COMMENT

Collective Bargaining vs. the First Amendment: Court-Ordered Remedies for the Political Use of Mandatory Union Fees

Following two decades of litigation, the Supreme Court in 1977 recognized the first amendment right of nonunion employees under union security agreements to prevent the use of their representation fees for political purposes. Since then, courts have struggled to design remedies to safeguard this constitutional right without impairing the union's legitimate collective bargaining activities. This Comment examines the development and scope of the first amendment right and the fairness and effectiveness of court-imposed remedies and recommends approaches to balance the important competing interests.

INTRODUCTION

Organized labor plays an increasingly influential role in American politics, as measured both by campaign expenditures[1] and direct partic-

[1] Labor organizations received over $39 million in federal political contributions during the 1981-82 election cycle. The figures for different types of political action committees (PAC's) are shown below:

Committee Type	*Receipts*	*Expenditures*
Corporations	$47,259,365	$43,352,796
Labor	39,027,781	36,814,186
Nonconnected	64,912,562	64,827,383
Trade/Member/Health	44,284,979	42,684,445
Cooperatives	4,238,443	3,930,978
Corporations without stock	2,707,583	2,077,010
Total	$202,430,438	$193,686,796

Of the total amount of contributions by labor to candidates in 1981-82, 94.2% went

ipation in managerial and grass-roots political activities.[2] At the same time, the gap between the political attitudes of union leaders and labor rank and file is widening. Declining union membership[3] and greater voting independence by union members[4] threaten the vitality of labor political action committees (PAC's), which depend on small, individual contributions by union members.[5] Although organizations hostile to organized labor have elicited large numbers of small, individual, volun-

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to Democrats and 5.8% to Republicans. 1 FEDERAL ELECTION COMM'N, REPORTS ON FINANCIAL ACTIVITY IN 1981-82, INTERIM REPORT NO. 4, PARTY AND NON-PARTY POLITICAL COMMITTEES 90, 96 (1983) [hereafter FEC REPORT].

[2] For example, the American Federation of Labor-Congress of Industrial Organization's Committee on Political Education (AFL-CIO COPE) estimated that in 1976, 120,000 labor volunteers made 10 million phone calls and distributed 80 million pieces of literature to union members in support of the Carter-Mondale ticket. H. ALEXANDER, FINANCING THE 1976 ELECTION 613 (1979). One analyst has placed the cash value of the total aid given in 1976 at $8.5 million. Malbin, *Labor, Business and Money — A Post-Election Analysis*, 9 NAT'L J. 412, 415 (1977).

The AFL-CIO Executive Board's pre-primary presidential endorsement of former Vice President Walter F. Mondale illustrates labor's renewed emphasis on using political action to achieve its legal, social, and economic goals. *See, e.g.*, *Unions Plan Expanded Efforts to Gain More Political Clout and Elect a President in 1984*, 42 CONG. Q. WEEKLY REP. 1981 (1983).

[3] After a consistent increase in the years following passage of the Wagner Act, the percentage of unionized workers has continued to fall, from a high of 34.7% in 1954, the year of the AFL-CIO merger, to only 25.7% of the nonagricultural work force in 1980. This percentage represents the smallest proportion of the work force represented by unions since the Great Depression. U.S. BUREAU OF CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, Pt. 1, at 178 (Bicentennial ed. 1975); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1983-84, at 440 (1982).

This decline has occurred in the face of major gains in public employee organizing. In October 1980, 48.8% of all state and local government employees were unionized, a 3.1% increase since 1979 and a 7.8% increase since 1972. U.S. BUREAU OF CENSUS, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS 1980 (1982), *reported at* 1982 GOV'T EMPL. REL. REP. (BNA) 2-21 (Reference File). Sixty-one percent of federal executive branch employees (excluding the Postal Service) are now represented by unions recognized as exclusive bargaining agents. Federal Personnel Manual Bulletin No. 711-86, *reprinted in* 1983 GOV'T EMPL. REL. REP. (BNA) 217 (Reference File).

[4] Despite labor's near-unanimous support of Democrat Jimmy Carter, nearly 50% of union members voted for Republican Ronald Reagan in 1980. *Unions Plan Expanded Efforts to Gain More Political Clout and Elect a President in 1984*, 42 CONG. Q. WEEKLY REP. 1981, 1983 (1983).

[5] Of the more than $39 million in federal political contributions raised by labor organizations in 1981-82, only $87,781 (0.23%) were in contributions of $500 or more. By contrast, over $8.3 million of the $47.2 million, or 17.5%, raised by corporate PAC's represented contributions over $500. 1 FEC REPORT, *supra* note 1, at 90.

tary contributions,[6] labor unions, without constituencies beyond their own membership, often must raise money through mandatory membership contributions.[7]

The renewed emphasis on political action and the need to raise money through internal means provide additional encouragement for unions to seek union security clauses[8] as part of their collective bargaining agreements. Union or agency shop contracts cover a large number of unionized workers,[9] particularly in politicized occupations where

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[6] The two leading money raising PAC's during 1981-82 were the National Conservative Political Action Committee, with $9,991,459 in receipts, and the National Congressional Club, chaired by Senator Jesse Helms (R-N.C.), with $9,742,494. Both groups rely heavily on direct mail solicitations sent to millions of small contributors. The third largest fundraiser, the Realtors' Political Action Committee, raised just under $3 million. The largest labor PAC, the U.A.W. Voluntary Political Action Committee, raised just under $2 million. 4 FEC REPORT, *supra* note 1, at C-164.

[7] Federal election laws governing contributions to candidates for office require that such contributions be funded out of voluntary non-dues-related payments made to a union PAC. The present controversy concerns the use of funds expended out of membership dues. This so-called "soft money" may be used for lobbying and ideological activities such as contributions to interest groups and foundations. It may also be used in voter registration, get-out-the-vote, and partisan activities directed at the union's members and their families. *See infra* note 64.

[8] "Union security" agreements generally fall into one of three categories: closed shops, union shops, and agency shops. Under a closed shop arrangement, an employer selects employees only from among union members; union membership is a prerequisite to employment. Though legal under the original Wagner Act, the closed shop was banned under the Taft-Hartley Amendments, Pub. L. No. 80-101, 61 Stat. 136 (1947), as "discrimination in regard to hire or tenure of employment." 29 U.S.C. § 158(a)(3) (1982).

In a union shop, an employee need not be a member immediately upon being hired, but must join the union within a specified period, usually the statutory minimum of 30 days. *Id.* In an agency shop, employees need not join a union but must pay a representation fee to the union and may not participate in any internal union decisionmaking process. F. BARTOSIC & R. HARTLEY, LABOR RELATIONS IN THE PRIVATE SECTOR 235-36 (1977).

Section 14(b) of the Taft-Hartley Amendments, 29 U.S.C. § 164(b) (1982), allows states to ban "agreements requiring membership in a labor organization as a condition of employment." Although agency shop agreements technically do not require membership, the Supreme Court has held that such agreements, as well as union shops, may be prohibited by state "right to work" laws. Retail Clerks, Local 1625 v. Schermerhorn, 373 U.S. 746 (1963). Thus, for purposes of this Comment, the terms "union shop" and "agency shop" are used interchangeably.

[9] Eighty-two percent of the 400 union agreements surveyed by the Bureau of National Affairs contained some form of union security clause. Union shop agreements were the most common (62%), followed by agency shops (12%) and modified union shops, which exempt certain workers such as temporary employees or religious objectors (11%). BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 85

successful collective bargaining often requires effective political and legislative action.[10] Unions seek security clauses to protect against the "free rider," the employee who derives the benefits of collective bargaining while refusing to voluntarily share the costs of operating the union.[11]

The use of union security agreements to expand labor's political power raises important first amendment issues because of potential conflicts between the political stances of unions and their individual members. Seeking to balance these interests, the Supreme Court, in *Abood v. Detroit Board of Education*,[12] held that individual employees have a first amendment right to prevent the use of mandatory dues for objectionable political purposes. Recently the Court, in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,[13] clarified the scope of permissible union expenditures, but cast severe doubts upon the constitutional adequacy of the prevailing remedy for deprivation of these employee rights.

This Comment explores these decisions and their effects on labor's ambitious political goals. Part I reviews the Supreme Court's initial upholding of union security clauses and subsequent narrowing of their

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(10th ed. 1983).

[10] For instance, union security agreements have become increasingly common among government workers. *See* Schneider, *Public Sector Labor Legislation — An Evolutionary Analysis* in B. AARON, J. GRODIN & J. STERN, PUBLIC SECTOR BARGAINING 217 (1979). For a list of state public employee statutes permitting union security agreements, see Note, *Public Sector Labor Relations: Union Security Agreements in the Public Sector Since* Abood, 33 S.C.L. REV. 521, 531 n.68 (1982).

[11] In addition to normal office overhead expenses, the more costly union functions include contract negotiation and administration, economic research, legal expenses in conjunction with arbitration, disciplinary proceedings and outside litigation, dissemination of membership information, and legislative lobbying efforts. Many of these responsibilities require trained professional personnel. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 (1977), discussed *infra* text accompanying notes 46-59.

Apart from pragmatic operational considerations, union leaders have historically decried the unfairness of free riders and their effect on internal union cohesion. Samuel Gompers, writing in 1905, asserted that "like all others in society, persons who are desirous of becoming beneficiaries of an agreement should become parties to that agreement, and they should bear the equal responsibility which such an agreement involves." Gompers, 12 AM. FEDERATIONIST 221 (1905). Although the intensity of feeling may have abated somewhat, the elimination of the "free rider" is still a cherished goal of most union officials.

[12] 431 U.S. 209 (1977). For a discussion of *Abood*, see *infra* text accompanying notes 46-59.

