Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds

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Union shop agreements require all represented employees to pay union shop fees to their collective bargaining representative. Although the Supreme Court has acknowledged that mandatory support of a collective bargaining representative infringes upon first amendment interests, it has upheld the use of union shop funds for activities "related to collective bargaining." After analyzing the Court's approach to distinguishing between permissible and impermissible expenditures of union shop funds, this article suggests an alternative analysis based on a rational balancing of the competing interests involved.

Introduction

Employees who do not financially support their collective bargaining representative receive the benefits of collective bargaining without sharing the costs.[1] Union shop[2] agreements elimi-

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[1] This is most likely to occur when a union has been selected as the exclusive representative of all employees within a given bargaining unit. Some employees in the unit may choose not to join the union or otherwise financially support its efforts. Nevertheless, the status of exclusive representative usually carries with it a duty of fair representation, requiring the exclusive representative to represent all employees in the unit fairly and without discrimination against those who are not union members. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 182 (1967); International Ass'n of Machinists v. Street, 367 U.S. 740, 760-62 (1961). These non-paying employees are frequently referred to as "free riders." *See, e.g.*, NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963); *Street*, 367 U.S. at 760-62.

[2] Union shop is one variety of union security agreement. Other principal variations include closed shop, maintenance of membership, agency shop and

nate such "free riding" by requiring all represented employees to pay union shop fees to their collective bargaining representative. Such agreements are authorized in the private sector by federal statute[3] and in the public sector, in some states, by state statutes.[4] The Supreme Court has acknowledged that statutorily authorized mandatory support of a collective bargaining representative infringes upon first amendment interests of dissenting

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fair share. Closed shop agreements require that all employees belong to the union as a precondition of obtaining or retaining employment. Union shop is similar but requires only that employees join the union within a specified period of time after obtaining employment. Maintenance of membership requires that all employees who are presently, or become, union members maintain that membership or be discharged. Maintenance of membership agreement does not, however, require anyone to join the union. Agency shop requires all employees who are not union members to support the union financially in an amount usually equal to the dues paid by members. Fair share is another name for agency shop but is usually used with reference to such agreements in the public sector, and the required financial support is more likely to be in an amount less than regular dues.

Closed shop is generally prohibited. Both the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA) prohibit such agreements, while union shop agreements are conditionally permitted by both statutes. 29 U.S.C. § 158(a)(3) (1976); 45 U.S.C. § 152, Eleventh (1976). The NLRA, however, unlike the RLA, has a local option provision permitting individual states to negate the NLRA's authorization of union shop by adopting so called right-to-work laws. 29 U.S.C. § 164(b) (1976). Since union shop agreements as permitted by the NLRA may require, as a condition of continued employment, only the tender of regular dues and fees, the Supreme Court has held that agency shop is the functional equivalent of union shop under the statute and is also permitted thereby. NLRB v. General Motors Corp., 373 U.S. 734, 744 (1963). Similarly, the Court has held that agency shop is also subject to the local option provision of the NLRA. Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746, 751-52 (1963).

[3] 29 U.S.C. § 158(a)(3)(1976); 45 U.S.C. § 152, Eleventh (1976).

[4] *See* ALASKA STAT. § 23.40.110(b) (1962); CAL. GOV'T CODE § 3546 (West Supp. 1979); CONN. GEN. STAT. ANN. §§ 5-280(a), 10-153a(b) (West Supp. 1980); HAW. REV. STAT. §§ 89-3 to 89-4(a) (1976); KY. REV. STAT. § 345.050 (1)(c) (1977); ME. REV. STAT. ANN. tit. 26, § 1027(3) (Supp. 1980); MD. EDUC. CODE ANN. § 6-504 (1978); MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1981); MICH. COMP. LAWS ANN. § 423.210(1)(c) (1978); MINN. STAT. ANN. § 179.65(2) (West Supp. 1980); MONT. CODE ANN. § 39-31-401(3) (1979); N.J. STAT. ANN. § 34:13A-5.5 (West Supp. 1980); N.Y. CIV. SERV. LAW § 208(3) (McKinney Supp. 1979); OR. REV. STAT. § 234.672(1)(c) (1979); R.I. GEN. LAWS §§ 29-9.3-1, 36-11-2 (1979 & Supp. 1979); VT. STAT. ANN. tit. 21, § 1726(a)(8) (Supp. 1978); WASH. REV. CODE ANN. §§ 41.06.150(11), 41.56.122(1), 41.59.100, 288.16.100(11) (Supp. 1980); WIS. STAT. ANN. §§ 111.70(2)-(3), 111.84(1)(c) (West 1974).

employees.[5] Nevertheless, the Court has held that such infringement is justified by the government's interest in the elimination of "free riders" as a means to promote labor peace.[6]

Although the Court has upheld the constitutionality of union shop agreements, questions concerning the uses of union shop funds remain. In general terms the Court has held that the funds may be used for purposes germane to collective bargaining,[7] but that use of union shop funds for political or ideological activities[8] unrelated to collective bargaining violates the first amendment.[9] However, the Court has not drawn a clear distinction between expenditures that are germane to collective bargaining and therefore permissible, and expenditures that are political or ideological in nature, unrelated to collective bargaining, and therefore impermissible.

This article analyzes the Supreme Court's approach to distinguishing between permissible and impermissible uses of union shop funds. It then explores an alternative analysis based on a more forthright recognition of the relationship between union political activity and collective bargaining, and discusses the application of this alternative approach to several types of union political activity. Finally, the article surveys the few state decisions which have examined the permissibility of particular uses of union shop funds.

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[5] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977). As to state action in this context, see note 31 *infra*.

[6] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977); Railway Employes' Dep't v. Hanson, 351 U.S. 225, 231, 233-35 (1956). *But see Abood*, 431 U.S. at 246-49.

[7] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977); Railway Employes' Dep't v. Hanson, 351 U.S. 225, 235, 238 (1956).

[8] The variety and magnitude of union political activity has been variously discussed. *See, e.g.*, D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 384-426 (1970); J. GREENSTONE, LABOR IN AMERICAN POLITICS (1969); A. MCADAMS, POWER AND POLITICS IN LABOR LEGISLATION (1964); RA, LABOR AT THE POLLS (1978); LABOR AND AMERICAN POLITICS (C. Rehmus & D. McLaughlin eds. 1967); V. VALE, LABOUR IN AMERICAN POLITICS (1971); G. WILSON, UNIONS IN AMERICAN NATIONAL POLITICS (1979); Blume, *Control and Satisfaction and Their Relation To Rank-and-File Support For Union Political Action*, 26 W. POL. Q. 51 (1973); Blume, *The Impact of a Local Union on its Membership in a Local Election*, 23 W. POL. Q. 138 (1970); Holloway, *The Political Machine of the AFL-CIO*, 94 POL. SCI. Q. 117 (1979); Wall, *Unions Politics: A Study In Law and the Workers' Needs*, 34 S. CAL. L. REV. 130 (1961).

[9] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236-37 (1977).

I. The Supreme Court's Approach

A. The Cases

Railway Employes' Department v. Hanson[10] was the first Supreme Court case to examine the uses of union shop funds. The plaintiffs contended that the union shop agreement to which they were subject conflicted with the "right to work" provision of the Nebraska Constitution.[11] The Nebraska court held that the Railway Labor Act (RLA), which specifically authorized union shop notwithstanding state law,[12] violated plaintiffs' first amendment associational rights because labor organizations were engaged in political and ideological activities which individual employees opposed.[13]

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[10] 351 U.S. 225 (1956).

