of individuals under the first amendment against the claims of the community, see Brett, *Free Speech, Supreme-Court Style: A View from Overseas,* 46 TEXAS L. REV. 668, 672-77 (1968); Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963); Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962).

[73] Railway Employee's Dep't v. Hanson, 351 U.S. 225 (1956).

[74] *See* S. REP. No. 187, 86th Cong., 1st Sess. 5-6 (1959). The Senate Committee on Labor and Public Welfare declared that

> [a] strong independent labor movement is a vital part of American institutions . . . . The problems of this now large and relatively strong institution are not unlike the difficulties faced by other groups in American society which aspire to live by the same basic principles and values within their group as they hold ideal for the whole community.

Id.

[75] *See* J. STIEBER, PUBLIC EMPLOYEE UNIONISM: STRUCTURE, GROWTH, POLICY 3-6 (1973).

[76] For an examination of the types of state interests that have been deemed sufficiently compelling to justify serious impairments in first amendment rights, see Emerson, *supra* note 72, at 928-49; Frantz, *supra* note 72, at 1426-27, 1429.

Private sector experience with the closed shop, union shop, and maintenance of membership agreement also suggests that these agreements should not be authorized in the public sector even if they do not violate the first amendment. Union abuses of such agreements under the NLRA were so invidious that a 1947 amendment outlawed the closed shop and limited the enforceable obligations of union membership under the union shop and maintenance of membership agreement to the payment of union dues and fees.[77] It is likely that the same abuses would occur in the public sector if these agreements were permitted.

IV

THE IMPAIRMENT OF CONTRACTS CLAUSE

Union security agreements of the type permitted in the private sector raise an additional issue of federal constitutional significance when applied to tenured public school teachers. Thirty-seven states now have teacher tenure laws which prohibit state agencies and local school boards from discharging teachers who have fulfilled the requirements for tenure set forth in these laws, except for causes specifically enumerated.[78] Some of these state tenure laws could be, and have been, construed to give teachers meeting the requirements for tenure a contractual right to continued employment that can be terminated only for the causes expressly stated in the law at the time the tenure contract was created.[79] A state legislature may be unable to amend that type of tenure law to authorize discharge for failure to abide by a union security agreement because tenured teachers whose contracts were in existence prior to the passage of any such amendment may be protected from discharge by the impairment of contracts clause of the United States Constitution.[80]

Certainly the enforcement of a union security agreement would impair the contract rights of teachers whose tenure contracts arose prior to legislative authorization of union security. The issue,

[77] Labor-Management Relations Act (Taft-Hartley Act), ch. 120, § 101, 61 Stat. 140 (1947), *amending* 29 U.S.C. § 158(a)(3) (1946) (codified at 29 U.S.C. § 158(a)(3) (1970)). The Railway Labor Act (45 U.S.C. § 152 (1970)) imposes a similar limitation on union security devices.

[78] M. MOSKOW, TEACHERS AND UNIONS 77 (1966).

[79] *See, e.g.,* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938); text beginning at note 86 *infra*.

[80] U.S. CONST. art. 1, § 10. That provision forbids any state to "pass any . . . Law impairing the Obligation of Contracts."

however, of whether that impairment is significant enough to contravene the contract clause requires an examination of the cases construing this clause.

One of the most significant cases involving the contract clause since the turn of the century is *Home Building & Loan Association v. Blaisdell.*[81] At issue in *Blaisdell* was the Minnesota Mortgage Moratorium Law[82] enacted during the Depression. The law authorized state courts to postpone real property foreclosure sales and to extend the period of redemption from foreclosure "for such additional time as the court may deem just and equitable," but in no event beyond May 31, 1935.[83] In upholding the Moratorium Law against an attack under the contract clause, the Court relied on three factors: (*1*) the law was an appropriate exercise of the state's police power; (*2*) it only temporarily impaired contract rights; and (*3*) it was a reasonable attempt by the legislature to alleviate an extreme economic emergency. The Court stated: "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved [police] power of the State to protect the vital interests of the community."[84]

If, applying the *Blaisdell* analysis, a contractual impairment is valid only when it results from a reasonable attempt by state officials to alleviate an emergency and only if the impairment is temporary, then the impairment of tenure contracts through the enforcement of union security agreements would violate the contract clause. Clearly, any impairment of a tenure contract that results from the enforcement of a union security agreement would be permanent.[85] Moreover, it is difficult to envision any type of state emergency that would reasonably require legislative authorization of union security agreements.

In *Indiana ex rel. Anderson v. Brand,*[86] however, the Supreme Court suggested in dictum that a less stringent standard is applicable in assessing the constitutionality of contractual impairments under the contract clause. That decision, rendered four years after *Blaisdell,* involved the impairment of a teacher tenure contract under the Indiana Tenure Act.[87] Adopted in 1927, that Act

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[81] 290 U.S. 398 (1934).

[82] Ch. 339, [1933] Minn. Laws 514.

[83] *Id.* part 1, § 4.

[84] 290 U.S. at 444.

[85] Since the enforcement of the union security agreements would result in *discharge* of the employee, the impairment of rights would certainly be permanent.

[86] 303 U.S. 95 (1938).

[87] Ch. 97, §§ 1-6 [1927] Ind. Acts. 259.

provided that teachers who served under contract for five or more successive years and thereafter entered into a contract for further services with the same school system would become permanent teachers. The Act further provided that if a contract of a permanent teacher expired, it would nevertheless be deemed to continue in effect until a new contract was negotiated or until cancelled for any of the reasons specified in the Tenure Act. The Tenure Act permitted cancellation of a permanent contract for "incompetency, insubordination . . . neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause . . . ."[88] Subsequently, the Indiana Legislature deleted the section of the Tenure Act that protected teachers in township school districts. The plaintiff in *Brand,* a teacher in a township school, had attained permanent status before the Tenure Act was amended, but was threatened with discharge after the amendment on grounds not mentioned in the 1927 Act.[89]

The Supreme Court, in examining the Tenure Act, found that the word "contract" appeared twenty-five times and that the tenor of the Act as a whole indicated this word was used in its normal legal sense. The Court concluded that, although state legislatures are normally free to repeal or amend their own statutes at any time, the Indiana Tenure Act contained provisions which, when acted upon by teachers, became a permanent contract between the teachers and the state within the protection of the impairment of contracts clause of the Constitution. Thus, plaintiff could be discharged only on the grounds stated in the Act at the time she met its requirements for tenure.[90]

The Court noted by way of dicta, however, that every contract is made subject to the implied condition that its fulfillment "may be frustrated by a proper exercise of the police power" and that "in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end."[91] Although the Court found that state action designed to aid in the efficient administration of public schools is a proper exercise of the police power, it nevertheless ruled that the amendment of the Tenure Act, which had the effect of authorizing discharges on grounds other than those specified in the original Act, was not a valid exercise of the police

[88] *Id.* § 2.
[89] 303 U.S. at 97; *id.* at 110 (Black, J., dissenting).
[90] 303 U.S. at 106.
[91] *Id.* at 109.

power. The Court reached that conclusion on the basis of the provision in the earlier Act permitting discharge for "good and just cause."[92] The Court reasoned that every valid public purpose which conceivably could be furthered by discharging tenured teachers was covered by this language. Hence, any amendment of the Act that permitted discharge on other grounds could not be an "exercise of the police power for the attainment of ends to which its exercise may properly be directed."[93]

Under the reasoning implicit in *Brand,* union security devices would be permissible even though their enforcement permanently impaired tenure contracts and even though no emergency existed, provided they were deemed a proper exercise of the state police power. Moreover, legislative authorization of union security in public employment is likely to be viewed as an appropriate exercise of the state police power. Although earlier decisions construed the police power to be limited to the protection of the public health, safety, and morals,[94] today the police power concept has been expanded to encompass also the general welfare.[95] The phrase "general welfare" includes every state action with almost any conceivable public purpose[96] and, as the Court stated in *Brand,* includes action designed to facilitate the efficient administration of public schools.

Union security agreements should be deemed appropriate state action to further the efficient administration of public schools in light of the Supreme Court's decision in *Railway Employees' Department v. Hanson.*[97] In *Hanson,* the Court held that congressional authorization of union shops for railroad employees was appropriate action under the commerce clause to promote industrial peace along the arteries of interstate commerce.[98] Similar reasoning supports the conclusion that state authorization of union

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[92] Ch. 97, § 2, [1927] Ind. Acts 259; *see* 303 U.S. at 103.

[93] 303 U.S. at 109.

[94] *See, e.g.,* Lawton v. Steele, 152 U.S. 133, 136 (1894); Barbier v. Connolly, 113 U.S. 27, 31 (1885); Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Hannibal & St. Joseph R.R. v. Husen, 95 U.S. 465, 471 (1878).

[95] *See, e.g.,* Berman v. Parker, 348 U.S. 26, 32 (1954); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952). In *Berman,* the Court noted that "[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power . . . . Yet they merely *illustrate* the scope of the power and do not delimit it." 348 U.S. at 32 (emphasis added).

[96] 3 R. POUND, JURISPRUDENCE 296, 305, 311, 315 (1959); B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE RIGHTS OF PROPERTY 42-44 (1965).