[13] 104 S. Ct. 1883 (1984). For a discussion of *Ellis*, see *infra* text accompanying notes 109-23.

scope to include only the mandatory payment of "germane" collective bargaining expenses. The nature of dissenting employees' rights and the court-developed remedy against their deprivation are discussed. Part II traces the growth and operation of union rebate plans for objectionable political expenditures. It analyzes the difficulties in securing constitutional rights through this privately administered remedy, a problem that ultimately led the Supreme Court in *Ellis* to eliminate or narrowly confine its use. Additional remedies imposed by the courts are examined, particularly the use of escrow accounts to prevent the "interim deprivation" of employees' first amendment rights. The fairness, effectiveness, and practicality of escrow requirements are evaluated in view of the nature of the individual rights involved and the competing interests in judicial economy, effective collective bargaining, and union political action. Finally, part III suggests judicial and legislative action to provide an effective remedy for dissenting employees, while eliminating the danger of judicial interference in the union's representative and political functions.

I. Union Security and Compulsory Political Contributions: The Supreme Court's Response

Organized labor historically has used union security agreements to institutionalize local unions,[14] prevent employer interference,[15] and provide locals with necessary operating expenses.[16] Only after courts began to impose certain affirmative duties on unions, however, did these agreements gain broad support from commentators and policymakers.[17]

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[14] *See, e.g.*, F. Bartosic & R. Hartley, *supra* note 8, at 235; R. Gorman, Labor Law: Unionization and Collective Bargaining 639 (1976); B. Taylor & F. Witney, Labor Relations Law 377 (4th ed. 1983).

[15] *See, e.g.*, B. Taylor & F. Witney, *supra* note 14, at 377.

[16] *See, e.g.*, R. Gorman, *supra* note 14, at 639; N. Levin, Successful Labor Relations 19 (1978); H. Wellington, Labor and the Legal Process 133 (1968).

[17] *See, e.g.*, F. Bartosic & R. Hartley, *supra* note 8, at 235 (because union has duty to represent all employees in bargaining unit, none should accept the benefits of unionization without paying for them); Hopfl, *The Agency Shop Question*, 49 Cornell L. Rev. 478, 480 (1964) (persons indifferent or opposed to union nonetheless receive benefits from union's activities); Palombo, *The Agency Shop in a Public Service Merit System*, 26 Lab. L.J. 409, 412 (1975) (citing examples of state public employee laws imposing duty to represent all members of bargaining unit fairly and equally); Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. Rev. 233, 240 (1959) (union security agreements permit better wages and working conditions while minimizing employee resentment); Note, *Union Shop Provisions of the Railway Labor Act Held Not to Authorize Use of Union Dues for Political Purposes*, 61

The most important duty was that of fair representation, under which a union must represent all members of a bargaining unit — not just its own members[18] — fairly and equally. First used as a weapon against union racial discrimination,[19] the duty was eventually extended to all aspects of the union-employee relationship.[20]

This responsibility created a need for additional funds to pay the union's increased operating expenses.[21] It also focused attention on the problem of free riders within the bargaining unit.[22] Because of the duty

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COLUM. L. REV. 1513, 1517 (1961) (main purpose of Railway Labor Act amendments was to require all workers to contribute to costs of collective bargaining); Note, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 233 (1961) (citing congressional debate over repeal of Railway Labor Act's "open shop" provisions); *see also* 96 CONG. REC. 17,050-51, 17,055, 17,057-58 (1951).

[18] Because of Taft-Hartley restrictions on union security agreements, *see supra* note 8, a bargaining unit may include nonunion employees. On the duty of fair representation, see generally F. BARTOSIC & R. HARTLEY, *supra* note 8, at 695-728; C. MORRIS, THE DEVELOPING LABOR LAW 1285-1358 (1983); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

[19] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (restrictions on black employment in collective bargaining agreement); *see also* Conley v. Gibson, 355 U.S. 41 (1957) (failure to protect black employees against discriminatory discharges); Syres v. Oil Workers Local 23, 350 U.S. 892 (1955) (per curiam) (negotiation of dual seniority system for black and white employees); Brotherhood of R.R. Trainsmen v. Howard, 343 U.S. 768 (1952) (threatened strike to force discharge of black employees).

[20] *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (grievance procedures); Humphrey v. Moore, 375 U.S. 335 (1964) (same); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (union security agreements); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) (sex discrimination); Pacific Maritime Ass'n, 209 N.L.R.B. 519 (1974) (same).

[21] B. TAYLOR & F. WITNEY, *supra* note 15, at 377; H. WELLINGTON, *supra* note 16, at 133; Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 42 (1961); *see also* International Ass'n of Machinists v. Street, 367 U.S. 740, 762 (1961) (Congress enacted union shop provisions of Railway Labor Act in part to provide necessary revenues to enable unions to represent all its workers fairly).

[22] *See supra* note 11. This free rider phenomenon, in both labor and other contexts, has been discussed by a number of academicians. *See, e.g.*, M. OLSON, THE LOGIC OF COLLECTIVE ACTION 76 (1964):

> A labor organization works primarily to get higher wages, better working conditions, legislation favorable to workers and the like; these things by their very nature ordinarily cannot be withheld from any particular worker in the group represented by the union. Unions are for "collective bargaining" not individual bargaining. It follows that most of the achievements of a union, even if they were more impressive than the staunchest unionist claims, could offer the rational worker no incentive to join; his individual efforts would not have a noticeable effect on the outcome, and

of fair representation, nonunion employees could obtain the benefits of collective bargaining without sharing the costs. Without a universal membership requirement as a prerequisite to employment, neither nonunion employees nor a union's existing members would have an economic incentive to belong to the union. Although mandatory membership would alleviate the free rider problem, there is an undeniable coercive element in these member agreements that must be balanced against their salutary effects in promoting industrial peace and stability through collective bargaining.

The Supreme Court has examined on five occasions the permissibility of legislatively mandated or authorized union security agreements.[23] Specifically, the Court has considered whether a sufficiently strong "government purpose" justifies the inherent coercion of such agreements.[24] The Court has found traditional union political practices im-

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whether he supported the union or not he would still get the benefits of its achievements.

[23] Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

Most of the litigation has involved collective bargaining contracts in the interstate transportation and public employment sectors, areas that fall outside the scope of the National Labor Relations Act. This is partially due to the general prohibition of closed shops and the authorization of state "right to work" statutes under the Taft-Hartley Amendments, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 164(b) (1982)).

[24] The Supreme Court has held that a first amendment infringement can be justified only when there is a "compelling state interest." *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (public employment cannot be conditioned on membership in a particular political party); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Congress may not limit independent or aggregate campaign spending, or a candidate's own personal expenditures); Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher may not be dismissed for criticizing school board policies unless statements were made with knowledge or reckless disregard of their falsehood); Bates v. City of Little Rock, 361 U.S. 516 (1959) (state may not require private organizations to provide membership lists to ascertain compliance with corporate or tax statute); NAACP v. Alabama, 357 U.S. 449 (1958) (same). Among the interests that the Court has recognized as justifying such infringement are military discipline, Parker v. Levy, 417 U.S. 733 (1974); maintaining the integrity of the civil service, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); the orderly conduct of primary elections, Rosario v. Rockefeller, 410 U.S. 752 (1973); ensuring the loyalty of state legislators, Bond v. Floyd, 385 U.S. 116 (1966); and protecting the public against obscenity, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). In Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), the Court balanced the government interest in industrial peace and stability against the infringement of first amendment rights in justifying the

permissible when made under a union security agreement, even while determining that such agreements were lawful for germane collective bargaining purposes such as contract negotiation and grievance adjustment. The Court's decisions have focused on the nature and scope of employee rights and on the methods used to secure these rights.

A. Statutory Violations: The Street *Decision*

In *International Association of Machinists v. Street*,[25] the Supreme Court first considered the use of mandatory union dues for political purposes.[26] The plaintiff union members sought to enjoin enforcement

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union shop authorizations of the Railway Labor Act. *See infra* note 26. A court recently applied the compelling state interest standard to hold that a Seventh-Day Adventist's religious objections gave him no right to avoid payment of agency shop fees. Gray v. Gulf M. & O.R.R., 429 F.2d 1064 (5th Cir. 1969), *cert. denied*, 400 U.S. 1001 (1971). *Contra* McDaniel v. Essex Int'l, 696 F.2d 34 (6th Cir. 1982) (union and company must reasonably accommodate employee whose religious tenets forbid contributions to unions); Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369 (Me. 1978) (same); *see* Note, *Accommodating the Anti-Union Religious Employee — A Balanced Approach*, 32 RUTGERS L. REV. 484 (1979); Note, *Union Security Agreements, Duty to Accommodate Religious Objections*, 47 TENN. L. REV. 212 (1979); Note, *Accommodation of Refusal to Pay Dues in an Agency Shop Because of Religious Beliefs*, 23 WAYNE L. REV. 1171 (1977). In 1980, Congress amended the NLRA to exempt from union security agreements employees with bona fide religious beliefs against joining or financially supporting labor organizations. Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (codified at 29 U.S.C. § 169 (1982)).

A similar analysis has been used to define the permissible use of mandatory state bar fees, *see* Lathrop v. Donohue, 367 U.S. 820 (1961); Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982); Falk v. State Bar of Mich., 411 Mich. 63, 305 N.W.2d 201 (1981), and student activities fees, *e.g.*, Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982); Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

For an interesting application of the compelling state interest approach in a decision invalidating a statute based on infringement of first amendment rights of association, see Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979) (requirement that participants in "Civilian Marksmanship Program" be members of the National Rifle Association not related to legitimate goals of government).

[25] 367 U.S. 740 (1961).