[11] *Id.* at 228.

[12] 45 U.S.C. § 152, Eleventh (1976) provides, in relevant part:

> *Eleventh.* Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
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> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

[13] Hanson v. Union Pac. R.R., 160 Neb. 669, 71 N.W.2d 526, 546 (1955), *rev'd*, 351 U.S. 225 (1956).

The plaintiffs had also claimed that the use of union shop funds for purposes other than collective bargaining violated their fifth amendment rights to due process. 351 U.S. at 230. The Supreme Court held that there was no fifth amendment violation insofar as the union shop funds were used for collective bargaining. *Id.* at 235, 238. The Court has never decided whether or not non-collective bargaining expenditures violate the fifth amendment, and that question is beyond the scope of this article. *See generally* City of New Orleans v. Dukes, 427 U.S. 297 (1976); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420

The Supreme Court reversed. The Court upheld the union shop agreement as an attempt to eliminate "free riders" by requiring financial support of a collective bargaining agency by all who received its benefits.[14] The Court avoided ruling on plaintiffs' first amendment claim because the record did not show that the assessments were used for purposes other than collective bargaining or for forcing ideological conformity.[15] However, it warned that its decision might be different should such circumstances arise.[16]

International Association of Machinists v. Street[17] raised the issue which the Court had avoided in *Hanson*. The trial court found that union shop funds had been used to support political campaigns and to promote doctrines and legislative programs opposed by the plaintiffs.[18] While the Supreme Court ruled that such uses of funds were impermissible, it avoided the first amendment question by basing its decision on statutory grounds.[19] Focusing on the underlying reason for union

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(1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). One court has even suggested that there might be a problem under the taking clause of the fifth amendment. Schleck v. Freeborn County Welfare Bd., 88 L.R.R.M. 3525, 3530 (Freeborn County Ct. Minn. 1975). As to state action in this context, see note 31 *infra*.

[14] Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

[15] *Id.* at 235, 238. Nevertheless, the record contained provisions from union constitutions and bylaws suggesting that the unions had spent funds for political purposes. *See id.* at 235 n.7 & 236 n.8. In view of this, the Court's characterization of the record has been questioned. *See, e.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 804-05 (1961) (Frankfurter, J., dissenting); H. WELLINGTON, LABOR AND THE LEGAL PROCESS 251-52 (1968). For a discussion of the related question whether the record sufficiently presented the constitutional issues, *compare* Lathrop v. Donohue, 367 U.S. 820, 842-43 (1961), with *id.* at 848-49 (Harlan, J., concurring) and *id.* at 867-69 (Black, J., dissenting).

[16] Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

[17] 367 U.S. 740 (1961).

[18] *Id.* at 744 & n.2.

[19] In Lathrop v. Donohue, 367 U.S. 820 (1961), decided the same day as *Street*, the Court again avoided similar issues. In *Lathrop* the plaintiff had sought a refund of dues paid under protest to the Wisconsin State Bar. Because the Wisconsin State Bar was integrated, payment of dues was a condition of being permitted to practice law. The plaintiff alleged that the Bar used his dues actively to oppose legislation which he favored, and he asserted that this activity violated his constitutionally protected rights of freedom of association and freedom of speech.

In the Supreme Court, a plurality of four justices held that the integrated bar was not unconstitutional on its face by analogy to *Hanson*. The plurality

shop—the elimination of "free riders"—the Court held that section 2 of the RLA implicitly prohibited the use of union shop funds for political activities opposed by an employee.[20] The Court said that the "free rider" rationale applied only to the negotiation and administration of collective agreements—not to political activity.[21] Nevertheless, the Court carefully prohibited

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held that the constitutional issues were not ripe because the Court was not "clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily extracted from its members are used to support the organization's political activities." *Id.* at 845-46.

Three justices would have reached the constitutional questions and upheld the use of compulsory dues for political activities. *See id.* at 848, 850 (Harlan, J., concurring, joined by Frankfurter, J.); *id.* at 865 (Whittaker, J., concurring). Two justices would have held such use of compulsory dues unconstitutional. *See id.* at 865, 871 (Black, J., dissenting); *id.* at 877 (Douglas, J., dissenting).

[20] International Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 (1961). The Court asserted that the legislative history of § 2, Eleventh supported this construction. *Id.* at 750-70. However, the hearings and debates surrounding the adoption of this provision contain very little discussion regarding the uses to which union shop funds might be put and do not suggest significant concern in this regard. *See, e.g.*, S. REP. No. 2262, 81st Cong., 2d Sess. (1950); H.R. REP. No. 2811, 81st Cong., 2d Sess. (1950). *But see* 96 Cong. Rec. 17049-50 (1951).

Nevertheless, the Court could have made a much more convincing argument for a slightly less restrictive reading of § 2, Eleventh. Four years before § 2, Eleventh was adopted, Congress in § 304 of the Taft-Hartley Act had prohibited contributions and expenditures by unions in connection with federal elections. *See* note 68 *infra*. One of the express purposes of that provision was to protect individual union members from having their dues spent by unions to support political candidates whom they might oppose. *See* United States v. C.I.O, 335 U.S. 106, 115 (1948); *Hearings on H.R. 804 and H.R. 1483 Before a Subcommittee of the House Committee on Labor*, 78th Cong., 1st Sess. 117-18, 133 (1943); 89 CONG. REC. 5334, 5792; 93 CONG. REC. 6440. Accordingly, it would seem reasonable to construe § 2, Eleventh so as not to authorize what Congress had explicitly prohibited only four years before. However, the only reference by the Court in *Street* to the prohibition contained in § 304 of the Taft-Hartley Act was a footnote stating that no contention that the expenditures in *Street* violated § 304 had been raised. 367 U.S. at 773 n.21.

[21] International Ass'n of Machinists v. Street, 367 U.S. 740, 767-68 (1961). After acknowledging that the reason Congress permitted union shop was to eliminate "the problems created by the 'free rider,' " the Court stated that the use of union shop funds

> to support candidates for public office and advance political programs is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances or disputes. In other words, it is a use which falls clearly outside the reasons advanced by the

the use of union shop funds only for political purposes, expressing no view regarding other expenditures of union shop funds not made to meet the cost of the negotiation and administration of collective agreements.[22]

Finally, the constitutional issue was unavoidably presented in *Abood v. Detroit Board of Education.*[23] *Abood* involved a first amendment challenge to an agency shop agreement between the Detroit Federation of Teachers and the Detroit Board of Education.[24] The plaintiffs alleged that their agency shop fees supported political activities which they opposed and which were unrelated to collective bargaining.[25] The trial court sustained the defendant's demurrer and dismissed the action.[26] Since on appeal from that dismissal the Supreme Court was required to treat plaintiffs' allegations as true, it could not avoid deciding the constitutionality of the expenditures by asserting that no such expenditures were presented in the record, as in *Hanson.*[27] Moreover, because the Michigan statute authorizing agency shop[28] had been construed by the Michigan Court of Appeals as permitting use of agency shop funds for political purposes unre-

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> unions and accepted by Congress why authority to make union shop agreements was justified.

Id. at 768.

[22] *Id.* at 769. This creates some ambiguity as to the rationale for the prohibition announced in *Street.* Is the prohibition of political expenditures of union shop funds based on the political nature of the prohibited expenditures or on their lack of relationship to collective bargaining? *See* note 41 *infra.*

[23] 431 U.S. 209, *reh. denied,* 433 U.S. 915 (1977). In the meantime, the Court had been faced with one other similar case, Brotherhood of Railway & S.S. Clerks v. Allen, 373 U.S. 113 (1963). In *Allen,* however, the Court's review was limited to whether or not the remedy granted below was consistent with *Street. Id.* at 118.