[97] 351 U.S. 225 (1956); *see* notes 47-49 and accompanying text *supra.*

[98] 351 U.S. at 233; *see* note 45 *supra.*

security agreements for teachers would promote peace in public schools, thereby qualifying as an appropriate exercise of the state police power facilitating the efficient administration of public schools.

Thus the *Blaisdell* restriction on the impairment of contracts, as modified by *Brand,* would permit the enforcement of union security agreements against teachers whose tenure contracts arose prior to legislative authorization of union security. A more recent Supreme Court decision, however, indicates that although the state can exercise its police power to permanently impair contract rights in the absence of an emergency, there are restrictions on such an exercise of the police power which were not stated in *Brand.*

In *City of El Paso v. Simmons,*[99] the Court, relying on *Blaisdell,* permitted Texas to modify permanently its own obligations under a contract to sell public land. At an early date, Texas had enacted a law authorizing the sale of public land on long term contracts for a small down payment of the principal and an annual payment of principal and interest.[100] Under that law, the purchaser or his vendees could reinstate the purchaser's rights to the land after a forfeiture for nonpayment of interest, by paying the delinquent interest at any future time if no rights of third parties had intervened. Subsequently, Texas amended the law to restrict the right of reinstatement to the last purchaser from the state or his vendees[101] and to require that this right be exercised within five years from the date of forfeiture.[102]

In upholding the amended statute against a challenge leveled under the contract clause, the Court emphasized the state's interest in restoring confidence in the stability of land titles that the earlier law had undermined. It also found that "the promise of reinstatement . . . was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking."[103] The Court did not suggest, however, that the public lack of confidence in land titles had risen to the level of an emergency, as it had with respect to mortgages in *Blaisdell.* Instead, the Court merely noted that the state had a vital interest in the efficient administration of public lands and in the stability of land titles that the amended statute was attempting to effectuate. Thus, under *El Paso,* a state can perma-

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[99] 379 U.S. 497 (1965).

[100] Ch. 47, § 11, [1895] Tex. Gen. Laws; ch. 129, art. 4218f, [1897] Tex. Gen. Laws.

[101] Ch. 59, § 2, [1951] Tex. Gen. & Spec. Laws.

[102] Ch. 191, § 3, [1941] Tex. Gen. & Spec. Laws.

[103] 379 U.S. at 514.

nently impair contract rights through any valid exercise of police power, even though this exercise is not directed at alleviating an emergency, subject to the qualification not stated in *Brand* that the impairment does not involve a central undertaking of the contract.

One of the state's central undertakings in a tenure contract, or in any employment contract, is its commitment not to terminate employment except on the grounds stated in the contract. Hence, the enforcement of a union security agreement against teachers whose preexisting contracts did not provide for discharge on that ground would seem to contravene a central undertaking of their employment contracts. It follows, therefore, that even under the reasoning of *El Paso,* union security agreements may violate the contract clause when they are enforced against teachers whose tenure contracts came into existence prior to legislative authorization of union security.

In *Ohlson v. Phillips,*[104] however, a three judge district court construed the *El Paso* decision to permit the discharge of tenured teachers and other teachers under contract with the state of Colorado on grounds not mentioned in their employment contracts. Colorado had enacted a law prescribing loyalty oaths for all teachers in public schools,[105] including those teachers already under contract with the state. Teachers who refused to subscribe to the oath were to be discharged.

In upholding the law against a challenge that it impaired preexisting contract rights, the court, citing *El Paso,* reasoned that a contractual impairment is not unconstitutional if insubstantial when balanced against a legitimate state interest. Without further analysis, the court concluded that any impairment of the teachers' employment contracts resulting from the loyalty oath law was insubstantial when balanced against the legitimate state interest in the loyalty of teachers.[106]

It is difficult to perceive on what basis the court could conclude that discharging teachers on grounds not stated in their employment contracts is an "insubstantial" impairment of their contract rights. Discharging employees on grounds other than those set forth in their employment contracts would appear to be a serious infringement. Such an infringement is clearly distinguishable from one that merely limits the time in which contractual rights must be asserted and the number of persons who may assert those rights, as was the case in *El Paso.*

[104] 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.,* 397 U.S. 317 (1970).

[105] COLO. REV. STAT. ANN. §§ 123-17-6, -17-7, -17-8 (1964).

[106] 304 F. Supp. at 1156.

Further, in *El Paso,* the Supreme Court, in ruling on the constitutionality of the contractual impairment before it, did not purport to balance the substantiality of the contractual impairment against the state interest involved,[107] as the three judge district court did in *Ohlson.* If the *El Paso* decision is read in conjunction with *Blaisdell* and *Brand,* however, a balancing test may be appropriate. It is possible to construe the three cases to mean that the state may impair minor contractual undertakings through any proper exercise of its police power, but that impairments in the central undertakings of contracts are valid only when they result from an exercise of the state police power reasonably directed at alleviating an emergency.[108] Under this analysis, the constitutionality of a contractual impairment depends on the severity of the impairment and the urgency of the state interest being served. Consequently, the test for determining the constitutionality of a contractual impairment under the contract clause would be similar to the test for determining the constitutionality of an impairment of a fundamental right under the due process and equal protection clauses. An impairment of a fundamental right is constitutionally permissible only when it can be justified by a compelling state interest.[109]

Yet even under a balancing test, union security agreements

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[107] Justice Black, however, in a dissenting opinion, chastised the majority for employing what he characterized as a balancing test in reaching its decision:

> I have previously had a number of occasions to dissent from judgments of this Court balancing away the First Amendment's unequivocally guaranteed rights of free speech, press, assembly and petition. In this case I am compelled to dissent from the Court's balancing away the plain guarantee of Art. I, § 10, that "No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . ," a balancing which results in the state of Texas' taking a man's private property for public use without compensation . . . .

379 U.S. at 517. He concluded his dissent by reiterating his view that the majority's approach was "just another example of the delusiveness of calling 'balancing' a 'test.' " *Id.* at 532. Another federal district court also found that under *El Paso* the proper standard for determining the constitutionality of a contractual impairment "when distilled to its essence is . . . a balancing test." Cuyahoga Housing Auth. v. Cleveland, 342 F. Supp. 250, 254 (E.D. Ohio 1972), *aff'd,* 474 F.2d 1102 (6th Cir. 1973).

[108] The Supreme Court, however, did not expressly mention a balancing test in reaching its decisions in *Blaisdell, Brand,* and *El Paso.* Moreover, only in *El Paso* did the Court distinguish between minor contractual impairments and impairments in central undertakings of the contract. Yet a balancing of interests test is one possible way to reconcile the seeming conflict among those decisions, as Justice Black suggested in his dissent in *El Paso. See* note 107 *supra.*

[109] *See, e.g.,* Williams v. Rhodes, 393 U.S. 23 (1968). For a detailed discussion of what constitutes a fundamental right and an examination of decisions sustaining impairments of fundamental rights under a compelling state interest standard, see Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969); 82 HARV. L. REV. 1065, 1120-31, 1169-90 (1969).

would violate the contract clause when enforced against teachers whose tenure contracts arose prior to legislative authorization of union security. The enforcement of such agreements impairs a central undertaking of the tenure contract, which under a balancing test would require either a state emergency or, at the least, a compelling state interest, to justify the impairment. But, as already noted, it is impossible to envision any type of state emergency that would reasonably require legislative authorization of union security.[110] And, assuming that a compelling state interest would justify the impairment, it is nevertheless unlikely that the state's interest in eliminating free riders through the authorization of union security rises to the level of a compelling state interest.[111]

Additionally, it does not appear that the court in *Ohlson* actually did balance the state interest in the loyalty of teachers against the severity of the contractual impairment in reaching its decision. Instead, the basis for the *Ohlson* court's holding seems to have been that the state can impair even the central undertakings of contracts through any valid exercise of police power, as the Supreme Court had suggested earlier in *Brand.*[112] Indeed, at one point in its decision, the court stated that "[a]s long as this reserved power is exercised for a public end . . . the power may not be restricted by individual contractual obligations."[113]

The First Circuit Court of Appeals, however, rejected this view in *Fornaris v. Ridge Tool Co.*[114] In *Fornaris,* the Puerto Rico legislature had enacted a Dealer's Contract Law which provided that a dealer's contract with a manufacturer was renewable indefinitely at the option of the dealer, regardless of provisions for termination of the dealership in the contract.[115] Subsequently, defendant manufacturer terminated its contract with plaintiff dealer in accordance with the terms of the contract, which antedated the Dealer's Contract Law. Defendant manufacturer asserted that the Dealer's Contract Law was unconstitutional under the contract clause because enforcement of the law would impair its preexisting contract rights with the dealer. The court of appeals indicated that the

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[110] *See* notes 84-103 and accompanying text *supra.*

[111] A compelling state interest is more than merely desirable social policy. For an analysis of decisions that discuss the components of a "compelling" state interest, see Karst, *supra* note 109, at 718-20; 82 HARV. L. REV. 1065, 1087-1131 (1969); note 109 and accompanying text *supra.*

[112] *See* notes 86-96 and accompanying text *supra.*

[113] 304 F. Supp. at 1156.