[26] The Court had previously upheld the union shop as a valid exercise of Congress' police power to maintain industrial peace under the commerce clause, thus justifying the infringement on the individual right of association. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956). The Court in *Hanson* did not address the question whether dues exacted under such agreements could be used for political purposes, because the record did not present that issue. *Id.* at 238. The Court hinted, however, that it might later enjoin the use of dues to force "ideological conformity." *Id.*

of a union shop contract under the Railway Labor Act in which a portion of membership dues was used for political purposes with which they disagreed.[27] In upholding the employees' right to object to the use of their dues, the Court strained to avoid the apparent first amendment issues,[28] namely whether the forced use of the dues violated constitutional rights of association, or otherwise restrained their political "speech." Instead, it held that the 1951 Railway Labor Act intended to authorize union shop assessments only to "meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes."[29]

Concerning the remedy, the Court held that the trial court's injunction against enforcement of the bargaining agreement was overbroad,

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[27] A group of railroad employees filed a class action in the Georgia state courts. The trial court dismissed the initial complaint, based on the Supreme Court's decision in *Hanson*. The Georgia Supreme Court reversed. Looper v. Georgia, S. & Fla. R.R., 213 Ga. 279, 99 S.E.2d 101 (1957). On remand, the trial court held that the allegations of unauthorized payments to federal, state, and local political candidates and to various causes, were fully proved. It then issued a blanket injunction enjoining the enforcement of the union shop agreement, finding violations of the first, fifth, ninth, and tenth amendments of the United States Constitution. The Georgia Supreme Court affirmed. 215 Ga. 27, 108 S.E.2d 796 (1959).

[28] " 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Street*, 367 U.S. at 749 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1931)); *see also infra* notes 29 & 44.

[29] 367 U.S. at 769. The dissenting and concurring opinions in *Street* revealed deep divisions within the Court, both regarding the nature of the employees' deprivation and the proper remedy. In his dissent, Justice Black argued that the first amendment prohibited forced payments that support political or ideological causes objectionable to some of the members, regardless of whether or not such causes facilitate collective bargaining. *Id.* at 780, 790-91; *see also infra* note 37. In contrast, Justice Frankfurter, joined by Justice Harlan, argued in dissent that labor's political role had become institutionalized by practice and necessity. 367 U.S. at 798. According to Justice Frankfurter, Congress, in enacting the Railway Labor Act, was aware of labor's political role and easily could have explicitly limited this role to safeguard union dissidents. Its failure to do so, Frankfurter reasoned, should be taken as acquiescence in the use of union dues to achieve political goals. Quoting *Hanson*, Frankfurter argued that the union in *Street*, as a legitimate collective bargaining agent, did not use union shop fees as a "cover for forcing ideological conformity" and, hence, did not violate the plaintiffs' first amendment rights. *Id.* at 805. Frankfurter argued that the mere payment of union dues, like taxes or bar membership fees, did not preclude the individual member from separately expressing her views and thus did not promote "ideological conformity." *Id.* In addition, Frankfurter chided the majority for its "pre-Victorian" view of the proper political role of unions, arguing that the political and economic goals of labor were inseparable and deserved equal protection. *Id.* at 814-15.

violating the public policy against judicial interference with collective bargaining expressed in the Norris-LaGuardia Act[30] and interfering with the union's legitimate collective bargaining activities.[31] Accordingly, the Court limited the injunction to restrain only the use of the employees' dues for political purposes unrelated to collective bargaining.[32] It further held that the employees were entitled to restitution of dues previously expended for such purposes.[33] The amount of the restitution and reduction of future payments was to be calculated by ascertaining the percentage of total union funds used for impermissible political and ideological purposes and by reducing the individual employee's future dues by that percentage.[34]

The majority opinion in *Street* established a right without a realistic remedy. The imbalance between the costs of litigation and the recoverable portion of union dues created little incentive for the individual dissenting employee to object.[35] Moreover, the Court prohibited the plaintiffs from bringing a class action on behalf of the other members of the bargaining unit.[36] The Court also offered no guidance concerning which specific union activities were germane to collective bargaining and, therefore, permissible.[37]

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[30] 29 U.S.C. §§ 101-115 (1982). Under the Act's declaration of public policy, workers have "full freedom" to associate, organize, and designate bargaining representatives. Further, the Act precludes federal courts from issuing injunctions against union membership and nonviolent work stoppages, assembly, or other activities aimed at publicizing labor disputes. *See infra* note 82.

[31] 367 U.S. at 771.

[32] *Id.* at 774.

[33] *Id.* at 775.

[34] *Id.* at 774-75.

[35] The commentators' response to the proposed remedy was generally critical. *See, e.g.*, Note, *Union Shop Provisions of the Railway Labor Act Held Not to Authorize Use of Union Dues for Political Purposes*, 61 COLUM. L. REV. 1513, 1518 (1961) ("little practical significance"); Note, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 238 (1961); Note, *Labor Law: Expenditures of Union Funds Over Objections of Members*, 13 MERCER L. REV. 439, 442 (1962) ("impractical and clearly inadequate"); Comment, *Freedom from Political Association: The* Street *and* Lathrop *Decisions*, 56 NW. U.L. REV. 777, 781 n.30 (1962); 28 BROOKLYN L. REV. 1070, 1071 (1961) ("[not] of great practical value").

[36] The Court held that the plaintiffs made "no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes." 367 U.S. at 774.

[37] The majority opinion, on which the present-day union remedy is based, *see supra* text accompanying notes 25-34, garnered the unqualified support of only four of the Justices. Justice Whitaker, although providing the fifth vote for the Court's finding that the unauthorized political use of union dues violated the Railway Labor Act, dissented

Two years later, in *Brotherhood of Railway Clerks v. Allen*,[38] the Court again construed the Railway Labor Act as prohibiting forced political contributions. The Court refined the principles governing employee actions for redress. First, the Court reduced the employees' burden by requiring only an objection to the general political use of their funds, rather than to each individual expenditure.[39] In addition, the unions, as keepers of receipt and expenditure records, were allocated the burden of proving the proper proportion of germane bargaining-related expenditures.[40]

In fashioning a remedy, the Court recognized the length and cost of litigation challenging union expenditures.[41] To avoid overtaxing the judicial system while adhering to the *Street* requirement of a pro rata restitution, coupled with a reduction in future dues, the Court suggested a "practical decree" based on the English Trade Union Act of 1913.[42] Essentially, the preferred remedy was a voluntary plan, adopted and managed by the union, that excused dissenting employees from paying the nongermane proportion of regular union fees.[43]

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from the remedial portion of the decision. Foreseeing the later difficulties in determining which union activities were "proscribed" and the ratio of such activities to the overall dues payment, Whitaker argued that the injunctive relief ordered by the Georgia court — enjoining enforcement of the union shop contract — was the only effective means of protecting individual rights. 367 U.S. at 779-80. Justice Black's dissent also urged injunctive relief, but would have limited it to the named plaintiffs in what was originally a class action brought on behalf of all members of the bargaining unit. *Id.* at 791; *see supra* note 29.

The crucial fifth vote for the rebate plan was provided by Justice Douglas, who filed a separate concurrence stating his agreement with the arguments of Justices Black and Whitaker and admitting that his vote was provided *dubitante* based on the "practical problems of mustering five Justices for a judgment in this case." 367 U.S. at 778-79.

[38] 373 U.S. 113 (1963).

[39] *Id.* at 118.

[40] "Since the unions possess the facts and records from which the proportion of political to total expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Id.* at 122.

[41] *Id.*

[42] Trade Union Act of 1913, 2 & 3 Geo. V, ch. 30, *reenacted by* Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. VI, ch. 52, *cited in Allen*, 373 U.S. at 123, 124-31. The Act specifically requires that unions maintain a separate political fund and that workers covered by the union not be excluded from representation benefits based on their failure to contribute to the fund. It allows employees to file a notice with the unions exempting them from political assessments for up to one year and requires that unions, upon voting to make political expenditures, notify their membership of the option not to participate.

[43] *Allen*, 373 U.S. at 122-23.

Thus, *Street* avoided the first amendment issue by finding a deprivation of an equivalent statutory right of association, while *Allen* created a corresponding private, self-executing remedy. Although the Court's logic has been faulted,[44] the two cases are consistent in tailoring the remedy to fit the offense. The federal system generally guards constitutional rights more zealously than statutory rights.[45] The Court's action in leaving redress to the parties, subject to minimal judicial supervision, thus befits the nonconstitutional nature of the deprivation found in *Street*.

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[44] Commentators have generally criticized *Street* as epitomizing judicial abdication and the "artful dodging" of constitutional issues. *See, e.g.*, Wellington, Machinists v. Street, *Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49; Note, *Union Shop Provisions of the Railway Labor Act Held Not to Authorize Use of Union Dues for Political Purposes*, 61 COLUM. L. REV. 1513, 1517 (1961); Note, *Union Shop Provision Construed to Deny a Union, Over an Employee's Objection, the Power to Use His Exacted Funds to Support Political Causes*, 30 GEO. WASH. L. REV. 541, 549 (1962); Note, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 235 (1961); Note, *Interpretation of Statute to Avoid Constitutional Questions Re: Labor Union Political Contributions*, 22 MD. L. REV. 348 (1962). This criticism was first voiced by Justice Black in his dissent in *Street*, in which he accused the court of "carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme." *Street*, 367 U.S. at 784 (quoting Clay v. Sun Ins. Office, 363 U.S. 207 (1960) (Black, J., dissenting)).

By contrast, numerous courts have cited *Street* and *Allen* as admirable examples of pragmatic judicial restraint. *See, e.g.*, United States v. Clark, 445 U.S. 23, 27 (1980); NLRB v. Catholic Bishop, 440 U.S. 490, 500 (1979); United States v. Pappas, 613 F.2d 324, 329 (1st Cir. 1979); Daylo v. Administrator of Veterans' Hosp., 501 F.2d 811, 819 (D.C. Cir. 1974); Kelsey v. Weinberger, 498 F.2d 701, 708 (D.C. Cir. 1974); Klemens v. Air Line Pilots Ass'n, 500 F. Supp. 735, 738 (D. Wash. 1980); Frigard v. Texaco, Inc., 460 F. Supp. 1094, 1101 (D. La. 1978).