[24] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 212 (1977).

[25] *Id.* at 213. These allegations were in general terms and did not specify what the specific activities were.

[26] *Id.*

[27] *See* notes 10-16 and accompanying text *supra.*

[28] MICH. COMP. LAWS ANN. § 423.210(1)(c) (1978) provides, in part:

> [N]othing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members . . . .

lated to collective bargaining,[29] the Court was also blocked from escaping the constitutional issue by basing its decision on statutory grounds, as in *Street*.[30]

The Court began its analysis with *Hanson*, which it read to stand for three propositions: (1) that union shop infringed upon first amendment interests; (2) that there was sufficient state action;[31] and (3) that the interference with first amendment in-

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[29] In Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 96, 230 N.W.2d 322, 326 (1975), *vacated and remanded*, 431 U.S. 209 (1977), the court stated with respect to the Michigan Public Employment Act's authorization of agency shop that

> the political activities of labor unions are well-recognized. It is reasonable to assume that at least a portion of every union's budget goes to activities that could be termed political, *e.g.*, support of candidates sympathetic to the union cause and lobbying for the passage of bills in the legislature. Since the amendment to M.C.L.A. § 423.210; M.S.A. § 17.455(10) does not limit the nonmember's contribution to his proportionate share of the costs of collective bargaining, it is clear that the amendment sanctions the use of nonunion members' fees for purposes other than collective bargaining.

[30] *See* notes 17-22 and accompanying text *supra*.

[31] Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956). The Court apparently felt that the RLA's authorization of union shop constituted state action sufficient to invoke constitutional scrutiny because that legislation, although permissive only, expressly superseded Nebraska law, which otherwise would have made illegal the union shop agreement in question. Mr. Justice Frankfurter, however, disagreed with that view. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 806-07 (1961) (Frankfurter, J., dissenting). Professor Wellington has pointed out that the Court's conclusion in *Hanson* leads to incongruous results, in that the presence of state action would vary from state to state depending on whether or not each state had a right-to-work law to be superseded by the RLA. *See* H. WELLINGTON, *supra* note 15, at 243-52. In fact, prior to the Court's decision in *Hanson*, some lower courts had failed to find sufficient state action where litigation arose in states without right-to-work laws. *See* Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956); Otten v. Baltimore & O. R.R., 205 F.2d 58 (2d Cir. 1953), *aff'd sub nom.* Otten v. Staten Island Rapid Transit Ry., 229 F.2d 919 (2d Cir.), *cert. denied*, 351 U.S. 983 (1956). Other lower courts, however, had found sufficient state action in view of state right-of-work laws. *See* Sandsberry v. International Ass'n of Machinists, 156 Tex. 340, 295 S.W.2d 412 (1956); Moore v. Chesapeake & O. Ry., 34 L.R.R.M. 2666 (Hustings Ct., Richmond, Va., 1954).

A different result could be reached under the NLRA, 29 U.S.C. § 164(b) (1976), which permits individual states to prohibit union or agency shop. *Compare* Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970),

terests could be justified by the government's interest in promoting industrial peace.[32] The Court rejected arguments that either the more direct nature of the governmental action in the public sector[33] or the more political nature of public sector collective bargaining[34] afforded greater protection to the rights of the public sector employees,[35] and observed that "free riders" pose as great a threat to labor peace in the public as in the private sector.[36] The Court then extended *Hanson* to the public sector and held that, insofar as union shops were used for collective bargaining, there was no constitutional violation.[37]

The Court also held that the use of union shop funds for political and ideological activities unrelated to collective bargaining

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with Reid v. McDonnell Douglas Corp., 443 F.2d 408 (10th Cir. 1971).

[32] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 218 & n.12, 226 (1977). *But see id.* at 246-49 (Powell, J., concurring). Justice Powell argued that *Hanson* did not clearly stand for any of the three propositions. In particular, he argued that the state action question was left open by *Hanson* and *Street* and that the government's more direct involvement in the public sector context of *Abood* required more exacting constitutional scrutiny.

[33] In the public sector, the government, as the employer, not only authorizes union shop agreements, but also is actually a party to them. Consequently, if an employee is terminated for failure to pay union shop fees, it is the government which terminates a public employee. *Cf.* note 31 *supra.*

[34] *See generally* Summers, *Public Employee Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669 (1975); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES (1971).

[35] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226 & n.23, 227-32 (1977).

[36] *Id.* at 224.

[37] *Id.* at 232. In his concurring opinion, Justice Powell criticized the Court for failing to require the state to show that its action was justified by an overriding state interest. *Id.* at 259-64. It has also been observed that the Court in *Abood* never explicitly stated whether the use of agency shop funds for collective bargaining was permissible because a compelling state interest justified the infringement on individual first amendment interests, or whether the infringement was justified by some lesser standard. K. HANSLOWE, D. DUNN & J. ERSTLING, UNION SECURITY IN PUBLIC EMPLOYMENT: OF FREE RIDING AND FREE ASSOCIATION 45-46 (1978).

In any event, this article does not purport to deal with the problem of how exacting a standard should be applied. Rather, it is taken as given that, under whatever standard is appropriate, some uses of agency shop funds are constitutionally permissible—even in the public sector—and some are not. It is therefore necessary, regardless of what standard is appropriate, to articulate a basis for distinguishing the permissible from the impermissible. This article focuses on that aspect of the problem.

violated the first amendment.[38] The Court's reasoning is similar to its reasoning in *Street*, in which the Court said that political expenditures were outside the scope of the "free rider" rationale.[39] Absent such an overriding government interest, there was no justification for the infringement of individual first amendment interests.[40] However, as in *Street*, the Court prohibited only political and ideological expenditures unrelated to collective bargaining. It reserved judgment as to other expenditures unrelated to collective bargaining.[41]

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[38] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977). The Court held only that plaintiffs' general allegations stated a cause of action. *Id.* at 237.

[39] International Ass'n of Machinists v. Street, 367 U.S. 740, 767-68 (1961). *See* notes 17-22 and accompanying text *supra*.

[40] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-23 (1977).

[41] *Id.* at 236 n.33. This creates the same ambiguity concerning the *Abood* rationale as exists concerning the *Street* rationale. *See* note 22 *supra*. It is not absolutely clear whether the Court held that the use of agency shop funds for political activities unrelated to collective bargaining violates the first amendment because of the political nature of these expenditures or because of their lack of relation to collective bargaining.

It would seem, however, that any expenditures unrelated to collective bargaining would be equally outside the "free rider" rationale for union shop. Nevertheless, an expenditure which was outside the "free rider" rationale could not violate the first amendment unless it somehow infringed first amendment interests. The Court's reluctance to prohibit all expenditures of agency shop funds unrelated to collective bargaining on the basis of the first amendment appears to stem from uncertainty, in view of the lack of a factual record, as to what nonpolitical expenditures would involve first amendment interests. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 n.33 (1977). The Court clearly rejected the notion, however, that first amendment protection was limited to political activities. *Id.* at 231-32. As to whether other expenditures of agency shop funds unrelated to collective bargaining might violate the Constitution on some basis other than the first amendment, see note 13 *supra*.