[114] 423 F.2d 563 (1st Cir.), *rev'd on other grounds,* 400 U.S. 41 (1970).

[115] P.R. LAWS ANN. tit. 10, § 278a (Supp. 1968).

impairment of contracts clause might not have any bearing on the case because Puerto Rico is not a state.[116] The court, however, did find that the due process clause of the fifth amendment was applicable. It further held that when the issue under the due process clause is the constitutionality of a contractual impairment, the standard to be utilized in evaluating the permissibility of the impairment is the same standard applicable under the contract clause. Relying on the *El Paso* decision, the court concluded that the Dealer's Contract Law resulted in an unconstitutional impairment of the manufacturer's contract rights because the law severely altered the basic undertaking of the parties to the contract. In reaching that conclusion, the court did not balance the state interest being advanced by the Dealer's Contract Law against the severity of the contractual impairment, nor did it construe *El Paso* as inviting such a balancing.[117]

Given the few decisions involving the contract clause in recent years and the conflicting standards for its application that are possible under relevant decisions, it is difficult to predict whether union security agreements will be held to violate the contract clause when their enforcement infringes preexisting contract rights. If the appropriate standard for determining the constitutionality of a contractual impairment is one that requires a balancing of the seriousness of the impairment against the urgency of the state interest, or that recognizes the validity of only minor contractual impairments, then union security agreements would violate the contract clause when enforced against teachers whose tenure contracts arose prior to legislative authorization of union security agreements. On the other hand, if the appropriate standard is one that recognizes the validity of any contractual impairment resulting from an appropriate exercise of the state police power, then union security agreements would not contravene the contract clause even when their enforcement infringed preexisting contract rights.

In many states, however, even a very restrictive interpretation of the contract clause would not prevent the discharge of tenured teachers for failing to abide by the terms of a union security agreement. That is because only a few state tenure laws actually confer contractual rights to continued employment on teachers fulfilling the requirements set forth in the tenure laws.[118] Instead,

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[116] *See* note 80 *supra*.

[117] The court merely cited *El Paso, Blaisdell,* and other cases as authority for its decision; it did not mention the "balancing test" at all. 423 F.2d at 567.

[118] *See, e.g.,* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

the majority of tenure laws have been construed as merely limiting the powers of local school boards to discharge tenured teachers, rather than as conferring contractual rights.[119] As such, these laws may be amended or repealed at any time without generating problems under the contract clause.

Moreover, many tenure laws that could be construed as granting contractual rights to continued employment provide for the discharge of tenured teachers for "good or just cause."[120] It is arguable that the failure to abide by a union security agreement, after such an agreement has been authorized by the state legislature, would constitute "good or just cause for discharge."[121] Thus, even if a tenure law is viewed as granting contractual rights to continued employment, discharge for failure to abide by a union security agreement would not violate the contract clause.

V
STATE LAW

Thirteen states now have provisions in their public employment bargaining laws that expressly permit various forms of union security.[122] Only the provisions in the laws of Alaska, Kentucky, and Washington, however, could be construed to authorize bargaining over all the forms of union security presently bargainable under the NLRA and RLA—the union shop, agency shop, maintenance of membership agreement, and fair share agreement.[123] The laws

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[119] For example, in Taylor v. Board of Educ., 31 Cal. App. 2d 734, 89 P.2d 148 (1939), a California appellate court held that the state's Teacher Tenure Act does not confer contractual rights to continued employment on teachers who have met the requirements for tenure enumerated in the Tenure Act. *Accord,* Groves v. Board of Educ., 367 Ill. 91, 10 N.E.2d 403 (1937); Campbell v. Aldrich, 159 Ore. 264, 79 P.2d 1257 (1938).

[120] MASS. ANN. LAWS ch. 31, § 43(g) (Supp. 1974); MICH. STAT. ANN. § 15.2001 (1968).

[121] *See* text beginning at note 191 *infra.*

[122] *See* notes 123-24 *infra.*

[123] Alaska law authorizes all public employees except teachers to bargain over all forms of union security except the closed shop. ALASKA STAT. §§ 23.40.110(b)(1), (2), 23.40.250(5) (1972). Kentucky law authorizes bargaining over a union shop for firefighters. KY. REV. STAT. ANN. § 345.050(1)(c) (Supp. 1973). Washington law authorizes bargaining over every form of union security except the closed shop for all public employees. WASH. REV. CODE ANN. § 41.56.122(1) (Supp. 1973).

When a law such as that of Kentucky authorizes a union shop, which is a more stringent form of union security than either the agency shop, maintenance of membership agreement, or fair share agreement, it is likely that these other less stringent forms of union security also will be deemed bargainable. That has been the interpretation given to § 8(a)(3) of the NLRA (29 U.S.C. § 158(a)(3) (1970)), which expressly authorizes only those union security agreements requiring union "membership . . . on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the

of the other ten states are more restrictive in the forms of union security that are authorized and, additionally, often distinguish between classes of public employees in their authorization of such devices.[124]

When public employment bargaining legislation is silent on the negotiability of union security, the issue arises as to what, if any, forms of union security are negotiable. In some states that issue is resolved by general "right-to-work" legislation which applies to both public employees and all private employees not covered by the RLA.[125] Some right-to-work laws prohibit all forms of union security,[126] while others expressly prohibit only those union se-

later." NLRB v. General Motors Corp., 373 U.S. 734 (1963); American Seating Co., 98 N.L.R.B. 800 (1952).

[124] The public employment laws in Michigan (MICH. STAT. ANN. § 17.455(10) (Supp. 1974)) and Montana (MONT. REV. CODES ANN. § 59-1605(c) (Supp. 1974)) authorize bargaining over an agency shop for all public employees, while a Rhode Island statute (R.I. GEN. LAWS ANN. §§ 36-11-1, -2 (Supp. 1973)) endorses the agency shop only for state employees. Four other Rhode Island statutes, which grant the right to bargain collectively to firemen (*id.* § 28-9.1-6), policemen (*id.* § 28-9.2-6), teachers (*id.* § 28-9.3-4 (1969)), and municipal employees (*id.* § 28-9.4-3), are silent on the issue of union security. A Vermont law also authorizes bargaining over an agency shop for municipal employees, but specifically prohibits municipal employers from discriminating against an employee for failing to abide by an agency shop agreement, thereby rendering the right to an agency shop illusory. VT. STAT. ANN. tit. 21, §§ 1722(1), 1726(a)(8) (Supp. 1974). When state employees are involved, Vermont law authorizes bargaining over a provision requiring employees to pay a fee equal to one year of union dues if the employee wishes to utilize a union representative in any grievance procedure. *Id.* tit. 3, § 941(k) (1972). Pennsylvania authorizes bargaining over maintenance of membership dues for all public employees except policemen and firemen. PA. STAT. ANN. tit. 43, § 1101.401 (Supp. 1974). Wisconsin (WIS. STAT. ANN. §§ 111.70(1)(h), (2), 111.81(6), 111.84(1)(f) (1974)) and Massachusetts (MASS. LAWS ANN. ch. 150E, § 12 (Supp. 1974)) authorize bargaining over a fair share agreement for all public employees, while a Hawaii law requires all public employers to establish a fair share arrangement upon demand by an exclusive bargaining agent. HAWAII REV. STAT. §§ 89-2(16), -4 (Supp. 1973). Minnesota (MINN. STAT. ANN. § 179.65(2) (Supp. 1974)) and Oregon (ORE. REV. STAT. §§ 243.711(10), (16), 243.730(4), 51 GOV'T EMPLOYEE REL. REP., Feb. 18, 1974, at Ref. File No. 4611) authorize bargaining over a contractual provision that would require union members to pay union dues and nonunion members to pay a pro rata share of the costs incurred by the union in the collective bargaining process.

Instead of expressly legitimizing a particular form of union security, the public employment law applicable to school teachers in Delaware prohibits bargaining over a union shop. DEL. CODE ANN. tit. 14, § 4003(a) (Cum. Supp. 1970). The other Delaware public employment bargaining law that applies to all public employees except teachers is silent on the issue of union security. *Id.* tit. 19, § 1301.

[125] The local option clause of the Labor-Management Relations Act (Taft-Hartley Act) (29 U.S.C. § 164(b) (1970)) expressly authorizes states to enact laws prohibiting agreements that require union membership as a condition of employment. In Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963), the Supreme Court construed that section of the Taft-Hartley Act as also validating state laws outlawing agreements conditioning employment on the payment of a bargaining service fee to unions. *Id.* at 98-103.

[126] The laws of Alabama, Arkansas, Iowa, Mississippi, Nebraska, and Virginia contain

curity devices that require actual union membership as a condition of employment.[127]

In the absence of statutes dealing directly with the negotiability of union security agreements in the public sector, the judiciary must determine what, if any, forms of union security are negotiable. Because most public employment bargaining laws define the scope of negotiable subjects in the NLRA language of "wages, hours and other terms and conditions of employment,"[128] the initial issue for judicial resolution is whether a particular form of union security comes within the plain meaning of this language.