[45] For example, the 1871 civil rights act and its corresponding jurisdictional statute permit suits against individuals seeking to deprive another person of her constitutional civil rights under color of state law. Act of Apr. 20, 1871, 17 Stat. 13 (current version codified at 42 U.S.C. §§ 1983-1986 (1982); 28 U.S.C. § 1343 (1982)).

The Supreme Court has held that § 1983 provides a federal remedy in three instances: (1) when a state law is facially unconstitutional, (2) when state procedure does not allow full litigation of a constitutional claim, or (3) when the procedure, though adequate in theory, is unavailable in practice. Monroe v. Pape, 365 U.S. 167, 173-74 (1960). The effect, according to the Court, is to "[alter] the balance of judicial power between the state and federal courts." Allen v. McCurdy, 449 U.S. 90, 99 (1980). The federal remedy is not conditional on resort to state legal or administrative remedies, or on findings of violation of state law. *Monroe*, 365 U.S. at 183; McNeese v. Board of Educ., 373 U.S. 668 (1963); *see also, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 934-35 (1982); Mitchum v. Foster, 407 U.S. 225, 239 (1972) (statute serves as "guarantor of basic federal rights against state power.").

B. Unions, Political Contributions, and the First Amendment: Abood v. Detroit Board of Education

The constitutional issues avoided in *Street* and *Allen* were squarely presented in *Abood v. Detroit Board of Education.*[46] Public school teachers objected to the payment of agency fees authorized by a state public employee statute,[47] claiming that a portion of such fees was used

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[46] 431 U.S. 209 (1977).

[47] MICH. COMP. LAWS § 423.211 (1979).

One of the key unresolved issues in this area is whether union security agreements constitute government action so as to bring the case within the first and fourteenth amendments. When the government sets the terms and conditions of employment, either through state public employee statutes or the negotiation of collective bargaining agreements, "government action" exists. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Disagreements linger, however, over whether such action exists under the Railway Labor Act and the National Labor Relations Act.

Section 2 (Eleventh) of the Railway Labor Act overrides state "right to work" laws and expressly authorizes union shops in the interstate railroad industry. Courts have held that this override constitutes government action. *Abood*, 431 U.S. at 218-19 (construing Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1954)). However, differences persist regarding the meaning of *Hanson*, in which the Court failed to find evidence of a first amendment violation. *See, e.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 807 (1961) (Frankfurter, J., dissenting) (arguing that the Act merely expanded commercial rights and did not involve government compulsion). Agreeing with Frankfurter, Justice Powell, concurring in *Abood*, argued that "under the first amendment, the Government may authorize private parties to enter into voluntary agreements whose terms it could not adopt as its own." *Abood*, 431 U.S. at 250 (Powell, J., concurring); *see also* Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345 (1951).

An even more difficult question exists when the collective bargaining agreements have been negotiated in the private sector under the National Labor Relations Act. Section 8(a)(3) of the Act, 29 U.S.C. § 158(b) (1982), expressly authorizes, but does not require union shops. However, § 14(b), added by the Taft-Hartley amendments, allows states to override this authorization by enacting "right to work" laws. Thus, the NLRA, unlike the Railway Labor Act, appears facially neutral with regard to union security agreements. *See* Levinson, *After* Abood: *Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 AM. U.L. REV. 1, 10 (1977). In Reid v. McDonnell Douglas Corp., 443 F.2d 408 (10th Cir. 1971), the Tenth Circuit adopted this position, holding that the NLRA is "neutral and permissive" toward union shops and that, as a result, "the federal government does not appear . . . to have so far insinuated itself into the decision of a union and employer to agree to a union security clause so as to make that choice government action for the first and fifth amendments." *Id.* at 410-11 (citations omitted).

A number of courts and jurists, however, including the First and Ninth Circuits and the Chief Justice of the United States, disagree. Instead, they have held that the NLRA places the "government imprimatur" on union security agreements. *See* Buckley v. American Fed'n of Television & Radio Artists, 419 U.S. 1093, 1095 (1975) (Douglas,

for political and ideological purposes. Although it upheld the agency fee payments for "collective bargaining, contract administration and grievance adjustment," the Court found, for the first time, that the "nongermane" political use of such payments violated nonconsenting employees' first amendment rights of association.[48] The Court held that the implied first amendment freedom to associate[49] included a freedom not to associate: "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."[50]

J., joined by Burger, C.J., dissenting from denial of certiorari) ("The Federal Government . . . by its approval and enforcement of union-shop agreements, may be said to 'encourage' and foster such agreements."); Linscott v. Millers Falls Co., 440 F.2d 14, 16-17 (1st Cir.) (little significance to distinction between Railway Labor Act and NLRA), *cert. denied*, 404 U.S. 872 (1971); Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003 (9th Cir. 1970) (both Railway Labor Act and NLRA based on Congress' power over interstate commerce; acts are "for all purposes here, the same"); *see also* Buckley v. American Fed'n of Radio & Television Artists, 354 F. Supp. 823 (S.D.N.Y. 1973) (same), *rev'd on other grounds*, 496 F.2d 305 (2d Cir.), *cert. denied*, 429 U.S. 1093 (1974).

The issue would appear to turn on the individual court's view as to the practical political effect of §§ 8(a)(3) and 14(b) of the NLRA, 29 U.S.C. §§ 158(a)(3), 164(b) (1982), that is, whether these provisions make it easier to negotiate union shops than would federal silence on the issue. *See, e.g.*, Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386, 416-17 (1977) (arguing that because it is more difficult to pass a state "right to work" law than to prevent the passage of a union security authorization, the requisite government action exists).

[48] 431 U.S. at 235-36.

[49] The Court has explicitly held that the freedom to associate is protected "speech" within the first and fourteenth amendments: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." NAACP v. Alabama, 357 U.S. 449, 460 (1958). The Court has invoked this principle primarily to invalidate membership disclosure requirements, loyalty oaths, and other restrictions on public employment. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (requirement that employee belong to a particular political party); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (loyalty oaths); Shelton v. Tucker, 364 U.S. 479 (1960) (affidavit disclosing organizations to which employees belonged or contributed).

[50] 431 U.S. at 234; *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (reversing criminal conviction for obscuring "Live Free or Die" slogan on New Hampshire automotive license plate); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding public school student's right not to participate in daily flag salute).

On the freedom not to associate, see Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995 (1982); Comment, *The Right of Ideological Nonassociation*, 66 CALIF. L. REV. 767 (1978).

The *Abood* Court made no effort to define those germane activities that could lawfully be funded by agency fees.[51] It also offered little practical guidance regarding the appropriate remedy in future cases.[52] After restating the history leading to the adoption of the "practical decree" in *Allen*, the Court affirmed its belief that resort to an "internal union remedy" was "highly desirable" in view of the extensive factfinding, delay, and cost of adjudicating disputes in the courts.[53]

Although *Abood* involved constitutional, rather than statutory violations, that difference, according to the Court, "surely could not justify any lesser relief in this case."[54] The Court was silent, however, on whether the nature of the deprivation warranted any broader relief. Instead, noting that the schoolteachers' union had adopted a rebate plan in the interim, the Court suggested that the state court defer further proceedings pending voluntary use of the plan.[55]

II. Recent Developments in the Law: The Uncertain Mandate of *Abood*

In *Abood*, the Court protected dissenting agency shop employees' first amendment right to abstain from financially supporting the union's ideological and political beliefs and causes.[56] The decision, however, reveals two additional, and potentially inconsistent, themes: (1) the need to weigh the newly recognized individual associational rights against the union's legitimate collective bargaining interests; and (2) the preference for settling dues disputes internally without resort to litigation.

In one sense, *Abood* was successful: numerous international unions implemented rebate plans.[57] But the decision failed to deter litigation.[58]

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[51] 431 U.S. at 236. The Court held that the issue was not presented by the pleadings, except for a reference in the complaint to union "social activities," an issue it left to be resolved by the Michigan courts. *See infra* notes 137-38 and accompanying text.

[52] *See* Levinson, *supra* note 47, at 28.

[53] 431 U.S. at 240.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 235; *see supra* text accompanying notes 49-50.

[57] Typically, union rebate plans require that employees annually file with the union, by registered or certified mail, a notice objecting to the political use of their dues and requesting a proportionate rebate. Provisions are made for the initial calculation of the rebate (usually by an officer or existing committee of the international union) and for appeals procedures (often to the union's Executive Council and finally to the international convention). For a comparison of four rebate plans (AFSCME, Railway Clerks, Machinists, and UAW), see Nelson, *Union Dues and Political Spending*, 28 Lab. L.J.

Instead, the inherent conflict between the magnitude of the protected

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109 (1977). *See also* Beck v. Communications Workers of Am., 468 F. Supp. 87, 92 (D. Md. 1979) (CWA rebate plan); Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 758-59 (C.D. Cal. 1973) (reproduction of Machinists' membership circular describing rebate plan).