The ambiguity underlying the rationales of *Street* and *Abood* has been discussed in Cumero v. King City School Dist., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74, at 25-32 (Cal. PERB, Aug. 29, 1980) (proposed decision, appeal pending). It has also resulted in very different applications of *Street* and *Abood*. For example, in Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 91 L.R.R.M. 2339, *modified*, 93 L.R.R.M. 2976 (S.D. Cal. 1976), the court proscribed the use of union shop funds for a variety of activities on the ground that they did not constitute collective bargaining activities as defined in *Street*. *See also* Beck v. C.W.A., 468 F. Supp. 93, 97 (D. Md. 1979) (holding use of union shop funds for purposes other than "collective bargaining, contract administration and grievance adjustment" violative of first amendment); Ball v. City of Detroit, 84 Mich. App. 383, 388, 269 N.W.2d 607, 612 (1978). On the other hand, some courts have prohibited only political and ideological ex-

Thus the Court employed the same test in *Abood* as it had in *Street—i.e.*, that expenditues of union shop funds were impermissible when they were "unrelated to collective bargaining." Because there was no factual record in *Abood*, the Court made no attempt to define what particular expenditures of union shop funds would be prohibited under this test.[42] Nevertheless, the Court did acknowledge that the more political nature of public sector collective bargaining would make it more difficult to distinguish between collective bargaining activities and political activities in the public sector.[43] In fact, the Court even suggested that some political activities might be sufficiently related to collective bargaining in the public sector to qualify for union shop funding.[44]

B. Problems with the Court's Approach

The difficulty with the test suggested by *Abood* and *Street* is that there is no clear distinction as a practical matter between collective bargaining and political activity. In many instances, union political activity is integrally related to the pursuit of union representational goals.[45] These political activities can be

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penditures of union or agency shop funds. *See, e.g.*, Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 761 n.7 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (1976); Cumero v. King City School Dist., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74, at 43 (Cal. PERB Aug. 29, 1980) (proposed decision, appeal pending); Detroit Mailers Union, 192 N.L.R.B. 951, 952, 78 L.R.R.M. 1053, 1054 (1971).

[42] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977).

[43] *Id.* For the Court's general discussion of the political nature of public sector bargaining, see *id.* at 227-32. *See also* note 34 *supra*.

[44] The Court suggested that where public sector agreements required legislative approval or funding, activity aimed at securing such approval might be considered to be an integral part of the bargaining process. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977). Use of agency shop funds to support lobbying for such legislative approval is permitted in Hawaii. *See* note 82 and accompanying text *infra*.

[45] *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 800-01, 813-16 (1961)(Frankfurter, J., dissenting). Describing the difficulties in attempting to separate collective bargaining activities from political activities, Professor Wellington has said:

> The economic position of both labor and management—their power at the bargaining table—is dependent upon many variables, not the least of which (at least in the short run) is ever changing federal and state law. The impact upon economic power of federal legislation which makes certain employer and union practices ille-

considered unrelated to collective bargaining only if their impact upon a union's ability to obtain employment-related benefits is ignored. But to ignore this impact is to view collective bargaining strictly in terms of the process of negotiation and administration of collective agreements, rather than in terms of the pursuit of union representational objectives. The Court's view of collective bargaining, as simply the process of negotiation and administraton of collective agreements, follows from the Court's

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> gal is obvious. A union, for example, may not apply secondary pressures to bring its adversary to terms. And its freedom to engage in organizational picketing is limited. Less obvious, but also important to the power of a union at the bargaining table, are minimum wage legislation, social security legislation, legislation dealing with unemployment and workmen's compensation, and the many other forms of welfare legislation which provide a foundation upon which unions may build in bargaining with management. Another factor that may be equally important to the union's economic position at the bargaining table is tariff legislation or other types of industry protecting or subsidizing enactments. More attenuated perhaps, but still important, are the general economic policies of an administration. (Is it then any wonder that business-minded unions are interested in politics and politicians?)

H. WELLINGTON, *supra* note 15, at 247 (footnotes omitted). He also noted that

> money spent in support of some legislation—for example, full crew laws—may make it unnecessary for the union to strike or spend money in support of a bargaining demand. One might think of the monetary expenditures as a collective bargaining activity by means of political action, even as one might think of picketing as a collective bargaining activity by means of "a form of speech."

Id. at 263 (footnote omitted). *See also* Sturmthal, *Some Thoughts on Labor and Political Action*, in LABOR AND AMERICAN POLITICS, *supra* note 8, at 20; Tyler, *A Legislative Campaign for a Federal Minimum Wage*, *id.* at 234.

Several commentators have suggested that the interrelationship between political and collective bargaining activity is even greater in the public sector. *See, e.g.*, K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 114-15 (1967); Bakke, *Reflections on the Future of Bargaining in the Public Sector*, 93 MONTHLY LAB. REV. 21, 24-25 (July 1970); Moskow, *Lobbying*, in COLLECTIVE BARGAINING IN GOVERNMENT 216 (J. Lowenberg ed. 1972); *Project: Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A. L. Rev. 887 (1972). As to the political nature of public sector collective bargaining generally, see note 34 *supra*.

Because of the interrelationship between collective bargaining and union political activity, at least one court has held that *Street* prohibits the use of union shop funds only for partisan political activities. Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 761 n.7 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (1976).

rationale in *Street* and *Abood*. In both cases, the Court said that the policy favoring elimination of "free riders" was limited to the negotiation and administration of collective agreements.[46] Upon closer scrutiny, however, the "free rider" rationale for union shop does not appear to be so limited.

First of all, the phenomenon of "free riding" is not limited to just the negotiation and administration of collective agreements. Employees may be considered "free riders" whenever they enjoy the benefits of union representation without helping to pay for them. When a union is unable to obtain a particular concession through bargaining, it often seeks the same concession through the political process.[47] If, for example, a union representing state employees negotiated an improved pension plan with the employer, all represented employees would receive the benefit. Those who did not financially support the union's efforts would be "free riders." If, instead, the union obtained the same pension plan improvement directly from the legislature as a result of lobbying efforts, any represented employees who did not support the union's efforts would be "free riders" in that situation as well. In both examples, the non-paying employees would have received a benefit paid for by the other employees' union dues. Similarly, non-paying employees would receive a "free ride" if the union obtained a benefit from the legislature by successfully supporting pro-labor candidates.

Although non-paying employees may receive "free rides" from many union activities in addition to the negotiation and administration of collective agreements, it might be argued that mandatory elimination of "free riding" is appropriate only with respect to negotiation and administration activities. Proponents of union shop have argued that fairness requires all represented employees to share the cost of collective bargaining, not merely because they receive benefits, but because the duty of fair representation requires that the benefits be extended to all represented employees.[48] Thus it is arguable that if a union engages in activity beyond the scope of the duty of fair representation, it acts as a volunteer and is not entitled to compensation for bene-

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[46] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-23 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740, 767-68 (1961).

[47] *See* note 45 *supra*.

[48] *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 759-62 (1961).

fits conferred upon non-paying employees.[49] Assuming that the duty of fair representation is limited to the negotiation and administration of collective agreements,[50] when a union engages in negotiation and administration activities, union shop would be justified to eliminate "free riders." But when a union engages in political activity beyond the scope of the duty of fair representation, it would be conferring a voluntary benefit upon non-paying employees, who could no longer be considered "free riders" in

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[49] Restatement of Restitution § 112 (1937) provides:

> A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.