The phrase "wages, hours, and other terms and conditions of employment" is, on its face, expansive enough to encompass all existing forms of union security and was so construed under the NLRA prior to its 1947 amendments.[129] Few decisions discuss the negotiability of union security under the recently enacted state public employment bargaining laws that adopt NLRA-type language to define the scope of negotiable subjects. The New Hampshire Supreme Court[130] and the Oregon Attorney General[131] have held that union shop agreements are within the plain meaning of that language. Two Michigan trial courts also found agency shop agreements to be within the plain meaning of that language.[132]

The interpretative issue under many public employment bargaining laws, however, is more complex than merely determining whether a particular form of union security comes within the plain meaning of the phrase "wages, hours, and other terms and conditions of employment." Most public employment bargaining laws combine an NLRA-type definition of negotiable subjects with other statutory provisions that guarantee employees the right to join or not to join a union,[133] or that prohibit employers from discriminat-

this type of flat prohibition. ALA. CODE tit. 26, §§ 375(1), (5) (1958); ARK. CONST. amend. 34, § 1; IOWA CODE ANN. § 736A.1, .4 (1973); MISS. CONST. art. 7, § 198-A.; NEB. CONST. art. 15, §§ 13, 14, 15; VA. CODE ANN. §§ 40.1-58, -62 (1970).

[127] This kind of provision is found in the laws of Arizona, Florida, Kansas, Nevada, North Carolina, North Dakota, South Carolina, and South Dakota. ARIZ. REV. STAT. ANN. § 23-1302 (1971); FLA. CONST. art. 1, § 6; KAN. CONST. art. 15, § 12; NEV. REV. STAT. § 613.250 (1973); N.C. GEN. STAT. § 95-78 (1965); N.D. CENT. CODE § 34-01-14 (1972); S.C. CODE ANN. § 40-46 (1962); S.D. COMPILED LAWS ANN. § 60-8-3 (1967).

[128] For an exhaustive list of the public employment bargaining laws that define the scope of bargainable subjects in NLRA-type language, see Blair, *supra* note 2, at 7.

[129] *See* note 20 and accompanying text *supra*.

[130] Tremblay v. Berlin Police Union, 108 N.H. 416, 237 A.2d 668 (1968).

[131] OP. ATT'Y GEN. No. 6449 (Ore. 1968).

[132] Warczak v. Board of Educ., 73 L.R.R.M. 2237 (Mich. Cir. Ct. 1970); Nagy v. Detroit, 60 CCH Lab. Cas. ¶ 52,105 (Mich. Cir. Ct. 1969).

[133] *See, e.g.*, N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1974); N.Y. CIV. SERV. LAW § 202 (McKinney 1973).

ing against employees to encourage or discourage union membership.[134] Provisions of this type could be construed to outlaw bargaining over all, or some, forms of union security.

Certainly, closed shop and union shop agreements should be found to violate the plain meaning of statutes that grant employees the right not to join unions and statutes that prohibit employer discrimination to encourage union membership. The predominant effect of conditioning employment on union membership, as the closed shop and union shop do, is to coerce employees into joining unions. To permit such coercion under public employment bargaining laws that grant employees the right not to join unions would render this right meaningless. Similarly, these agreements, by conditioning employment on union membership, require employers to distinguish between union and nonunion employees in a manner that would tend to induce employees to join a union. Hence, since closed shop and union shop agreements clearly contravene both types of statutes, they should be deemed outside the scope of bargaining under these statutes.

Maintenance of membership agreements also appear to contravene the plain meaning of statutes that give employees the right not to join unions. That right, to be meaningful, should encompass the right to discontinue union membership. But maintenance of membership agreements prevent employees who elect union membership from disaffiliating themselves from the union without loss of employment until the collective bargaining agreement has expired, thereby coercing a continuation of union membership. Such coercion should be found to violate statutes that give employees the right not to join unions. Additionally, such coercion of continuing membership involves employer conduct that distinguishes between union and nonunion employees and thereby contravenes statutes that prohibit employer discrimination to encourage union membership.

Additional support for finding union shop and maintenance of membership agreements invalid under public employment laws that prohibit employer discriminatory conduct to encourage union membership comes from section 8(a)(3) of the NLRA.[135] That section prohibits discriminatory conduct on the part of employers to encourage or discourage union membership, but further provides that

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[134] *See, e.g.*, ALASKA STAT. § 23.40.110(3) (1972); MICH. STAT. ANN. § 17.455(10) (Supp. 1974).

[135] 29 U.S.C. § 158(a)(3) (1970).

> Nothing in this [Act] . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.[136]

It is likely that most state legislatures were familiar with section 8(a)(3) and its proviso when they enacted their public employment bargaining laws. The failure of state legislatures to adopt the proviso which expressly validates union shop and maintenance of membership agreements, while adopting the remainder of section 8(a)(3), could be construed to imply a legislative intent to exclude these agreements from public sector collective bargaining.

Moreover, the absence of a section 8(a)(3)-type proviso may further be used to infer a legislative intent to exclude even agency shops from public sector collective bargaining. The obligations of union membership agreements permitted by the section 8(a)(3) proviso are limited by other language in this section to the payment of "periodic dues and initiation fees."[137] The Supreme Court, in *NLRB v. General Motors Corp.*,[138] found that by so limiting the enforceable obligations of union membership, the NLRA makes the union shop permitted under the proviso the practical equivalent of the agency shop.[139] It is likely that most state legislatures were familiar with the Court's description of the union shops permitted under section 8(a)(3) when they enacted their public employment bargaining laws. Thus, the omission of a section 8(a)(3)-type proviso from public employment laws that prohibit employer discriminatory conduct to encourage union membership could likewise be used to infer a legislative intent to make agency shop agreements nonnegotiable.

The Michigan Supreme Court, in *Smigel v. Southgate Community School District*,[140] found agency shop agreements to be nonnegotiable under a section of that state's Public Employment Relations Act which prohibits employers from discriminating to encourage or discourage union membership, but which contains no "savings" proviso for union security agreements.[141] Four justices relied on

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[136] *Id.*

[137] *Id.*

[138] 373 U.S. 734 (1963).

[139] *Id.* at 743.

[140] 388 Mich. 531, 202 N.W.2d 305 (1972).

[141] The Michigan Public Employment Relations Act subsequently was amended to authorize bargaining over agency shop agreements. MICH. STAT. ANN. § 17.455(10) (1968), *as amended* MICH. STAT. ANN. § 17.455(10) (Supp. 1974).

Michigan's previously enacted Private Employment Relations Act,[142] which has provisions similar to section 8(a)(3) of the NLRA and its proviso, as well as on the NLRA itself, in finding agency shop agreements to be impermissible in the public sector.[143] The four justices reasoned that the absence of any similar proviso from Michigan's Public Employment Relations Act implied a legislative intent to invalidate agency shop agreements in the public sector. Three justices also opined, with little analysis, that agency shop agreements violate the plain meaning of the statutory provision prohibiting employers from discriminating to encourage union membership.[144]

The Rhode Island Supreme Court[145] and appellate courts in New York[146] and New Jersey[147] also have found agency shop agreements to be outside the scope of collective bargaining under public employment laws that give employees the right to join or not to join a union. Additionally, the New Jersey law[148] gives employees the right to refrain from assisting a union, while the New York law gives employees the right to refrain from participating in a union.[149] The New Jersey and New York courts found that an agency shop agreement coerces employees to join a union and, at the very least, constitutes forced employee participation in, or assistance to, a union, contrary to the respective state statutes.[150]

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[142] MICH. STAT. ANN. §§ 17.454(15), (17) (1968).

[143] Justices Adams, T.G. Kavanagh, T.M. Kavanagh, and Brennan relied on the existence of a "savings" proviso in both the NLRA and the Michigan Private Employment Relations Act in finding agency shop agreements to be invalid under the Michigan Public Employment Relations Act. 388 Mich. at 539-43, 544-46, 202 N.W.2d at 306-08, 309-10. Justice Williams relied solely on the existence of a "savings" proviso in the NLRA in his opinion, which also found agency shop agreements to be invalid under the Michigan Public Employment Relations Act. *Id.* at 543-44, 202 N.W.2d at 308-09.

[144] *Id.* at 541-43, 202 N.W.2d at 308. Chief Justice T. M. Kavanagh wrote an opinion in which Justices Adams and T. G. Kavanagh joined.

[145] Town of North Kingstown v. North Kingstown Teachers Ass'n, 110 R.I. 698, 297 A.2d 342 (1972). The Rhode Island court expressed willingness to approve agency shop agreements strictly limited to payment by nonunion employees of only enough money to cover the benefits actually received.

[146] Farrigan v. Helsby, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (3d Dep't 1973).

[147] New Jersey Turnpike Employees' Local 194 v. New Jersey Turnpike Auth., 123 N.J. Super. 461, 303 A.2d 599 (1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974).

[148] N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1974).

[149] N.Y. CIV. SERV. LAW § 202 (McKinney 1973).

[150] In Farrigan v. Helsby, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (3d Dep't 1973), the court concluded that "any forced payment of dues or their equivalent would be in violation of the law as constituting, at the very least, participation in an employee organization." *Id.* at 267, 346 N.Y.S.2d at 41.