[58] *See, e.g.*, Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984); Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984); Champion v. California, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3559 (U.S. Feb. 19, 1985) (No. 84-1010); Dean v. Trans World Airlines, 708 F.2d 486 (9th Cir.), *cert. denied*, 104 S. Ct. 490 (1983); Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269 (9th Cir. 1983); Gabauer v. Woodcock, 594 F.2d 662 (8th Cir.), *cert. denied*, 444 U.S. 841 (1979); Lehnert v. Ferris Faculty Ass'n, 556 F. Supp. 309 (W.D. Mich. 1982); Perry v. City of Fort Wayne, 542 F. Supp. 268 (N.D. Ind. 1982); Lykins v. Aluminum Workers, 510 F. Supp. 21 (E.D. Pa. 1980); Havas v. Communications Workers of Am., 509 F. Supp. 144 (N.D.N.Y. 1981); Beck v. Communications Workers of Am., 468 F. Supp. 87 (D. Md. 1979); Fort Wayne Educ. Ass'n v. Goetz, 443 N.E.2d 364 (Ind. App. 1982); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982); White Cloud Educ. Ass'n v. Board of Educ., 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal dismissed sub nom.* Jibson v. White Cloud Educ. Ass'n, 105 S. Ct. 236 (1984); Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978); Haag v. Hogue, 116 Misc. 2d 935, 456 N.Y.S.2d 978 (Sup. Ct. 1982); Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 265 N.W.2d 559 (1978).

Litigation in this area has proved expensive, time-consuming, and complex. For instance, *Ellis* involved five years of discovery, eight days of hearings, 16 witnesses, and 1400 documents. Brief for Amicus Curiae National Education Association at 6-7, Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984) [hereafter NEA Brief] (copy on file with *U.C. Davis Law Review*). In Beck v. Communications Workers of Am., No. M-76-839 (D. Md., filed June 4, 1976), the district court heard 27 days of testimony and received more than 2000 exhibits. NEA Brief, *supra*, at 7. In Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982), *aff'd*, 460 U.S. 1048 (1983), *rev'd on other grounds following remand*, 104 S. Ct. 1058 (1984), discovery lasted three years, during which plaintiffs conducted 46 days of depositions and required unions to make available 75,000 pages of documents. NEA Brief, *supra*, at 7-8. In addition to the volume of information, litigation involves complex factfinding due to the extensive accounting necessary. For example, in *Beck*, a special master appointed by the district court allocated the chargeable expenditures for union newspapers based on eight different categories of news and prorated the cost of maintenance, repair, and operation of the union's headquarters building. NEA Brief, *supra*, at 13 n.11.

The litigation also historically involves a small percentage of workers in the bargaining unit. School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982), for example, involved two named plaintiffs and a total of 200 dissenting employees out of 60,000 members and 700 nonmember feepayers in the bargaining unit. *Knight* involved 63 persons out of 38,336 members and 2618 feepayers. Antonacci v. New Jersey, 741 F.2d 598 (3d Cir. 1984), involved 10 named plaintiffs and 51 total dissenters out of over 80,000 members and 1700 feepayers. NEA Brief, *supra*, at 9 n.8.

right and the reliance on a privately administered remedy to prevent its violation created new controversies over the range of permissible union expenditures, the scope of judicial review of union rebate plans, and the extent of the first amendment deprivation. These controversies threatened to involve the courts in the type of cumbersome and detailed scrutiny of the adequacy of individual union rebate programs that *Abood* strove to avoid.[59]

A. Nonconstitutional Approaches to the Rights of Union Political Dissidents

Part of the problem faced by the courts stemmed from the lack of administrative or statutory means to resolve political dues disputes.[60] Courts must now engage in cumbersome first amendment analysis largely because earlier decisions rejected nonconstitutional theories of recovery. Courts have held that the political use of dues payments does not violate federal civil rights statutes,[61] is not a breach of union officials' fiduciary duty to the membership,[62] and does not require denial of the union's tax-exempt status.[63] Criminal sanctions against union political expenditures have rarely been enforced and, as a result of narrow judicial interpretation, have proved ineffective in preventing perceived

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[59] 431 U.S. at 237-42.

[60] *See infra* notes 61-67 and accompanying text.

[61] Lohr v. Association of Catholic Teachers, 416 F. Supp. 619 (E.D. Pa. 1976) (negotiation of agency shop contract does not constitute conspiracy to violate individual employee's civil rights because negotiators not acting under color of state law); *see also* Champion v. California, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3559 (U.S. Feb. 19, 1985) (No. 84-1010) (denial of injunction against collection of union fees in federal civil rights action).

[62] Gabauer v. Woodcock, 594 F.2d 662 (8th Cir.), *cert. denied*, 444 U.S. 841 (1979); McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

[63] Marker v. Connally, 337 F. Supp. 1301 (D.D.C. 1972), *aff'd sub nom.* Marker v. Shultz, 485 F.2d 1003 (D.C. Cir. 1973). For a discussion of the differential treatment given the political activities of unions and charitable organizations under the Internal Revenue Code, see Graves, *When Will Political Activities of Unions and Associations Cost Them Their Exemption?*, 35 J. TAX'N 254 (1971). The Tax Reform Act of 1976 allows charities, depending on their size, to use up to 20% of their budget for lobbying and propaganda without losing their tax exempt status. Pub. Law No. 94-455, 90 Stat. 1520 (codified at 26 U.S.C. §§ 501(b), 4911 (1982)).

Attempts to withdraw tax exemptions from unions that use membership dues for political purposes have been defeated several times in the Senate. 115 CONG. REC. 42,371 (1971); 115 CONG. REC. 38,318 (1969); 115 CONG. REC. 37,624 (1969); *see* Comment, *Political Contributions and Tax-Exempt Status for Labor Organizations*, 1974 WASH. U.L.Q. 139.

abuses by unions.[64] In addition, criminal statutes have been held not to

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[64] Corporate political expenditures have been prohibited since the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. However, prior to World War II, there was only one recorded prosecution under the Act or its successor, the Corrupt Practices Act, Pub. L. No. 68-506, 43 Stat. 1070, 1074 (1925). *See* United States v. United States Brewers' Ass'n, 239 F. 163 (D. Pa. 1916) (overruling the grant of a demurrer based on alleged first amendment violation).

The Corrupt Practices Act was extended to labor unions, first as a temporary wartime measure, War Labor Disputes Act of 1943, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167-68, and later in the Taft-Hartley Amendments, Pub. L. No. 80-101, 61 Stat. 136 (1947) (current version at 2 U.S.C. § 441b (1982)). Although prosecutions of labor unions have greatly exceeded those of corporations, doubts regarding the Act's constitutionality and Congress' goals in enactment continued to thwart its implementation.

In United States v. CIO, 335 U.S. 106 (1948), the Supreme Court held that 18 U.S.C. § 610, the forerunner of the modern statute, did not apply to materials circulated exclusively among union members or their families. Four Justices voted to hold § 610 unconstitutional as a violation of freedom of speech. The next year, in United States v. Painters Local 481, 172 F.2d 854 (2d Cir. 1949), the Second Circuit dismissed an indictment based on a union-sponsored advertisement attacking Senator Taft's presidential candidacy. The critical consideration for the court was the small audience reached by the advertisement. Another court invoked a similar de minimis exclusion in United States v. Construction & Gen. Laborers Local 264, 101 F. Supp. 869 (W.D. Mo. 1951) (quashing an indictment for using union members to register and turn out voters in support of a union business agent's candidacy).

Although the legislative history of the Corrupt Practices Act indicates congressional intent to restrict labor political influence, subsequent Supreme Court decisions have avoided the constitutional issue by construing the law as intending to protect union minority rights. Thus, in United States v. UAW, 352 U.S. 567 (1957), the Court reinstated an indictment of a union for sponsoring a political broadcast and remanded for a factual determination whether the broadcast was paid for by voluntary donations or by union dues. On remand, a jury found the union not guilty. *See* Graves, *supra* note 63, at 256; *see also* United States v. Teamsters Local 688, 41 Lab. Cas. (CCH) ¶ 16,601 (E.D. Mo. 1962) ("check-off" of dues for political purposes not covered by § 610). Between 1950 and 1961, the Department of Justice received 175 complaints under § 610. Of that number, 126 were investigated and 22 presented to grand juries. Six indictments were returned, but no convictions resulted. Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. REV. 1033, 1041 n.38 (1965); Comment, *Political Contributions by Labor Unions*, 40 TEX. L. REV. 665, 670 (1962).

The principles of *CIO* and *UAW* were codified in the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 441b (1982)). The Hansen amendment to the original bill revised § 610 to exclude from prohibited contributions or expenditures:

> (A) communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; (B) non-partisan registration and get-out-the-vote campaigns . . . [and] (C) *the establishment, administration, and solicitation of contributions . . . to be utilized for political purposes by a corporation or labor organization* . . . (emphasis added).

create a private cause of action.[65] Moreover, it is doubtful that unlawful

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The addition of the latter proviso diluted § 610, thus avoiding the seemingly inevitable collision with the first amendment. In Pipefitters Local 562 v. United States, 407 U.S. 385 (1972), the Court, per Justice Brennan, held that § 610 did not apply when there was a "strict segregation" of union political monies from dues and assessments, and when solicitations to the fund were "conducted under circumstances plainly indicating that donations [were] for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power." *Id.* at 414. The test, according to the Court, is whether such donations are made through "knowing free choice." *Id.* Although the alleged offenses took place before Congress enacted the Hansen amendment, the Court relied on the author's statements that he intended merely to codify existing law. *Id.* at 422-24. For a discussion of the *Pipefitters* decision and its likely impact, see Cohan, *Of Politics*, Pipefitters *and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936 (1973).

The FECA was again amended in 1976 to codify the holdings in *CIO* and *Pipefitters*. Pub. L. No. 94-283, 90 Stat. 475 (codified as amended at 2 U.S.C. §§ 441a-441b (1982)).