[50] Because the duty of fair representation is seen as a corollary to the principle of exclusive representation, it seems reasonable to assume that its scope is co-extensive with the scope of exclusive representation. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 n.15 (1977); Vaca v. Sipes, 386 U.S. 171, 182 (1967); International Ass'n of Machinists v. Street, 361 U.S. 740, 760-61 (1961). The National Labor Relations Act is typical in limiting the scope of exclusive representation to collective bargaining in the sense of negotiation and administration of collective agreements. 29 U.S.C. §§ 158(d), 159(a) (1976). Moreover, the first amendment would seem to prohibit application of the principle of exclusive representation to political activity. For example, the Supreme Court has held that a teacher's union, even though designated as the exclusive representative of a unit of teachers, could not prevent an individual teacher from addressing a school board meeting. Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). In fact, in *Madison School District*, the Court expressly reserved judgment on the constitutional validity of the principle of exclusive representation in the public sector altogether. *Id.* at 175. Thus it seems at least arguable that the duty of fair representation is limited to the negotiation and administration of collective agreements and does not apply to political activity.

However, it is not absolutely certain that the duty of fair representation would not apply to political activity, at least in the public sector. For example, a public sector union might not be permitted to evade the duty of fair representation by seeking employment benefits for union members only through the political process rather than through bargaining. Whether or not this would be permitted would have to be answered hypothetically if the constitutionality of union shop expenditures is to be determined with reference to the duty of fair representation. Yet, whether the duty of fair representation ought to prohibit an exclusive representative from seeking employment benefits for members only through the political process might be thought to depend on whether union shop funds could be used in the effort. Thus, to determine the constitutionality of particular expenditures of union shop funds by asking whether or not the expenditures are subject to the duty of fair representation begs the question and obscures the first amendment interests involved.

the accepted sense.

But even if the duty of fair representation justifies the elimination of "free riders" for union activities within its scope, it is not clear that the first amendment requires limiting union shop to such circumstances. The Court recognized in both *Hanson* and *Abood* that union shop infringed upon first amendment interests but that this infringement was constitutionally permissible where justified by the government's interest in promoting labor peace.[51] Elimination of "free riders" may promote labor peace in various ways. Unions may act more responsibly if the need for militancy to impress and retain membership is reduced.[52] Further, requiring those who reap the benefits of union representation to share the financial burden may lessen the tensions between union members and nonmembers.[53] Finally, union shop may help provide the union with a secure financial base to ensure that it is capable of fulfilling its representational functions[54] and to insulate it from attack by rival organizations.[55] However, the necessity for a union to impress and retain membership to finance its activities is just as pressing whether or not those activities are subject to the duty of fair representation. Similarly, feelings of unfairness experienced by union members whose union dues have financed benefits for nonmembers are likely to be just as poignant. Moreover, added financial resources would be useful regardless of their sources. Thus, to the extent that elimination of "free riders" serves the governmental interest in labor peace in any of these ways, it would seem to do so irrespective of the duty of fair representation.

Although the Court's limitation of the "free rider" rationale to the negotiation and administration of collective agreements does

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[51] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977). As to *Hanson*, see note 32 and accompanying text *supra*.

[52] *See, e.g.*, Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 189 (1975); Oberer, *The Future of Collective Bargaining in Public Employment*, 20 LAB. L.J. 777, 781 (1969); Weisberger, *Union Security in Public Employment*, in NEW TRENDS IN PUBLIC EMPLOYEE ORGANIZING AND BARGAINING 199-200 (B. Pogrebin, Chairman, Practicing Law Institute, 1976).

[53] *See*, Weisberger, *supra* note 52; Zwerdling, *Union Security in the Public Sector*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 160-61 (A. Knapp ed. 1977); Comment, *Impact of Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547, 548 n.3 (1970).

[54] Blair, *supra* note 52; Weisberger, *supra* note 52.

[55] *See* Oberer, *supra* note 52; Comment, *supra* note 53, at 548.

not withstand close scrutiny, it might nevertheless be argued that the use of union shop funds should be limited to negotiation and administration activities because only these activities benefit represented employees directly.[56] A wage increase negotiated as part of a collective bargaining agreement constitutes an immediate and direct benefit. By contrast, even if union political activity is important to the achievement of union representational objectives, its impact is indirect and remote. For example, a union might lobby Congress to permit trade with some country with which trade was previously forbidden. Permitting trade might open new markets for products produced by represented employees. New markets, in turn, might mean more work or more jobs. Similarly, the election of a particular candidate for public office might help obtain passage of legislation that would be beneficial to represented employees. The point is that such activity, although it may further union representational interests, does so only indirectly.

One difficulty with this argument is that a union might well seek concessions in bargaining which also benefit the employee only indirectly. A union might, for example, seek an employer's agreement to make contributions to an industrial promotion fund.[57] More importantly, even if union political activity could be distinguished on this basis, it is unclear why that should make any difference as a first amendment matter. Although an activity might result in benefit to the employees only indirectly, employees not helping to finance the activity are still "free riders." Moreover, if the benefit was substantial, the government's interest in eliminating "free riders" would not seem any less merely because the benefit was indirect.

In sum, while there surely are some political activities which constitutionally cannot be financed with union shop funds, such activities cannot be distinguished simply on the basis that they are unrelated to collective bargaining or that they are outside the scope of the "free rider" rationale. To attempt to identify constitutionally inappropriate uses of union shop funds on such

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[56] *See* Browne v. Milwaukee Bd. of School Directors, Dec. No. 18408, at 30 (Wis. Employment Relations Comm'n, Feb. 3, 1981).

[57] Employer contributions to industrial promotion funds have been held a permissive subject of bargaining. Detroit Resilient Floor Decorators Local 2265, 136 N.L.R.B. 769, 49 L.R.R.M. 1842 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963).

grounds obscures the underlying inquiry into which political uses of union shop funds should be forbidden by the first amendment.

II. A Suggested Alternative

Expenditures of union shop funds are constitutional only insofar as the governmental interest in promoting peaceful labor relations justifies infringement of individual first amendment interests.[58] To identify the limits of that justification, it is necessary to focus more clearly on the relationship between the governmental interest and the individual's interests. Some union political activity is completely irrelevant to the governmental interest because the activity is wholly unrelated to labor-relations concerns. For example, as Justice Douglas stated in *Street*:

> If . . . dues are used . . . to promote or oppose birth control, to repeal or increase the tax on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action.[59]

Even if union political activity of this sort benefits a represented employee, the benefit is not within the sphere of labor-related concerns which constitute the basis for the establishment and recognition of labor unions. In short, a union engaging in such activity has ceased to act as a labor union when it seeks objectives beyond its representational concerns. In these circumstances, a union has no special claim to be reimbursed for its efforts. A represented employee who receives an alleged benefit wholly unrelated to employment conditions is no more a "free rider" than any member of the general public who is similarly benefited. Elimination of "free riders" in these circumstances would not further the government's interest in maintaining peaceful labor relations. Therefore, the first amendment should prohibit the use of union shop funds for union political activity not reasonably calculated to obtain employment-related benefits.

This test, whether union political activity is reasonably calculated to achieve employment-related objectives, is not sufficient by itself, however. Much union political activity, including some

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[58] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225 (1977).

[59] International Ass'n of Machinists v. Street, 367 U.S. 740, 777-78 (1961).

activity for which the first amendment should prohibit union shop funding, is reasonably calculated to achieve labor-related objectives.[60] For example, the activities objected to in *Street* included contributions to political campaigns.[61] As Justice Douglas noted in *Street*, despite the fact that election of a particular candidate for President might be extremely helpful to a union's ability to achieve employment-related objectives, the use of union shop funds for that purpose should be prohibited by the first amendment.[62] The difficulty is identifying which political expenditures of union shop funds should be prohibited by the first amendment even though they might be reasonably calculated to achieve union representational objectives.