Similarly, in New Jersey Turnpike Employees' Local 194 v. New Jersey Turnpike Auth., 123 N.J. Super. 461, 303 A.2d 599 (1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974),

The Rhode Island Supreme Court did not decide whether an agency shop agreement constituted coercion that would violate an employee's statutory right not to join a union, although this argument was discussed.[151] Instead, the court found an agency shop agreement to be nonnegotiable because it is patently unfair to require nonunion employees to pay to a union a sum of money —union dues and fees—that bears no relation to their actual share of collective bargaining costs.[152]

In fact, agency shop agreements should be held to violate statutes that grant employees the right not to join unions or that prohibit discriminatory conduct by employers to encourage union membership. Such agreements are inherently coercive of union membership since they require nonunion employees to pay the equivalent of union dues and fees to retain employment, while denying to these employees the benefits of union membership other than the benefits flowing directly from the collective bargaining agreement. The natural desire of employees to obtain all the benefits of union membership that they have been forced to purchase by their employer constitutes a substantial inducement to become a union member. That inducement is sufficient to violate statutes guaranteeing employees the free exercise of the right not to join a union or prohibiting employer discriminatory conduct[153] to encourage union membership.

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the court assessed the validity of the agreement under the relevant New Jersey Statute (N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1974)), which

> confirms a right in public employees not only to refrain from activity in the nature of forming or joining an employee organization but also to refrain from assisting such an organization. The agency shop arrangement . . . does purport to relate the payments to be made by nonmembers to the union's expenses for collective negotiations and the handling of grievances. But it also mandates that payments to the union by nonmember employees are a condition of employment; . . . and failure to pay results in discharge. These clauses . . . would have the predominant effect of inducing, if not compelling, union membership, participation and assistance on the part of nonmember employees.

Id. at 469-70, 303 A.2d at 604.

[151] Town of North Kingstown v. North Kingstown Teachers Ass'n, 110 R.I. 698, 702-04, 297 A.2d 342, 344-45 (1972).

[152] The court recognized that either of two types of unfairness might result, depending upon the specific provisions of the agreement. It found that "it would he 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 hear a fair and just share of the financial burdens . . . ." On the other hand, compelling the nonunion members to pay more than a just portion of the costs of the benefits conferred upon them by the union, "would, in effect, sanction an inverse 'free-rider' situation in which the union member, rather than the non-joiner, would be a 'free-rider.' " *Id.* at 706, 297 A.2d at 346.

[153] With respect to an agency shop agreement, or any agreement conditioning employment on the payment of a fee to the union, the employer discrimination is not between union and nonunion members, but hetween employees who will financially support the

Those public employment laws, however, that attempt to protect employees in their decisions on union membership also require unions selected as exclusive bargaining agents to represent in a nondiscriminatory manner all employees, union and nonunion alike, in the bargaining unit.[154] To impose the duty on a union to represent nonunion employees, without permitting any device for a union to recoup from these employees a share of the costs of representation, is unfair and contrary to the apparent intent of legislatures in enacting public employment bargaining laws.

The New Jersey and Rhode Island courts, as well as three justices of the Michigan Supreme Court, have recognized this unfairness in their decisions invalidating agency shop agreements for public employees.[155] They have suggested in dicta that some other union security arrangement, which relates the sum that nonunion employees must pay a union as a condition of employment to their share of collective bargaining costs, would be permissible.[156]

Yet any bargaining fee arrangement that distinguishes between union and nonunion employees in the amount paid to a union as a condition of employment is also suspect under statutes granting employees the right to join or not to join unions or prohibiting employer discriminatory conduct to encourage or discourage union membership. For example, it is possible that a nonunion employee's pro rata share of bargaining costs might be more than union dues or fees.[157] In that case employees would be induced to join a union in order to save money. Such inducement appears sufficiently coercive to contravene the employee's right to refrain from union membership. In addition, because of the employer's involvement in the underlying bargaining arrangement, such inducement can be considered discriminatory conduct by the

union and those who will not. For a discussion of the meaning of discrimination under § 8(a)(3) of the NLRA (29 U.S.C. § 158(a)(3) (1970)), see Radio Officers' Union v. NLRB, 347 U.S. 17, 39-52 (1954).

[154] *See* note 34 *supra*.

[155] *See* notes 144-52 and accompanying text *supra*.

[156] Smigel v. Southgate School Dist., 388 Mich. 531, 543, 202 N.W.2d 305, 308 (1972); New Jersey Turnpike Employees' Local 194 v. New Jersey Turnpike Auth., 123 N.J. Super. 461, 469, 303 A.2d 599, 604 (1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974); Town of North Kingstown v. North Kingstown Teachers Ass'n, 110 R.I. 698, 707, 297 A.2d 432, 436 (1972).

[157] This would occur if the union divided the costs of collective bargaining equally among all employees in the bargaining unit, but chose to charge each nonunion employee who elected to use a union representative in a grievance procedure with the entire cost of processing his grievance, while spreading the cost of a union member's grievance over all union members.

employer against nonunion members tending to encourage union membership.

It is more likely, however, that a nonunion employee's share of the costs of collective bargaining will be less than the amount of union dues and fees.[158] If union members are required to pay union dues and fees as a condition of employment, while nonunion employees are required to pay the lesser amount equivalent to a pro rata share of bargaining costs, employees are induced to refrain from union membership to save money. Again, such inducement appears sufficiently coercive of nonunion membership to violate statutes granting employees the right to decide whether or not to join a union. It also involves employer discrimination against union employees that is very likely to discourage union membership.

Indeed, the Michigan Court of Appeals, in *Smigel v. Southgate Community School District*,[159] recognized the strong possibility of encouragement or discouragement of union membership resulting from a union security device that differentiates between the amounts union and nonunion employees must pay a union as a condition of employment. The court concluded that the only type of union security agreement permissible under a statute prohibiting employer discriminatory conduct to encourage or discourage union membership is one that compels all employees in the unit, union and nonunion alike, to pay a pro rata share of bargaining costs.[160] Although that device would eliminate the "free rider," it

[158] Union dues are used to finance many activities in addition to the collective bargaining process:

> Rather typically, unions use their members' dues to promote legislation . . . , to publish newspapers . . . , to finance low cost housing, to aid victims of natural disasters, to support charities, to finance litigation, to provide scholarships, and to do those things which the members authorize the union to do in their interest . . . .

Retail Clerks v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).

[159] 24 Mich. App. 179, 180 N.W.2d 215 (1970), *rev'd*, 388 Mich. 531, 202 N.W.2d 305 (1972).

[160] In *Smigel*, the Michigan Court of Appeals was asked to rule on the validity of an agency shop agreement. The court found that an agency shop agreement is valid only when the amount of union dues to be paid under the agreement is equivalent to an employee's pro rata share of the costs of collective bargaining. The court held, however, that it lacked the factual record necessary to decide whether that essential equivalency existed in the present case. It therefore reversed and remanded to the trial court, which had sustained the agency shop agreement, for a hearing to determine what percentage of the fees paid the union under the agency shop agreement were used to defray the costs of collective bargaining. 24 Mich. App. 179, 180 N.W.2d 215 (1970). The decision of the court of appeals was reversed by the Michigan Supreme Court, which held that agency shop agreements are invalid on their face, but without a majority opinion on the issue whether an agreement that requires all employees in the bargaining unit to pay a pro rata share of collective bargaining costs would be valid. 388 Mich. 531, 202 N.W.2d 305 (1972).

may still involve some inducement for an employee to join a union. When an employee must pay a union a pro rata share of bargaining costs—indeed, when he must pay any money to a union as a condition of employment—he is induced to join the union, since a person who must support an organization is likely to wish a voice in the internal affairs of the organization. That voice is impossible without union membership. Such inducement, although certainly less substantial than that existing under other union security devices, might be held to violate statutory provisions giving employees the right not to join unions or prohibiting employers from discriminating to encourage union membership.

To so construe those provisions would result in a requirement that unions elected as exclusive agents represent in a nondiscriminatory fashion all employees in the bargaining unit, union and nonunion alike, while denying unions any device for recouping from nonunion employees a part of the costs of representation. It is patently unfair to permit employees who wish not to join a union to benefit from a union's bargaining services, rendered at some cost, without also permitting some device that will force them to bear their fair share of the costs. Therefore, provisions granting employees the right to join or not to join unions or prohibiting employer discriminatory conduct to encourage or discourage union membership should be construed to permit union security devices that require all employees in the bargaining unit to pay a pro rata share of the costs of collective bargaining as a condition of employment.

Fair share agreements, however, may be deemed impermissible under a few state statutes, like those in New York and New Jersey, that give employees the right not only to refrain from joining a union, but also the right to refrain from participating in or assisting a union.[161] An agreement requiring an employee to pay a union for his fair share of bargaining costs as a condition of employment could be read to contravene the plain meaning of the words "refrain from participating in" or "assisting" a union.[162] Nevertheless, those words must be construed in conjunction with the statutory duty imposed on unions to represent all employees in the unit in a nondiscriminatory fashion. It is inconceivable that a legislature would impose such a costly duty on unions and also intend the words "to refrain from participating in or assisting a

[161] N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1974); N.Y. CIV. SERV. LAW § 202 (McKinney 1973).