An exceptional instance in which the union president failed to meet the minimal burdens imposed by *Pipefitters* arose in the Justice Department's successful prosecution of United Mine Workers President W.A. "Tony" Boyle. The evidence showed that union officials converted proceeds from the union treasury to the union's political arm from which contributions were made. The officials made no attempt to "strictly segregate" the funds or to report their transfer to the membership. *See* United States v. Boyle, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

State criminal prosecutions of unions for political activity have been similarly ineffective in preventing perceived abuses by unions. *See, e.g.*, Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944) (holding statute invalid), *cert. denied*, 325 U.S. 450 (1945); DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947) (§ 610 does not cover referenda), *cert denied*, 333 U.S. 876 (1948); AFL v. Reilly, 130 Colo. 90, 155 P.2d 145 (1944) (holding statutes invalid); AFL v. Bain, 165 Or. 183, 106 P.2d 544 (1940) (lack of justiciable controversy). *But see* AFL v. Mann, 188 S.W.2d 276 (Tex. Civ. App. 1945) (upholding state ban on union political activity). For a list of state statutes restricting union political activity, see NATIONAL ASS'N OF ATTORNEYS GENERAL, CAMPAIGN FINANCE LAWS: LEGISLATIVE APPROACHES AND CONSTITUTIONAL LIMITATIONS 33 (1977). The validity of these and other restrictions on corporate or union political activities is in serious doubt because of the Supreme Court's decision in First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (invalidating state law restricting corporate expenditures in connection with state referenda not relating to business, property, or assets of corporation). *See infra* note 129.

[65] Cort v. Ash, 422 U.S. 66 (1975). In *Cort*, the Supreme Court held that the Federal Election Campaign Act Amendments of 1974 gave the Federal Election Commission exclusive jurisdiction over alleged corporate violations of 18 U.S.C. § 610. In doing so, it held that a stockholder could not bring a derivative action on ultra vires grounds against a corporation for its illegal political expenditures. "The legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the cor-

political expenditures, including unauthorized use of agency fees, constitute an unfair labor practice[66] or a breach of the union's duty of fair representation.[67] In any case, because of the constitutional question involved, the courts are reluctant to require the employee to exhaust administrative remedies before bringing suit.[68] Thus, a first amendment action is effectively the sole available avenue of relief for a dissenting employee.

B. The Scope of Judicial Review of Union Rebate Plans

The Court's failure in *Abood* to define adequately the scope of judicial review of union rebate plans also left the lower courts perplexed.

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porations and their shareholders." 422 U.S. at 82.

A footnote in *Cort*, however, suggests possible different treatment of corporations and labor unions, making private § 610 remedies available only against the latter. *See infra* note 129. But in McNamara v. Johnston, 522 F.2d 1157, 1167 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), the court dismissed an action based on § 610 as well as the Landrum-Griffin Act. *Cf.* Barber v. Gibbons, 367 F. Supp. 1102 (E.D. Mo. 1973) (union member may bring declaratory judgment action invalidating dues allocations to political funds when expenditures would have violated FECA). The *Barber* case suggests a limited availability of private causes of action in actions for declaratory relief. Regarding declaratory judgment actions as a possible remedy against the unauthorized political use of agency shop fees, see White Cloud Educ. Ass'n v. Board of Educ., 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal dismissed sub nom.* Jibson v. White Cloud Educ. Ass'n, 105 S. Ct. 236 (1984). *See also infra* notes 157-60 and accompanying text.

[66] *See, e.g.*, NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (union has broad power over its own internal affairs, including the ability to prescribe rules of membership).

[67] Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 763 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976). In addition, an employee must show that the union acted in bad faith to claim a breach of the duty of fair representation. Vaca v. Sipes, 386 U.S. 171 (1967).

[68] *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 556 F. Supp. 309 (W.D. Mich. 1982); Beck v. Communications Workers of Am., 468 F. Supp. 87 (D. Md. 1979). *But see* Seay v. McDonnell Douglas Corp., 371 F. Supp. 754 (C.D. Cal. 1973) (court imposed a de facto exhaustion requirement by holding that the failure to use union rebate procedures rendered the controversy over its adequacy nonjusticiable), *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976); *see also* Threlkeld v. Robbinsdale Fed'n of Teachers, 316 N.W.2d 551 (Minn. 1982), *aff'g* Robbinsdale Educ. Ass'n v. Local 872, Robbinsdale Fed'n of Teachers, 307 Minn. 96, 239 N.W.2d 437 (1976), *appeal dismissed*, 459 U.S. 802 (1982). In *Robbinsdale*, the Minnesota Supreme Court interpreted the state public employee statute as creating the rights to (1) bring an action to enjoin the use of the withheld fee; (2) enjoin, in certain circumstances, the collection of fees; and (3) have a court hearing to determine the validity and proper amount of the "fair share" fee.

As noted, *Abood* indicated a strong preference for an "internal union remedy" as an alternative to litigation.[69] At the same time, however, it affirmed the principle, first expressed in *Allen*, that the individual employee, lacking access to the union's financial records, should not bear the burden of proving the inadequacy of the rebate.[70] The question arose whether the union satisfies its *Abood* responsibilities merely by implementing a rebate program or whether it must also prove the adequacy of the program.

Several courts have held that a union's good faith implementation of a rebate program precludes further judicial inquiry into its adequacy. In 1977, the Washington Supreme Court ruled that the availability of a "publicized, 'readily accessible' " union rebate procedure met the *Abood* test.[71] The Ninth Circuit's opinion in *Ellis* held that the union's rebate plan was presumptively valid.[72] Moreover, the court deemed irrelevant to the question of good faith the fact that the union did not fully implement its plan until twelve years after the *Allen* mandate.[73]

Even prior to the Supreme Court's decision in *Ellis*, however, most courts had suggested a broader scope of review because first amendment rights are implicated. In *Seay v. McDonnell Douglas Corp.*,[74] decided prior to *Abood*, the Ninth Circuit reversed a grant of summary judgment in favor of a union that had implemented a rebate plan. The court held that a factual issue existed concerning whether the union would fairly and honestly determine the percentage of dissenters' dues that it could legitimately use.[75] The Ninth Circuit ruled that the trial

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[69] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237-42 (1977); *see supra* notes 46-55 and accompanying text.

[70] 431 U.S. at 239, 240 n.40.

[71] Association of Capitol Powerhouse Eng'rs v. Division of Bldg. & Grounds, 89 Wash. 2d 177, 188, 570 P.2d 1042, 1049 (1977).

[72] Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part*, 104 S. Ct. 1883 (1984).

[73] *Id.* at 1069.

[74] 533 F.2d 1126 (9th Cir. 1976). It is interesting to compare the Ninth Circuit's narrow view of "good faith" in *Seay* with the deference given to the union by the same court in *Ellis*. The *Ellis* court distinguished *Seay* on the grounds that it involved a summary judgment motion, while the challenge to the rebate program in *Ellis* was fully litigated. *Ellis*, 685 F.2d at 1070. Further explanation may lie in the fact that the author of the Ninth Circuit's opinion in *Ellis*, Judge Pregerson, was the district judge who was overruled in *Seay*. *See* Seay v. McDonnell Douglas Corp., 371 F. Supp. 754 (C.D. Cal. 1973), *rev'd*, 533 F.2d 1126 (9th Cir. 1976).

[75] Specifically, the employees alleged that union accounting procedures concealed many political expenditures, and that the union had destroyed or withheld records of such expenditures. The court also noted that, despite the *Street* and *Allen* decisions, the Railway Clerks (which was a party in *Allen*) did not implement a rebate program for

court's presumption of the plan's validity violated the *Allen* requirement that the union affirmatively demonstrate that it properly calculated the rebate.[76] Thus, the courts were split over the proper deference to be given union rebate plans.

C. *Interim First Amendment Deprivation Under Union Rebate Plans and the Use of Escrow Accounts*

Finally, the courts differed as to the adequacy of existing remedies in protecting first amendment rights. Since *Allen* the courts have safeguarded dissenting employees' associational rights by initially requiring full dues payment, but subsequently rebating the amount found not germane to collective bargaining.[77] Experience with this scheme renewed many of the doubts and disagreements over its fairness that were first evidenced in *Street*.[78] In particular, the fact that the determination of the rebate amount was left to the union, subject only to cumbersome, intraunion appeals procedures, suggests that this mechanism failed to adequately safeguard employee rights of association.

Decisions prior to *Ellis* suggested the emergence of a new doctrine dramatically altering the administration of present "demand and return" programs.[79] Specifically, the courts held that the interim use of dues by a union pending payment of the rebate or adjudication of a dispute over the proper amount unduly infringes first amendment rights.

Justice Stevens first articulated this theory of "interim deprivation" in his concurrence in *Abood*. He observed that:

> [T]he Court's opinion [in *Abood*] does not foreclose the argument that the union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.[80]

Stevens suggested that the *Abood* court's interest balancing test does not prevent further judicial inquiry. Instead, courts could, on a case-by-

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over 12 years. *Seay*, 533 F.2d at 1132.

[76] *Id.*

[77] *See supra* notes 30-43 and accompanying text.

[78] *See supra* notes 25-45 and accompanying text.

[79] Robinson v. New Jersey, 547 F. Supp. 1297 (D.N.J. 1982), *rev'd*, 741 F.2d 598 (3d Cir. 1984); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982); Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978); Haag v. Hogue, 116 Misc. 2d 935, 456 N.Y.S.2d 978 (Sup. Ct. 1982); *see infra* text accompanying notes 83-103 & 143-56.