Much union political activity, even when it vitally affects union representational concerns, has broader impact as well. For example, although the election of a particular presidential candidate, as just noted, may significantly advance union representational interests, the choice of a President also affects many other matters completely unrelated to union representational concerns. Similarly, passage of some legislative programs, although relevant to labor matters, may also have broad social impact. *Hanson* and *Abood* held that individual first amendment interests may constitutionally be subordinated to the government's interest in promoting peaceful labor relations.[63] But while it is one thing to subordinate an individual's first amendment interests relating only to the very concerns with respect to which a union is his representative, it is quite another to subordinate these interests when they relate to matters which are beyond union representational concerns and which have no bearing on the asserted governmental interests.[64] Certainly, *Hanson* and *Abood* do not endorse broad infringement of first amendment interests merely because they are incidental to activities reasonably calculated to achieve union representational objectives. To distinguish objectionable from unobjectionable expenditures of union shop funds, the analysis must focus on the extent to which

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[60] *See* note 45 *supra*.

[61] International Ass'n of Machinists v. Street, 367 U.S. 740, 774 & n.22 (1961).

[62] *Id.* at 778.

[63] *See* note 51 *supra*.

[64] *See* Comment, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 WIS. L. REV. 134, 153.

the impact of any given expenditure is limited to the union's representational concerns. Where a particular expenditure furthers union representational objectives but also has a significant impact on unrelated first amendment interests, a balancing of interests is required.[65]

The analysis suggested to determine whether the first amendment should permit union shop financing of particular union political activities requires a two-step inquiry. The first step must ask whether or not the activity is reasonably calculated to achieve employment-related objectives. If it is not, presumably the use of union shop funds to support the activity would violate the first amendment for lack of any governmental interest to justify the infringement of individual first amendment interests. If the activity does seek representational objectives, the second step asks to what extent the activity's overall impact is limited to such matters. Only after focusing on these factors can a court rationally balance the interests involved.[66]

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[65] Such an approach has been used in a variety of first amendment contexts. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 360-62 (1976); Buckley v. Valeo, 424 U.S. 1, 10-19 (1976); Pickering v. Board of Educ., 391 U.S. 563 (1968). Even *Hanson* and *Abood* used a balancing approach in concluding that some infringement of first amendment interests is justified to promote the government's interest in labor peace. However, because the Court did not define the dividing line between collective bargaining activity and political activity unrelated to collective bargaining, it did not spell out how much incidental infringement of first amendment interests unrelated to labor concerns could be tolerated. Moreover, the Court did not make clear what sort of standard it was using to balance these interests. *See also* note 37 *supra*.

[66] One commentator has suggested that inappropriate uses of union shop funds for political purposes might be identified as "purely political" or only "tangentially related to the collective bargaining process." Blair, *supra* note 52, at 196. The "purely political" test might function similarly to the first step of the analysis suggested in this article, prohibiting the use of union shop funds to finance activities not reasonably calculated to achieve employment-related benefits. The "tangentially related to the collective bargaining process" test, however, is insufficient to distinguish those political activities which, although reasonably calculated to achieve employment-related benefits, nevertheless should not be financed by union shop funds.

It has also been suggested that permissible expenditures of union shop funds could be distinguished as "expenditures incident to the the negotiation and administration of any specific contract," as opposed to "those incident to the negotiation and administration of contracts in general . . . ." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 197 (1977). This approach seems arbitrary in that the "free rider" problem may be equally severe in either case.

III. Application of the Proposed Analysis

Perhaps the most egregious infringement of individual interests associated with union shop involves use of union shop funds to influence political elections. Both *Street* and *Abood* focused on this problem.[67] In addition, Congress has addressed the problem in slightly broader terms, prohibiting contributions and expenditures from general union funds in connection with some federal elections.[68] Under the analysis suggested above, this use of union shop funds would violate the first amendment as well. Because the election of a particular candidate to public office may significantly contribute to the realization of the union's representational objectives, represented employees who do not financially support a union's efforts are "free riders." Nevertheless, the outcome of political elections has far greater impact upon interests unrelated to employment conditions. An accommodation of interests compels the conclusion that the government's interest in eliminating "free riders" does not justify such broad interference with individual first amendment interests.[69]

Other common forms of union political activity include advocating particular positions on issues and lobbying for or against legislation. These activities raise more difficult problems. First of all, the exact nature of the issue involved is important. The first part of the proposed analysis requires that to qualify for union shop funding, an activity must be reasonably calculated to achieve employment-related objectives. Since many issues are completely unrelated to such concerns, the use of union shop funds to advocate positions regarding these issues would be prohibited.

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[67] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740, 767-68 (1961).

[68] 2 U.S.C. § 441b (1976 & Supp. III 1979). For a discussion of the litigation relating to the application of this section to union political activity, see Comment, *Of Politics, Pipefitters, and Secton 610: Union Political Contributions in Modern Context*, 51 Tex. L. Rev. 936 (1973).

[69] This result would seemingly be required regardless of whether the infringement must be justified by a compelling state interest or whether it is subject to a lesser standard. *See* note 37 *supra*. Even the less strict scrutiny generally associated with content-neutral time, place or manner restrictions must not unwarrantedly abridge first amendment interests. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941). *See also, e.g.*, Carey v. Brown, 100 S. Ct. 2286 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Cox v. Louisiana, 379 U.S. 536, 554 (1965); Kovacs v. Cooper, 336 U.S. 77 (1949).

On the other hand, at least in the public sector, legislation can serve as a direct substitute for concessions in bargaining.[70] For example, a state legislature could adopt legislation improving pension rights for state employees. Advocacy of such legislation is clearly calculated to achieve employment-related benefits. However, the second part of the proposed analysis requires examination of the extent to which any such legislation also affects non-labor concerns. To the extent that any employment benefits granted by legislation cost money, the legislation may have some effect upon the allocation of public resources generally or upon the tax rates. That, in turn, could affect the level of some government services. Thus all legislation of this sort would have some impact beyond the scope of labor concerns. Nevertheless, the same impact would result if the government granted an equivalent benefit through bargaining. In fact, that impact is an inevitable incident of public sector collective bargaining over economic issues, an impact which the Court in *Abood* implicitly approved.[71] Accordingly, there should be no first amendment objection to the use of union shop funds to advocate programs which are in substance direct substitutes for provisions in collective bargaining agreements.[72] Similarly, the use of union shop funds to support lobbying for legislative ratification or funding of negotiated agreements would be unobjectionable.

A somewhat different situation arises if a union supports or opposes legislation which does not directly benefit represented employees, but which may do so indirectly. Suppose a union representing employees in the widget manufacturing industry lobbies for legislation to permit the export of widgets to countries where this was previously forbidden. Adoption of this legislation would not, by itself, confer a benefit upon the represented employees. Nevertheless, it would alter the preconditions for bar-

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[70] This has been explicitly recognized by the Hawaii Public Employment Relations Board in Hawaii State Teacher's Ass'n, SF-05-58, Dec. No. 94, at 27 (Hawaii PERB, Nov. 8, 1978), *appeal granted in part, dismissed in part*, No. 56431 (Hawaii Cir. Ct., June 5, 1979), *consolidated & appeal pending*, No. 7513 (Hawaii, Jan. 23, 1980) [hereinafter cited as Hawaii PERB Dec. No. 94].

[71] *See* notes 33-37 and accompanying text *supra*.