[162] *See* statutes cited note 161 *supra*.

union" to grant employees the right to refuse to pay for their fair share of bargaining costs. Hence fair share agreements should be found negotiable under public employment laws that grant employees the right to refrain from participating in or assisting a union.

Unions, however, contend that the implementation of fair share agreements imposes an impossible accounting burden on them. They argue, therefore, that courts should find agency shop agreements to be within the scope of bargainable subjects unless expressly prohibited.[163] Although the mechanics of ascertaining what expenses of a union are attributable solely to the collective bargaining process involve substantial record-keeping at considerable cost to the union, fair share agreements have been successfully implemented under state public employment laws that expressly permit no other types of union security agreements.[164]

The more fundamental issue, of course, is whether a state legislature should expressly authorize bargaining not only over fair share agreements, but also over the closed shop, union shop, maintenance of membership agreement, and agency shop. The arguments militating against legislative authorization of the closed shop, true union shop, and maintenance of membership agreement have been discussed already.[165] Indeed, such arguments support public employment legislation expressly outlawing those agreements.

The argument against public employment legislation expressly authorizing the agency shop is that it is unfair to require employees who elect not to join a union to support the union beyond their fair share of bargaining costs. But there are two arguments favoring legislative authorization of agency shop agreements. First, unions would have substantial savings in record-keeping costs if all employees in the bargaining unit were required to pay union dues and initiation fees. The money saved could be passed on to all employees in the bargaining unit in the form of lower union dues and fees. Second, the portion of union dues not devoted to defraying collective bargaining expenses is often used for nonpolitical purposes that contribute to the general well-being of all

[163] Brief for Defendant at 4, Smigel v. Southgate School Dist., 388 Mich. 531, 202 N.W.2d 305 (1972).

[164] *See* note 12 *supra*. In Hawaii State Teachers Ass'n, 525 GOV'T EMPLOYEE REL. REP., Oct. 15, 1973, at E-1, the Hawaii Public Employment Relations Board determined the bargaining service fee which nonunion employees had to pay a majority union under a fair share agreement.

[165] *See* notes 69-77 and accompanying text *supra*.

employees.[166] Neither of these reasons, however, provides sufficient justification for forcing employees who refrain from union membership to support the union beyond paying for their fair share of bargaining costs.

VI

TEACHER TENURE AND CIVIL SERVICE ACTS

Even if a union security agreement is found to be within the statutory scope of bargainable subjects and consistent with all other provisions of a public employment bargaining law, a court still may invalidate the agreement for particular classes of public employees. Any final determination of the legality of a union security agreement under most state public employment laws applicable to all public employees must be made in the context of civil service and teacher tenure acts that are applicable only to limited classes of public employees. These acts, which antedate public employment bargaining laws, frequently provide that designated classes of public employees can be discharged only on specifically enumerated grounds.[167] Unless the civil service and teacher tenure acts provide for discharge for failure to abide by a union security agreement, or unless the public employment bargaining law provides that failure to abide by a union security agreement constitutes grounds for discharge under these acts, the courts must decide whether employees covered by teacher tenure and civil service acts can be discharged for breaching a union security agreement.

When teacher tenure and civil service acts provide for discharge on grounds that cannot be construed to encompass the breach of a union security agreement, they seem to conflict with public employment bargaining laws that expressly or impliedly authorize discharge for the breach of such an agreement. In resolving the conflict, a court could decide that the public employment law's authorization of union security agreements for all public employees impliedly amends the grounds for discharge in the prior acts and makes the failure to abide by a union security agreement a ground for discharging the employees covered by the acts. In contrast, a court could decide that the civil service and teacher tenure provisions enumerating the grounds for the dis-

[166] *See* note 49 *supra*.

[167] *See, e.g.*, MICH. STAT. ANN. § 15.2001 (1968) (dismissal only for reasonable and just cause); N.Y. CIV. SERV. LAW § 75 (McKinney 1973) (dismissal only for misconduct or incompetency).

charge of specific classes of public employees are exclusive and constitute an implied exception to the public employment law's authorization of union security agreements for all public employees. Hence, those public employees covered by teacher tenure and civil service acts could not be discharged for failing to abide by a union security agreement, even though all other public employees could be so discharged.

Illustrative of the latter view is an opinion by the Attorney General of the state of Oregon[168] issued in response to a request for a ruling on the validity of a union shop agreement negotiated for "classified employees"[169] under the Oregon Public Employes' Collective Bargaining Act.[170] That Act authorizes all public employers to bargain collectively, through representatives of their own choosing, over "employment relations,"[171] which term the Attorney General construed to include union shop agreements.[172] Oregon also has a civil service law[173] that is applicable only to classified employees. This law enumerates grounds for the discharge of classified employees that could not reasonably be construed to encompass the breach of a union shop agreement.[174] The

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[168] OP. ATT'Y GEN. No. 6449 (Ore. 1968).

[169] ORE. REV. STAT. § 241.215 (1967). That statute requires the board of county commissioners, in those counties which have enacted civil service legislation, to classify all positions in the public service of the county. The statute provides:

> The classifications shall be based upon the respective functions of the positions and the compensation attached thereto, and shall be arranged so as to permit the grading of positions of like character in groups and subdivisions, to the end that like compensation shall be paid for like duties.

Id.

[170] Ch. 579, § 4, [1963] Ore. Laws (repealed by ch. 536, § 39, [1973] Ore. Laws).

[171] *Id.*

[172] OP. ATT'Y GEN., *supra* note 168, at 522-23. The Oregon Public Employes' Collective Bargaining Act subsequently was amended to authorize, by express language, agreements that require union members to pay union dues and nonunion members to pay a pro rata share of the costs incurred by the union in the collective bargaining process. ORE. REV. STAT. § 243.672(c) (1974).

[173] ORE. REV. STAT. §§ 241.002-990 (1967).

[174] The Oregon civil service law authorizes municipal governments to adopt civil service rules that regulate the discharge of classified municipal employees and that have the force of state law once adopted. ORE. REV. STAT. § 241.006 (1967) (enabling clause). Pursuant to the Civil Service Law, a municipal government adopted the following civil service rules which gave rise to the ruling by the Attorney General:

> (1) The tenure of persons subject to civil service shall continue during good behavior and such persons may be dismissed . . . only for the following causes:
>
> (a) Incompetency, inefficiency or inattention to or dereliction of duty.
>
> (b) Dishonesty, intemperance, drug addiction, immoral conduct, insubordination or discourteous treatment of the public or of fellow employees.
>
> (c) Any other wilful failure of good conduct tending to injure the public service.
>
> (d) Any wilful violation of the provisions of this Act or the rules or regulations adopted under this Act.

Attorney General found that the section of the Bargaining Act authorizing the discharge of all public employees for the breach of a union shop agreement[175] conflicted with the civil service law's provisions for the discharge of classified public employees.[176] To resolve the conflict the Attorney General used the rule of statutory construction that the provisions of a special statute control the provisions of a general statute in case of conflict.[177] He then found the civil service law to be a special statute since it applies only to classified public employees and the Bargaining Act to be a general statute since it applies to all public employees. The Attorney General therefore concluded that the provisions for the discharge of classified public employees in the civil service law are exclusive and that classified employees cannot be discharged for the breach of a union shop agreement.[178]

A Michigan trial court, however, used the same rule of statutory construction to reach the opposite conclusion. In *City of Warren v. Local 1383, Firefighters,*[179] the court was asked for a declaratory judgment on the validity of an agency shop agreement. The court was confronted with Michigan's Public Employment Relations Act (PERA),[180] which authorizes all public employees to bargain collectively over "wages, hours . . . or other conditions of employment,"[181] and with a civil service act[182] providing for the discharge of firemen only for neglect of duty, incompetency, and inefficiency.[183] The court found that agency shop agreements were within the definition of bargainable subjects under the PERA and that the PERA's authorization of agency shops conflicted with the civil service law's provisions for the discharge of firemen. The court further found the PERA to be special legislation, since it deals with the "special" situation of public employees who elect to engage in collective bargaining, and the civil service law to be general legislation. The court concluded that, as special legislation, the PERA's authorization of agency shops prevailed over the civil

(e) Conviction of a felony or misdemeanor involving moral turpitude.
(f) The wilful giving of false information or withholding information with intent to deceive, when making application for entrance.

OP. ATT'Y GEN., *supra* note 168, at 523, *quoting* Columbia County, Ore., Civil Service Act § 35.

[175] Ch. 579, § 4, [1963] Ore. Laws (repealed by ch. 536, § 39, [1973] Ore. Laws).

[176] *See* note 174 *supra.*

[177] Appleton v. Oregon Iron & Steel Co., 229 Ore. 81, 86, 358 P.2d 260, 262 (1960).

[178] OP. ATT'Y GEN., *supra* note 168, at 523-24.

[179] 68 L.R.R.M. 2977 (Mich. Cir. Ct. 1968).

[180] MICH. STAT. ANN. § 17.455(9) (1968).

[181] *Id.* § 17.455(11).

[182] *Id.* § 5.3351.