[80] *Abood*, 431 U.S. at 244 (Stevens, J., concurring).

case basis, evaluate the effect of potential remedial devices on the union's collective bargaining ability and fashion the appropriate relief.[81]

To be sure, most courts, prior to *Ellis*, relied on the conventional *Street* and *Allen* analysis, holding that the anti-injunction policy of the Norris-LaGuardia Act[82] and the likely resulting interference with collective bargaining precluded a remedy for alleged "interim deprivation."[83] Another court reached a similar result on first amendment grounds, holding that an injunction against union political expenditures constituted a prior restraint on the speech of employees who do not object to the political use of their dues.[84] Acting on Justice Stevens' concerns, however, a significant number of courts held that the first amendment requires either cessation of union assessments or the creation of escrow accounts into which the amount of the complaining employee's dues could be placed pending adjudication. In *Ball v. City of Detroit*,[85] the state court that originally heard *Abood* held that ordering escrow payments did not violate the Supreme Court's prohibition against "broad injunctive relief."[86] Instead, it viewed an escrow account as a temporary measure that protected the interests of both parties by guaranteeing that the employees' first amendment rights are not temporarily infringed, while allowing unions to collect dues payments for their immediate use following victory in the courts.[87]

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[81] The Stevens concurrence, when coupled with the majority opinion's express refusal to rule conclusively on the adequacy of union "demand and return" systems, *id.* at 297 n.45, was interpreted as granting state and federal courts wide discretion over remedies for the political use of dues. *See, e.g.*, Robinson v. New Jersey, 547 F. Supp. 1297, 1318 (D.N.J. 1982), *rev'd*, 741 F.2d 598 (3d Cir. 1984); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180, 187-89 (1982); Ball v. City of Detroit, 84 Mich. App. 383, 391-93, 269 N.W.2d 607, 611 (1978). *See generally infra* notes 85-108 & 157-62 and accompanying text.

[82] 29 U.S.C. §§ 101-115 (1982). The Act states that workers should be allowed to organize, join and support unions, collectively bargain, publicize disputes, peaceably assemble, and withhold labor without being subject to an injunction.

[83] *See, e.g.*, Hostetler v. Brotherhood of Ry. Trainsmen, 294 F.2d 666 (4th Cir. 1961) (per curiam); Seay v. McDonnell Douglas Corp., 371 F. Supp. 754 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976); Marker v. Connally, 337 F. Supp. 1301 (D.D.C. 1972), *aff'd sub nom.* Marker v. Shultz, 485 F.2d 1003 (D.C. Cir. 1973); Ruby v. Pan American Airways, 252 F. Supp. 393 (S.D.N.Y. 1966); *see also* Southern Ohio Coal Co. v. UMW, 551 F.2d 695 (6th Cir.) (*Street* requires that injunction be framed as narrowly as possible and issued only when necessary to safeguard individual employment rights), *cert. denied*, 434 U.S. 876 (1977).

[84] Lehnert v. Ferris Faculty Ass'n, 556 F. Supp. 309 (W.D. Mich. 1982).

[85] 84 Mich. App. 383, 269 N.W.2d 607 (1978).

[86] *Id.* at 397, 269 N.W.2d at 613.

[87] *Id.*

More recently, in *School Committee of Greenfield v. Greenfield Education Association,*[88] the Massachusetts Supreme Court invalidated a local teachers' union rebate plan that required separate applications to local, state, and national education associations. The Court held that the plan was overly cumbersome and violated the *Allen* requirement that the union prove the lawfulness of expenditures financed by compulsory fees.[89] The court found that the union's right to the use of agency fees, as established by the state collective bargaining statute, was secondary to the employee's first amendment right to refrain from supporting, even temporarily, political causes objectionable to the employee.[90] Accordingly, it interpreted the statute as requiring either that the union cease collection of the fees, or that the total amount of the fees be paid into an escrow account.[91]

The *Greenfield* escrow requirement illustrated the uncertainty of *Abood*'s mandate and the potential for widely varying remedies. The court held that the additional burden placed on the union — the denial of access to the employee's agency fee payment — was consistent with *Allen* and *Abood*. It held that because *Allen* involved a statutory rather than a constitutional deprivation, it did not preclude additional remedies beyond requiring a rebate program.[92] Noting the discretionary nature of *Abood*'s remand instructions, the court concluded that *Abood* did not preclude the escrow remedy, and may, given Justice Stevens' concurrence,[93] have required it.[94]

In contrast, courts in two recent decisions refused to find an "interim deprivation" based on the union's temporary retention of funds under a "demand and return" system. As noted above,[95] the Ninth Circuit in *Ellis* ruled that the existence of a rebate program satisfies the *Abood* requirement unless the union is shown to have acted in "bad faith."[96] In upholding the union's rebate system, the court focused on *Abood*'s use of the term "restitution." Because the term connotes a "giving back," the union was entitled to retain employee fees during the entire

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[88] 385 Mass. 70, 431 N.E.2d 180 (1982).

[89] 431 N.E.2d at 188.

[90] *Id.*

[91] 431 N.E.2d at 189.

[92] *Id.*

[93] Abood v. Detroit Bd. of Educ., 431 U.S. at 244 (Stevens, J., concurring).

[94] *Greenfield*, 431 N.E.2d at 189.

[95] *See supra* text accompanying notes 72-73.

[96] Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part*, 104 S. Ct. 1883 (1984); *see supra* text accompanying notes 72-73.

appeals process without resort to an escrow account.[97]

A less conclusive result was reached in *Haag v. Hogue*,[98] in which the plaintiff sought summary judgment against a union's automatic deduction of nonmember fees equal to the full amount of dues charged members. The New York trial court noted that all fees collected by the union were presumed to be used for germane collective bargaining purposes and that the complaint failed to allege specific facts to rebut that presumption.[99] In addition, the court held, somewhat ingenuously, that first amendment rights were abridged not by the collection, but by the unlawful use of employee fees.[100] Criticizing *Greenfield*, it stated that requiring the union to pay the disputed fees into an escrow account absent special circumstances would impair its collective bargaining efforts.[101] It did not find, however, that escrow payments were necessarily precluded in all cases. Citing a recent Third Circuit opinion,[102] it held that the requirement might be appropriate when the plaintiff made a

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[97] *Id.* at 1069-70.

[98] 116 Misc. 2d 935, 456 N.Y.S.2d 978 (Sup. Ct. 1982).

[99] *Id.* at 943-44, 456 N.Y.S.2d at 984.

[100] *Id.*

[101] *Id.* at 941-42, 456 N.Y.S.2d at 983.

[102] Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982). In *Galda*, the New Jersey Public Interest Research Group (PIRG), an independent consumer-oriented student group, received support through "mandatory" student fees imposed on Rutgers University students. Organizations could receive such support only if they had been certified by the University Senate and approved by a student referendum held at least every three years in which at least 50% of the students participated, or in which at least 25% of the students voted to support the organization. In addition, students received in their registration packet a postcard they could return to receive a refund. Three students challenged the assessments, alleging that PIRG violated their first amendment rights by engaging in lobbying and ideological activity in the areas of energy, abortion rights, and environmental protection. The trial court held that the rebate procedure met the *Allen* and *Abood* tests of not unduly burdening the dissenters and granted summary judgment for the university. 516 F. Supp. 1142 (1981).

The Third Circuit opinion reversing the trial court can be construed in several ways. The ostensible basis was the narrow holding that an issue of fact remained as to whether PIRG's activities were germane to the task of a university; that is, whether there was a "compelling governmental interest" justifying the first amendment infringement. But the court also held that *Abood* did not rule on the constitutional adequacy of the internal remedy. 686 F.2d at 167. Instead, it relied on the Stevens concurrence in *Abood*, finding an interim constitutional deprivation (the university's rebate procedure typically involved a processing period of several months). *Id.* at 168. Moreover, the court said that a remedy should provide for both a rebate and future proportional reductions. *Id.* at 169. Thus, *Galda*, in its broadest sense, may stand for the proposition that *any* rebate program, regardless of its facial fairness, may be subject to de novo review by the courts.

facial showing of burdensomeness and when the court had thoroughly examined the record.[103]

The *Haag* and *Ellis* cases illustrate shortcomings in the *Ball* and *Greenfield* analysis that tended to thwart rather than facilitate the goals of *Abood*. First, in trying to mitigate the unreasonable burden placed on individual employees who challenge union rebate plans, *Ball* and *Greenfield* placed a burden on the unions that is disproportionate to their alleged transgressions. By requiring that the entire agency fee payment be placed in escrow pending adjudication, the *Ball* and *Greenfield* courts, in effect, assumed that the entire fee is being used for political purposes. The typical amount involved, however, is a small percentage of such fees.[104]

Viewed in this light, the escrow requirement closely resembles the type of overbroad injunctive relief disapproved in *Hanson* and *Street*.[105] Despite the courts' portrayal of the escrow requirement as a temporary delay in the union's eventual access to employees' dues, the requirement, carried to its logical extreme, could severely impair union operations as much as if the court had enjoined the union security agreement.

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[103] 116 Misc. 2d at 943-44, 456 N.Y.S.2d at 984.

[104] For instance, in 1974 the Secretary-Treasurer of the American Federation of State, County and Municipal Employees (AFSCME) estimated that the proportion of individual member dues used for political purposes, and to which dissenters were entitled to receive in rebate, came to a total of 86¢ per member per year. On appeal to the union's International Judicial Panel, which was empowered to hear such disputes, *see supra* note 57, the amount was increased by 6¢. Zwerdling, *Liberation of Public Employees in the Public Sector*, 17 B.C. IND. & COM. L. REV. 993, 1036 (1976).

More recently, in *Haag*, an action brought under the auspices of the National Right-to-Work Legal Defense Foundation, the dispute involved an annual payment of two dollars to the New York Education Association's Political Action Committee. Haag v. Hogue, 116 Misc. 2d 935, 939-40, 456 N.Y.S.2d 978, 982 (Sup. Ct. 1982). However, in Beck v. Communications Workers of Am., 112 L.R.R.M. (BNA) 3069 (D. Md. 1983), the district court adopted a special master's finding that 79% of the union's dues assessments were used for impermissible nongermane purposes. The union argued that *Allen* imposed on the union the burden of production, not of persuasion. The court disagreed and upheld the master's requirement that the union prove the germane portion by "clear and convincing evidence." *Id.* at 3073. The union also unsuccessfully argued that the master drew improper adverse inferences from the testimony of union employees and from the union's failure to maintain adequate personnel records. The union has appealed the judgment.