[72] Such expenditures of agency shop fees have been permitted in Hawaii. *See* Hawaii Gov't Employees' Ass'n, Nos. SF-02-44, SF-03-45, SF-04-46, SF-06-47, SF-08-48, SF-13-49, Dec. No. 92, at 19 (Hawaii PERB, Oct. 18, 1978), *dismissed sub nom.* Jordan v. Hamada, No. 56253 (Hawaii Cir. Ct., Jan. 25, 1979), *appeal pending*, No. 7332 (Hawaii, Mar. 19, 1979).

gaining, thereby affecting the concessions that the union might be able to obtain through bargaining. Thus, since lobbying for this kind of legislation is related to a union's ability to obtain employment-related benefits, it satisfies the first part of the proposed analysis.

Difficulty arises, however, in the second part of the proposed analysis. Legislation permitting trade with a foreign country has an obvious impact beyond the scope of the union's representational concerns; it is part of our national foreign policy. Accordingly, the question whether or not the use of union shop funds to lobby for such legislation is permissible requires a difficult balancing of interests. On one hand, this kind of legislation can be important, indeed crucial, to a union's ability to obtain employment-related benefits. If use of union shop funds were not permitted, dissenting employees would receive a "free ride." On the other hand, if use of union shop funds were permitted, the first amendment interests of dissenting employees would be sacrificed, not only with respect to employment-related matters, but also with respect to an important question of foreign policy. Thus, the government's interest in promoting labor peace through the elimination of "free riders" must be balanced against a somewhat broader infringement of first amendment interests than was clearly approved in *Hanson* and *Abood*.

A special problem may be involved if a union seeks a general increase in the level of government funding for programs requiring the services of represented employees. For example, a teachers' union might advocate allocation of more money to education, or a union representing defense-industry employees might advocate that more money be spent on national defense. In the same manner as legislation permitting the export of widgets, allocation of more money to a particular area would alter preconditions for bargaining, thus satisfying the first part of the proposed analysis.

But the second part of the proposed analysis again raises questions. It is arguable that any non-labor impact of increased funding is limited to the allocation of public resources and tax rates, and that advocacy of greater funding is therefore indistinguishable from advocacy of legislation granting improved pension rights to state employees. If so, use of union shop funds for this purpose should be permitted. However, there may be a difference. If the question is not simply higher cost for a given level of government service, but rather an increase in the level of the

service itself, it may be beyond anything that could be obtained through bargaining. To the extent that public employees could have bargained over the level of service that the government would provide, it should make no difference that they advocated legislation having the same effect.[73] But private sector employees would not ordinarily be able to negotiate with their employer over the level of government demand for the products or services which they provide. Thus the use of union shop funds to advocate increases in the level of government services can involve an impact upon individual first amendment interests beyond that involved in permitting the use of union shop funds for public sector bargaining over economic issues. Where this is the case, advocacy of increased funding is analogous, not to advocacy of a state employees' pension plan, but rather to advocacy of opening trade with a foreign nation. In other words, although not clearly prohibited by *Abood*, such expenditures involve impact on first amendment interests beyond anything implicitly approved in *Abood*.

Similar problems would be involved if union shop funds were used to advocate programs which confer benefits upon the general public as well as upon represented employees. Many of these programs involve precisely the kind of benefits that unions might obtain from employers through bargaining, such as social security or national health insurance. It is arguable that such benefits are not employment-related in the sense that they are not limited to represented employees. Under that view, the first part of the proposed analysis would seem to prohibit use of union shop funds to advocate these general programs. However, benefits such as health and retirement insurance are not beyond the scope of the concerns that give rise to the need for group action. Prohibiting the use of union shop funds to advocate national programs of this sort on the ground that such advocacy is not reasonably calculated to achieve labor-related objectives is fictional. The better view is that because such benefits directly substitute for, or at least supplement, bargained-for benefits, they should be considered employment-related. Advocacy of such programs would then satisfy the first part of the proposed analysis.

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[73] With respect to the scope of bargaining in the public sector, see Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685.

The use of union shop funds for this purpose might nevertheless violate the first amendment under the second part of the proposed analysis. Whether or not benefits should be provided to the general public is a question of policy outside the realm of employment-related concerns. Allocation of public resources would be affected not only by the cost of the benefits to represented employees, but also by the cost of the benefits to the rest of the general public. Thus again, the use of union shop funds for this purpose, although not clearly prohibited in *Abood*, involves a broader impact upon individual first amendment interests than was clearly approved in *Hanson* and *Abood*.

It is not submitted that the proposed analysis will yield simple or automatic answers to all controversies that might arise regarding the use of union shop funds for political or ideological purposes. Rather, a careful balancing of interests is required whenever union shop funds are used for activity which, although reasonably calculated to achieve employment-related objectives, also affects non-labor issues. Moreover, that balancing of interests will require analysis of two additional, interrelated issues beyond the scope of this article. First, what standard is to be applied in balancing the interests? Must the government's interest be compelling, or is some lesser standard sufficient?[74] Second, how important is the elimination of "free riders" to the government's interest in labor peace? *Hanson* and *Abood* conclude that the elimination of "free riders" is sufficiently important to justify infringement of first amendment interests at least within the area of labor concerns. However, the Court has not specified how exacting a level of scrutiny underlay that conclusion. Thus, it is submitted only that the proposed analysis focuses the inquiry on the factors relevant to the first amendment policies at stake. Whatever level of scrutiny is applied, the suggested analysis identifies the criteria necessary to distinguish those uses of union shop funds that are constitutionally permissible from those that are not.

IV. *Abood* AND STATE AGENCY SHOP LEGISLATION

Professor Wellington has suggested that in avoiding the constitutional issues in *Street*, the Court might have restricted un-

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[74] *See* note 37 *supra*.

ions' use of union shop funds more than necessary.[75] That is, since the Court did not attempt to define the boundary between political and collective bargaining activities, *Street* left open the possibility that subsequent litigation would apply the statutory prohibition too broadly. *Abood* raises a similar problem for state legislation authorizing agency shop by holding that the use of agency shop funds for political purposes unrelated to collective bargaining violates the first amendment.[76] State courts may be inclined to avoid constitutional problems by construing their state statutes authorizing agency shop to prohibit what *Abood* says is unconstitutional. If so, the ambiguity surrounding the reach of *Abood*'s prohibition could lead state courts to construe their statutes more restrictively than necessary.

To date there has been surprisingly little litigation examining the permissible uses of agency shop funds under state statutes. In determining whether or not particular union activities are sufficiently related to collective bargaining to qualify for agency shop funding, the state decisions have rejected a narrow view of collective bargaining. Their focus has not been on whether particular activities are part of the process of negotiation and administration of collective agreements. Rather, their primary focus has been on whether particular activities relate to union efforts to obtain employment-related benefits. Even in Hawaii, where the applicable statute limits agency shop to negotiation and administration of collective agreements,[77] the Hawaii Public Employment Relations Board (HPERB) has construed that language to include virtually all activity calculated to secure a union's representational objectives.[78] Recent decisions in California and Wisconsin, where the applicable statutes contain no such express limitation, have explictly rejected any limitation of

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[75] H. WELLINGTON, *supra* note 15, at 261.

[76] *See* note 38 *supra*.

[77] HAW. REV. STAT. § 89-4(a) (1976).

[78] 1 Decisions of the HPERB 22, 35 (Jan. 17, 1972) (hearing officer's memorandum decision), *aff'd*, SF-05-1a, Dec. No. 7 (Hawaii PERB, Jan. 24, 1972), *aff'd*, No. 35588 (Hawaii Cir. Ct., Jan. 25, 1972) [hereinafter cited as Hawaii PERB Dec. No. 7].