[183] *Id.* §§ 5.3363, 64.

service law's provisions for the discharge of firemen. Thus, firemen could be discharged for failing to abide by an agency shop agreement.[184]

Through the use of a mechanical rule of statutory construction, the Michigan court and the Oregon Attorney General were able to resolve the conflict between a public employment law's authorization of union security and a civil service act's discharge provision that did not include the breach of a union security agreement. Unfortunately, the inconsistent results were accomplished without any analysis of the reasons why a union security agreement should or should not be bargainable for employees who are subject to civil service and teacher tenure acts.

The mere existence of other acts specifying grounds for the discharge of certain classes of employees does not justify excluding these employees from a provision of a public employment bargaining law similarly dealing with discharges. The justifications for legislative and judicial recognition of the principle of union security arise from the duty that bargaining laws impose on majority unions to represent all employees, union and nonunion alike, in the bargaining unit.[185] Any justifications for union security agreements that arise from that duty apply in every case where a union must represent all employees in the bargaining unit regardless of their union affiliation. When a state legislature places the employees covered by civil service and teacher tenure acts in the same category as all other public employees with regard to union representation, these employees should be treated in the same manner as all other public employees in terms of union security agreements. It clearly was not the legislative intent in enacting civil service and teacher tenure acts that employees so covered be immune from the effects of union security agreements, since these acts were passed prior to laws authorizing collective bargaining for all public employees.[186]

Further, the principle of union security is consistent with the legislative purposes behind the discharge provisions in civil service and teacher tenure acts. Those acts were passed to protect employees from arbitrary action by their public employers[187] and to

[184] City of Warren v. Local 1383, Firefighters, 68 L.R.R.M. 2977 (Mich. Cir. Ct. 1968).

[185] *See* notes 34-36 and accompanying test *supra*.

[186] *See* W. CARPENTER, *supra* note 32; M. MOSKOW, *supra* note 78; NATIONAL EDUCATION ASSOCIATION, RESEARCH BULLETIN: THE PROBLEM OF TEACHER TENURE (1924); NATIONAL EDUCATION ASSOCIATION, TRENDS IN TEACHER TENURE THRU LEGISLATION AND COURT DECISION (1957); A. SAGESER, *supra* note 31.

[187] As used here, the term "public employer" refers to the various public agencies that employ workers within a governmental unit.

ensure that the government would not lose competent employees from its service unless a legitimate public purpose would be served thereby.[188] When a state legislature expressly authorizes union security agreements for public employees, it necessarily has decided that these agreements serve a legitimate public purpose and that there is nothing arbitrary in a public employer's discharging employees for the breach of a union security agreement.

Many public employment bargaining laws are silent on the issue of union security, although they define the scope of bargainable subjects in language that is sufficiently expansive to encompass all forms of union security.[189] The Michigan trial court in *City of Warren* and the Oregon Attorney General confronted public employment bargaining laws of that type when they were asked to rule on the validity of union security agreements negotiated for civil service employees. A court may find a particular form of union security to be negotiable solely because it is within the literal language defining the scope of bargainable subjects in a public employment law, as did the Michigan court and the Oregon Attorney General,[190] while at the same time believing that this particular form of union security does not further a legitimate public purpose. Indeed, although there are ample justifications for permitting fair share agreements to be negotiable, the justifications for other forms of union security, particularly the closed shop and union shop, are more tenuous and the negative aspects more striking.[191] After finding one of the more objectionable forms of union security agreements to be negotiable solely because it is within the literal language defining the scope of bargainable subjects, a court may wish to limit the applicability of the agreement to as few employees as possible. Excluding employees covered by the discharge provisions in civil service and teacher tenure acts facilitates that objective. Yet, if a court believes that a particular form of union security agreement serves no legitimate public purpose, it is unlikely that the state legislature intended this form of agreement to be negotiable even though the agreement comes within the literal language defining the scope of bargainable subjects in a public employment bargaining law. Hence, the court should place those objectionable forms of union security outside the scope of collective bargaining for all public employees and not merely the

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[188] *See* sources cited note 18 *supra*.

[189] *See* notes 14-27 and accompanying text *supra*.

[190] *See* notes 162-83 and accompanying text *supra*.

[191] *See* notes 69-77 and accompanying text *supra*.

employees covered by discharge provisions in civil service and teacher tenure acts.

Further, even if a state legislature expressly authorizes bargaining over a particular form of union security agreement, it is possible that the agreement violates the United States Constitution.[192] In that case, of course, the court must find the agreement invalid for all public employees.

Unlike the civil service discharge provisions that confronted the Michigan court and the Oregon Attorney General, many civil service and teacher tenure acts include a ground for discharge that can be construed to encompass the breach of a union security agreement. For example, such acts often provide that the employees they cover can be discharged for "just cause."[193] This is frequently the case in states with public employment bargaining laws that authorize union security agreements for all public employees. In those states, the courts must determine whether the breach of a union security agreement constitutes "just cause" for discharging employees under civil service and teacher tenure acts.

That issue was presented to another Michigan trial court in the *Smigel* case,[194] where the court was asked to determine the validity of an agency shop agreement negotiated for public school teachers covered by Michigan's Teacher Tenure Act.[195] That Act provides that public school teachers may be discharged only for "reasonable and just cause."[196] The agency shop agreement was negotiated pursuant to Michigan's Public Employment Relations Act,[197] which authorizes all public employees to bargain over "wages, hours of employment or other conditions of employment."[198] The court found that agency shop agreements serve a legitimate public purpose by contributing to stable employer-employee relations and therefore should be negotiable under the broad definition of bargainable subjects contained in the PERA. The court further found that the legislative purpose in enacting the discharge provisions of the teacher tenure act was to protect public school teachers

[192] *See* notes 69-76 and accompanying text *supra*. Similar provisions of state constitutions would also be relevant.

[193] *See, e.g.*, MASS. ANN. LAWS ch. 31, § 43(a) (1973); MICH. STAT. ANN. § 15.2001 (1968).

[194] 70 L.R.R.M. 2042 (Mich. Cir. Ct. 1968), *rev'd on other grounds*, 24 Mich. App. 179, 180 N.W.2d 215 (1970), *rev'd on other grounds*, 388 Mich. 531, 202 N.W.2d 305 (1972); *see* note 160 *supra*.

[195] MICH. STAT. ANN. § 15.1971-.2056 (1968), *as amended*, (Supp. 1974).

[196] *Id.* § 15.2001 (1968).

[197] *Id.* §§ 17.455(1)-(16) (1968), *as amended*, (Supp. 1974).

[198] *Id.* § 17.455(11).

from arbitrary action by local school boards. The court concluded that the public purpose served by agency shop agreements was entirely consistent with the legislative purpose behind the discharge provisions of the Teacher Tenure Act, and that the failure of a teacher to abide by an agency shop agreement constituted "reasonable and just cause" for discharge within the meaning of the Teacher Tenure Act.[199]

The court's conclusion that public policy supported finding agency shop agreements negotiable is, at best, arguable.[200] Nevertheless, once it is either legislatively or judicially determined that a particular form of union security serves a legitimate public purpose and is negotiable under a public employment bargaining law applicable to all public employees, breach of the agreement should be held to constitute "just cause" for discharge under other acts.

VII

CIVIL SERVICE COMMISSIONS

The existence of state public employment bargaining laws applicable to all public employees may create an additional interpretative problem in states with civil service acts that are applicable only to selected classes of public employees. Often the state public employment bargaining law combines a provision that authorizes union security agreements with another provision to the effect that nothing in the law is intended to diminish the power of a civil service commission.[201] One function of a civil service commission is the hearing of appeals from civil service employees who contend that they have been dismissed contrary to the provisions for discharge enumerated in the civil service act.[202] The legislatures of a few states have given the civil service commissions the additional power to prescribe the grounds on which employees subject to civil service acts can be discharged.[203] It is arguable that to construe an authorization of union security in a public employment bargaining law as applicable to civil service employees would diminish the

[199] 70 L.R.R.M. 2042 (Mich. Cir. Ct. 1968). *Accord,* Warczak v. Board of Educ., 73 L.R.R.M. 2237 (Mich. Cir. Ct. 1970).

[200] *See* notes 164-66 and accompanying text *supra.*

[201] *See, e.g.,* note 210 *infra.*

[202] *See, e.g.,* MASS. ANN. LAWS ch. 31, § 43(b) (1973); N.J. STAT. ANN. § 11:15-4 (1960); ORE. REV. STAT. § 240.560 (1971); PA. STAT. ANN. tit. 71, § 741.203(2) (Supp. 1974).

[203] *See, e.g.,* N.J. STAT. ANN. § 11:15-2 (1960); PA. STAT. ANN. tit. 71, § 741.203(1) (Supp. 1974).

power of a civil service commission over the discharge of these employees. Since the public employment bargaining law specifically provides that nothing in the law shall diminish the power of the commission, it can be argued that it was the legislative intent that civil service employees be excluded from the law's authorization of union security agreements.

The Supreme Judicial Court of Massachusetts confronted that precise argument in *Karchmar v. City of Worcester.*[204] The court was asked to determine the validity of an agency service fee agreement for classified municipal employees subject to the Massachusetts Civil Service Law,[205] which is administered by a civil service commission and provides for the discharge of municipal civil service (classified) employees for "just cause."[206] The agency service fee agreement was negotiated under the Massachusetts Municipal Employees' Bargaining Law,[207] which expressly applies to all municipal employees, "whether or not in the classified service,"[208] and which expressly authorizes agency service fee agreements.[209] The Bargaining Law also provides that "[n]othing in . . . [the Act] shall diminish the authority and power of the civil service commission."[210]

The city of Worcester argued that the statement "nothing shall diminish the authority and power of the civil service commission" in the Bargaining Law required the court to hold that civil service employees are not subject to agency service fee agreements. The court rejected that argument. It found that in enacting the Civil Service Laws the legislature had not exhausted its power over civil service employees. Instead, the legislature retained the power to prescribe rules for the removal of civil service employees which it exercised in the Bargaining Law by authorizing agency service fee agreements. Without explaining its analysis, the court concluded that civil service employees are not excluded from legislative authorization of agency service fee agreements because the authorization, "even if it [were] treated as giving rise to a 'just

[204] 301 N.E.2d 570 (Mass. 1973).

[205] MASS. ANN. LAWS ch. 31 (1973), *as amended,* (Supp. 1974).

[206] *Id.* § 43(b) (1973).

[207] Ch. 763, § 2, [1965] Mass. Acts & Resolves (now MASS. LAWS ANN. ch. 150E, § 12 (Supp. 1974)).

[208] Ch. 763, § 2, [1965] Mass. Acts & Resolves (now MASS. LAWS ANN. ch. 150E, § 1 (Supp. 1974)).

[209] Ch. 763, § 2, [1965] Mass. Acts & Resolves (now MASS. LAWS ANN. ch. 150E, § 12 (Supp. 1974)).

[210] Ch. 763, § 2, [1965] Mass. Acts & Resolves (repealed by ch. 1078, § 1, [1973] Mass. Acts & Resolves).

cause' for disciplinary action against a civil service employee . . . , did not 'diminish the authority and power of the civil service commission' " within the meaning of the Bargaining Law.[211]

It is unfortunate that the court reached its conclusion without detailed analysis, but the decision is correct and should be followed in all cases where a civil service commission's power in relation to the discharge of civil service employees is limited to ensuring that discharges conform to statutory grounds. That power is not diminished by the legislature's adding a new ground for discharge either to the civil service law or another law, such as the Massachusetts Bargaining Law. The commission's power with respect to employee discharges remains the same—to determine in a specific discharge situation whether the statutory grounds for discharge have been met. In that context, a provision in a collective bargaining law protecting the power of a civil service commission from diminishment should not be construed to exclude civil service employees from legislative authorization of union security for all public employees.

Yet when the legislature has granted a civil service commission the additional power to delineate grounds for the discharge of civil service employees, there is merit to the argument that the addition of a new ground for discharge, *i.e.*, union security, by the state legislature diminishes the power of the commission. The legislature, by adding a new ground for discharge, has precluded the commission from prescribing a different rule on the particular matter. In that sense the power of the commission over the discharge of civil service employees has been diminished.

Legislative authorization of bargaining over union security, however, does not *require* that a union security provision be included in a collective bargaining agreement. Instead, it merely *permits* the inclusion of a union security provision in the collective bargaining agreement,[212] which would have the effect of establishing failure to abide by the terms of the union security provision as a ground for discharging employees covered by the agreement. If a union security device, to be valid, must be negotiated with the civil service commission in all cases where civil service employees are subject to commission regulation of dischargeable offenses, the

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[211] 301 N.E.2d at 576.

[212] The duty to bargain collectively over a subject does not include the duty to make concessions while bargaining. *See generally* Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248 (1964); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

commission's power to promulgate rules governing employees' discharges is not diminished. A union security device would constitute grounds for the discharge of those civil service employees only if the commission decided to adopt it in an agreement with the union. That result, of course, would require construing the words "public employer" in collective bargaining laws to include a civil service commission for purposes of bargaining over union security agreements for civil service employees in cases where the commission has the power to promulgate discharge rules for these employees.

The preceding analysis is supported by the history of public sector collective bargaining laws. Prior to the enactment of laws authorizing public employee collective bargaining, state legislatures frequently delegated the power to regulate the conditions of public employment to executive officials and to civil service commissions.[213] Often the director of a public agency was legislatively granted the power to establish certain basic employment conditions for agency employees, while a civil service commission was given the power to establish other conditions for the same employees, including grounds for discharge. That preexisting bifurcation of the power to establish working conditions for public employees created a problem under early public employment laws. The early collective bargaining laws totally ignored the bifurcation and merely directed all "public employers" to engage in collective bargaining with their employees over "wages, hours, and other terms and conditions of employment" without defining who was the "public employer" for purposes of bargaining over particular employment conditions.[214]

Under those laws, unions often negotiated collective bargaining agreements with agency directors on subjects that under preexisting legislative delegations of power had been deemed to be solely within the control of a civil service commission.[215] Unions justified

[213] For a discussion of the diffusion of decision-making authority that exists over the conditions of public employment in state and local governments, see Blair, *supra* note 2, at 8-10.

[214] *Id.* at 10-11.

[215] *See, e.g.*, Nagy v. Detroit, 60 CCH Lab. Cas. ¶ 52,105, at 66,958 (Mich. Cir. Ct. 1969). In *Nagy*, the court was asked for a declaratory judgment on the validity of an agency shop agreement between the city of Detroit and a local union representing employees in the Detroit Civil Service. The Detroit Civil Service Commission was not a party to that agreement, nor had it participated in the collective bargaining process, although the Commission bad the power to delineate the grounds for the discharge of civil service employees under the Michigan Civil Service Law and the Charter of the City of Detroit. *See* MICH. ANN. STAT. §§ 17.455(11), (15) (1968). The agency shop provision was negotiated

the negotiation of such items with agency directors, rather than with the civil service commission, by arguing that the "public employer," for purposes of bargaining over all conditions of employment, should be the directors of the various employing agencies. Unions further maintained that the collective bargaining law's definition of bargainable subjects impliedly reallocated the power over all items coming within this definition from the civil service commission to the directors of the various employing agencies, as the "public employer."[216]

That was the context in which state legislatures began redesigning their collective bargaining laws to ensure that preexisting delegations of power to civil service commissions over employment conditions would not be adversely affected by the collective bargaining process. A public employment bargaining law that authorizes union security agreements for all public employees and also protects the power of civil service commissions from diminishment should be construed, therefore, to require that union security agreements be negotiated directly with a civil service commission whenever the commission has, under a preexisting delegation of power, the right to promulgate the grounds on which civil service employees can be discharged.[217] Under such a construction, the power of the commission to regulate discharges would not be diminished by legislative authorization of union security devices, since it would be the commission that would determine whether or not to adopt a union security device for civil service employees.

CONCLUSION

There is little question as to which types of union security agreements for public employees should be considered in the

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pursuant to Michigan's Public Employment Relations Act (*id.* §§ 17.455(1)-(16) (1968), *as amended,* (Supp. 1974)), which applies to all public employees, but which fails to define who is the "public employer" for purposes of collective bargaining. The court found that agency shop agreements may be negotiated for civil service employees, but

> that the only proper and legal agency to conduct such bargaining negotiations . . . is the Civil Service Commission of the City of Detroit. Without such participation, as in the instant case, no valid collective bargaining agreement can be entered into.

60 CCH Lab. Cas. at 66,965.

[216] 60 CCH Lab. Cas. at 66,961.

[217] Even when a public employment bargaining law contains no provision expressly protecting the powers of the civil service commission from diminishment, it should be so construed if the commission has the power to delineate grounds for the discharge of civil service employees. *See* note 215 *supra.*

public interest and which should not. Public policy considerations overwhelmingly support the authorization of fair share agreements in public employment bargaining laws that impose a duty on majority unions to represent all employees in the bargaining unit, union and nonunion alike. In contrast, public policy considerations support legislation prohibiting the closed shop, union shop, maintenance of membership agreement, and agency shop in the public sector.

Most state public employment bargaining laws, however, are silent on the issue of union security. Thus the courts must decide whether the principle of union security is desirable in the public sector and, further, whether a particular type of union security is within the definition of bargainable subjects set forth in public employment bargaining laws. The resolution of these issues involves a myriad of interpretative problems that could be avoided by provisions in public employment bargaining laws expressly dealing with the negotiability or nonnegotiability of the various types of union security.

Yet even when public employment bargaining laws expressly authorize particular types of union security, interpretative problems still will arise in states with civil service and teacher tenure acts that enumerate the grounds for discharge of certain classes of public employees, without mentioning the breach of a union security agreement as a ground. Those interpretative problems also can be avoided by provisions in public employment bargaining laws to the effect that the failure to abide by a union security agreement constitutes grounds for discharge under the other acts. To avoid a further conflict with civil service acts, state public employment bargaining laws should provide that union security agreements must be negotiated with the civil service commission in all cases where the commission is authorized to promulgate rules governing the grounds for the discharge of civil service employees.

Until existing public employment bargaining laws are amended to deal with the problems created by union security agreements, however, the judiciary will be forced to resolve these problems. Hopefully, whatever judicial solutions develop will be based on considerations of public policy, rather than on the mere application of mechanical rules of statutory construction.