Minnesota also has had several cases involving the use of union shop funds. However, the Minnesota cases have relied heavily upon the Hawaii cases, and for that reason will not be separately discussed. *See, e.g.*, Unfair Share Employees Organization, 77-FSC-106-A (Minn. PERB, Jan. 18, 1978), *aff'd*, No. 425616 (Minn. Dist. Ct., May 25, 1979).

agency shop to negotiation and administration of collective agreements,[79] adopting instead a standard focusing on whether or not activities supported with agency shop funds relate to improving employment conditions.[80]

This broad approach allows a realistic analysis of the relationship between union political activity and collective bargaining. Hawaii was the first state to specifically authorize the use of agency shop funds for union political activity. Under Hawaii law, which requires legislative approval of all cost items in agreements negotiated in the public sector,[81] the HPERB has authorized agency shop funding of lobbying efforts aimed at securing this approval.[82] The HPERB has also acknowledged that, in the

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[79] Cumero v. King City School Dist., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74 (Cal. PERB, Aug. 29, 1980) (proposed decision, appeal pending); Browne v. Milwaukee Bd. of School Directors, Dec. No. 18408 (Wis. Employment Relations Comm'n, Feb. 3, 1981). In *Browne,* the Wisconsin Employment Relations Commission stated:

> We cannot accept the Complainants' narrow interpretation of the term "collective bargaining process" to include only those functions relating to the negotiation of collective bargaining agreements, to the contract administration, and to the resolution of grievances arising under such agreements. The Complainants' position completely ignores the efforts of unions leading up to obtaining status as bargaining representatives. A union can only obtain its representative capacity by organizing employes, protecting their rights to engage in such activity, and in obtaining voluntary recognition or certification as an exclusive collective bargaining representative, after it has demonstrated, informally or formally, that it represents a majority of the employes in an appropriate bargaining unit. The collective bargaining process is broader than negotiating an agreement and reducing it to written form, and in [*sic*] processing grievances thereunder. *Abood* held that the process of establishing an agreement itself may also require "subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." As discussed subsequently herein a union performs its representational interest in expending funds seeking the enactment of legislation beneficial to employees generally, and especially to municipal employes, and in opposing legislation which would tend to have an opposite effect.

[80] Cumero v. King City School Dist., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74, at 23 (Cal. PERB, Aug. 29, 1980) (proposed decision, appeal pending); Browne v. Milwaukee Bd. of School Directors, Dec. No. 18408, at 23 (Wis. Employment Relations Comm'n, Feb. 3, 1981).

[81] HAW. REV. STAT. § 89-10 (Supp. 1979).

[82] Hawaii PERB Dec. No. 7, *supra* note 78, at 36. In *Abood,* the Court sug-

public sector, legislative concessions may directly substitute for bargained for concessions, and it has permitted the use of agency shop funds to finance lobbying for such legislative concessions.[83] The HPERB has even permitted agency shop funds to be used to support lobbying for more general programs—including, for example, increased funding for education, and changes in educational policy—which affect the preconditions for bargaining.[84]

On the other hand, the state decisions are unanimous in refusing to allow agency shop funds to be used for lobbying which is not arguably related to obtaining employment-related benefits, or for contributions to, or efforts on behalf of, political parties or candidates.[85] While lobbying which is not calculated to obtain employment-related benefits is clearly unrelated to a union's representational functions, the decisions have not articulated a sound explanation for excluding partisan political activity. After acknowledging that such activity may advance union representational interests, decisions in Hawaii and California simply cite *Abood* and announce that such uses of agency shop funds are impermissible.[86]

A recent Wisconsin decision recognized the apparent inconsistency of allowing the use of agency shop funds for union lobbying calculated to advance union representational interests while

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gested that lobbying for required legislative approval or funding of negotiated agreements might be sufficiently related to collective bargaining to qualify for union shop funding. *See* note 44 *supra*.

[83] Hawaii PERB Dec. No. 94, *supra* note 70, at 27.

[84] *Id.* at 26. The Hawaii PERB has also held that lobbying requires maintaining a relationship with legislators and cultivating access to them. Thus the Hawaii PERB has permitted as a charge to service fees the costs of a party for legislators at the beginning of the legislative session and for floral gifts. *Id.* at 25-26.

Similarly, the Wisconsin Employment Relations Commission recently authorized the use of agency shop funds for lobbying reasonably calculated to obtain employment-related benefits. Browne v. Milwaukee Bd. of School Directors, Dec. No. 18408, at 30-31 (Wis. Employment Relations Comm'n, Feb. 13, 1981).

[85] Cumero v. King City School Dist., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74, at 13, 44 (Cal. PERB, Aug. 29, 1980) (proposed decision, appeal pending); Browne v. Milwaukee Bd. of School Directors, Dec. No. 18408, at 29-33 (Wis. Employment Relations Comm'n, Feb. 13, 1981); Hawaii PERB Dec. No. 94, *supra* note 70, at 28.

[86] Cumero v. King City School Dist., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74, at 43-44 (Cal. PERB, Aug. 29, 1980) (proposed decision, appeal pending); Hawaii PERB Dec. No. 94, *supra* note 70, at 28.

prohibiting their use for partisan political efforts which might accomplish the same objective.[87] The Wisconsin Employment Relations Commission attempted to distinguish partisan political activity on the basis that its impact on union representational interests was too indirect or remote to override the first amendment interests of dissenting employees.[88] However, the Commission did not explain how the impact of partisan political activity upon union representational interests was any more remote than the impact of other activity for which use of agency shop funds had been approved.[89] Nor did it explain why, if the impact upon union representational interests was substantial, its being indirect or remote would be relevant to the first amendment. Thus, while state courts and administrative agencies have acknowledged the relationship between union political activity and collective bargaining, they, like the Supreme Court, failed to distinguish adequately between constitutionally permissible and impermissible uses of agency shop funds.

Conclusion

In *Railway Employes' Department v. Hanson*, the Supreme Court held that eliminating "free riders" through union shop was constitutional. *Abood v. Detroit Board of Education* reaffirmed *Hanson* and went on to hold that use of union shop funds for political or ideological purposes unrelated to collective bargaining violated the first amendment. The Court implied that such expenditures did not further the government's interest in eliminating "free riders." However, the test of whether expenditures of union shop funds are related to collective bargaining is, by itself, inadequate to distinguish between permissible and impermissible expenditures of union shop funds. Many union political expenditures, especially those in the public sector, are related to collective bargaining in that they further

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[87] Browne v. Milwaukee Bd. of School Directors, Dec. No. 18408, at 30 (Wis. Employment Relations Comm'n, Feb. 13, 1981).

[88] *Id.*

[89] For example, the Wisconsin Employment Relations Commission held:

> Further, to be chargeable [to agency shop funds], a particular lobbying activity need not relate to a particular bargaining unit's benefits where it is part of an overall program with other units by which they pool their strength . . . to assist each other.

Id. at 31.

union efforts to secure employment related benefits for represented employees.

This article suggests an alternative, two-part analysis. First, this analysis asks whether or not the expenditure is reasonably calculated to further union efforts to obtain employment-related benefits for represented employees. Second, if so, the analysis seeks to determine the extent to which the impact of the expenditure is limited to employment concerns. The first prong of the suggested analysis gives full scope to the "free rider" rationale for union shop. It recognizes that the government's interest in eliminating "free riders" applies to all union activity designed to improve employment conditions. The second prong of the suggested analysis recognizes that some union activity calculated to further union representational interests may also infringe individual first amendment interests beyond the scope of the union's representational concern. By focusing the inquiry on the competing interests involved, the approach suggested in this article facilitates a more rational balancing of these interests.