Ellis involved individual sums between $47 and $352, NEA Brief, *supra* note 58, which constituted between 4.68% and 5.4% of the total assessments during the years in question. Respondents' Brief in Response to Petition for Certiorari, Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984) (copy on file with *U.C. Davis Law Review*).

[105] *See supra* notes 25-37 and accompanying text.

The union's financial interest in the individual employee's fee payment may be even smaller, as a proportion of the total union treasury, than that of the employee in the nongermane portion of their fees. However, the union's failure to litigate the employee's claim may undermine the efficacy of the agency shop agreement, encouraging other employees to refuse to pay the full amount of their fees and otherwise to challenge the union's authority.

Therein lies the danger of the *Greenfield* approach. The Massachusetts court argued that by requiring escrow of the entire amount of the individual member's dues, the inconvenience is placed on both the employee, forced to tender payment, and on the union, prevented from collecting the payment. In the context of an individual, isolated union-employee dispute, such an argument might prove compelling. But, as indicated,[106] dues disputes are likely to recur, often within the same bargaining unit. Thus, a remedy appropriate in an individual context may unduly burden the union if applied generally. Because only a small portion of an employee's dues is used for political or ideological purposes,[107] the complaining employees are often motivated less by personal financial gain than by a desire to weaken the union.[108] Applied

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[106] *See supra* text accompanying notes 30-31 & 36; *see also supra* note 104 and accompanying text.

[107] *See supra* note 104.

[108] The extensive involvement of the National Right-to-Work Foundation in challenges to rebate plans indicates the significance of this underlying intent. Among the cases in which the Foundation is listed as having represented the employee or filed an amicus brief are: Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984); Champion v. California, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3559 (U.S. Feb. 19, 1985) (No. 84-1010); Kentucky Educators Pub. Affairs Council v. Kentucky Registry of Election Fin., 677 F.2d 1125 (6th Cir. 1982); Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982), *aff'd*, 460 U.S. 1048 (1983), *rev'd on other grounds following remand*, 104 S. Ct. 1058 (1984); Havas v. Communications Workers of Am., 506 F. Supp. 144 (N.D.N.Y. 1981); Lohr v. Association of Catholic Teachers, 416 F. Supp. 619 (E.D. Pa. 1976); Fort Wayne Educ. Ass'n v. Goetz, 443 N.E.2d 364 (Ind. App. 1982); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982); Haag v. Hogue, 116 Misc. 2d 935, 456 N.Y.S.2d 978 (Sup. Ct. 1982); Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 265 N.W.2d 559, *reh'g denied*, 267 N.W.2d 379 (1978). The Foundation was also instrumental in bringing the actions resulting in the Supreme Court's decisions in *Abood* and *Ellis*.

In 1978, the United Auto Workers unsuccessfully alleged that the Foundation's activities violated § 101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(4) (1982), prohibiting interested employers or employer associations from financing, encouraging, or participating in representation suits in which they were not a party. UAW v. National Right-to-Work Legal Defense & Educ. Fund, 590 F.2d 1139 (D.C. Cir.

generally, the escrow requirement permits organized anti-union activists to disrupt not only the union's political activities, but also its collective bargaining and contract administration functions, by joining together dissenting employees within a bargaining unit in challenges to the union rebate plan.

D. The Demise of the Rebate: The Ellis *Decision*

Despite its drawbacks, the imposition of an escrow requirement appears to be the favored remedy after the Supreme Court's recent decision in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*.[109] In *Ellis*, plaintiff employees challenged an agency shop contract between their employer, Western Airlines, and the since decertified union.[110] The employees' challenge took two forms. First, they challenged several of the nonpolitical activities that their compulsory dues financed.[111] Second, the employees charged that the union's rebate program was constitutionally inadequate.[112] Thus, the employees asserted both a permanent and interim deprivation of their first amendment rights. The district court found each of the challenged expenditures nongermane and hence impermissible.[113] However, it held that the union's rebate plan constituted a good faith and adequate effort to protect the dissenting employees' rights. Accordingly, it ordered a refund of forty percent of the dues already paid, and an equivalent permanent reduction in future dues. The Ninth Circuit affirmed in part and reversed in part,[114] holding each of the challenged expenditures germane and upholding the union's rebate program.[115]

In an opinion by Justice White, the Supreme Court unanimously reversed. Although acknowledging that language in *Abood* seemed to permit rebate programs,[116] the Court held that neither *Allen* nor *Abood*

1978). In the course of the decision, the court found that "between 1969 and 1974, the Foundation supplied counsel or financial support for over forty lawsuits brought by employees against unions in addition to the twenty-one other suits outlined in the union's complaint." *Id.* at 1143 n.4.

[109] 104 S. Ct. 1883 (1984).

[110] Despite the decertification of the union since the commencement of the litigation, the Court held that, because of the outstanding claims for improper past dues assessments, the case was not moot. *Id.* at 1889.

[111] *See infra* note 138 and accompanying text.

[112] 104 S. Ct. at 1888.

[113] 91 L.R.R.M. (BNA) 2339 (S.D. Cal. 1980).

[114] 685 F.2d 1065 (9th Cir. 1982).

[115] *Id.* at 1069-70; *see supra* notes 72, 73 & 95-97 and accompanying text.

[116] 104 S. Ct. at 1889; *see supra* notes 95-97 and accompanying text.

passed upon their constitutional adequacy.[117] Instead, adopting Justice Stevens' "interim deprivation" theory,[118] it held the Railway Clerks' rebate plan inadequate.[119] Such a plan, according to the Court, "effectively charges the employees for activities that are outside the statutory authorization."[120] Even if the union were to pay interest on the withheld amount, the rebate program constituted an impermissible "involuntary loan" that administrative convenience could not justify.[121]

In place of a rebate program, the Court delineated two "readily available alternatives": an advance reduction in dues or the placement of disputed dues into interest-bearing escrow accounts.[122] The former, a component of the "practical decree" enunciated in *Allen*,[123] apparently requires the union to assume and anticipate that nonunion employees would choose not to support union political and related causes and reflect this refusal in the dues initially charged the employee. In the event that the union does not do so, or if the employee otherwise disputes the amount of the reduction, the union would presumably be forced to place the disputed dues into an escrow account.

III. Judicial and Legislative Recommendations

Even prior to *Ellis*, the confusion over the scope of judicial review of union rebate plans, the "temporary deprivation" of first amendment rights, and the remedial use of escrow payments suggested the need to refine the "practical remedy" set forth in *Allen* and *Abood*.[124] By formally recognizing this "temporary deprivation" and requiring interim relief, *Ellis* further suggests the need to rethink the right and the remedy, lest similar confusion plague the latest "definitive" Supreme Court decision. Specifically, courts, Congress, and state legislatures should renew the compelling state interest analysis[125] used to justify forced association in *Hanson* and *Abood* in light of experience with union rebate plans.

The government interest in ensuring stability in key industries and

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[117] 104 S. Ct. at 1892.

[118] *See supra* text accompanying note 80.

[119] 104 S. Ct. at 1890.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See supra* notes 41-43 and accompanying text.

[124] *See supra* notes 44-46 & 53-55 and accompanying text.

[125] *See supra* note 24.

eliminating free riders remains strong.[126] There also exists a government interest not evident at the time of *Street* and *Abood*: the need to ensure that unions enjoy political access comparable to that of management. The courts should recognize that recent Supreme Court decisions have placed union PAC's at a competitive disadvantage. Specifically, in *Buckley v. Valeo*,[127] the Supreme Court eliminated most restrictions on independent political contributions, which many large corporations, through their executives, are better able to make. Further, in *First National Bank of Boston v. Bellotti*,[128] the Court sharply limited state restraints on corporate political speech, rejecting the "forced association" claims applied to unions under the *Abood* line of cases.[129] Finally,

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[126] *See supra* note 11 and accompanying text. The Supreme Court in *Ellis* affirmed the interest in preventing free riders, refusing to review the constitutionality of authorized union security clauses. "[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights . . . It has long been settled that such interference is justified by the governmental interest in industrial peace." 104 S. Ct. at 1896.

[127] 424 U.S. 1 (1976) (per curiam); *see also* Federal Election Comm'n v. National Conservative Political Action Comm., 53 U.S.L.W. 4293 (U.S. Mar. 18, 1985) (No. 83-1032) (holding unconstitutional limits on independent campaign expenditures to further candidacy of presidential nominees that accept public campaign funding).

[128] 435 U.S. 765 (1978).

[129] In *Bellotti*, the Court held that a Massachusetts state law prohibiting corporations from making political expenditures in connection with state referenda not "materially affecting any of the property, business or assets of the corporation" violated the first amendment. *Id.* at 768, 795. Addressing the argument that corporate expenditures for unrelated political purposes (in this case a graduated individual income tax) violated the associational rights of its shareholders, the Court distinguished between corporations and labor unions and held that the principles of *Street* did not apply:

> The critical distinction here is that no shareholder has been "compelled" to contribute anything. Apart from the fact . . . that compulsion by the State is wholly absent, the [shareholder] invests in a corporation of his own volition and is [free to withdraw his investment at any time and for any reason].

Id. at 794. The Court concluded that corporate democracy safeguards, including derivative suits based on an ultra vires theory, adequately protected the individual shareholder. *Id.* at 795.

The Court had hinted at such a distinction three years earlier in Cort v. Ash, 422 U.S. 66 (1975). In holding that the Federal Election Commission had exclusive jurisdiction over illegal corporate contributions and denying a private right of action to a corporate shareholder, the Court observed, in dictum, that the "voluntary/involuntary" distinction might permit a private action against a labor union:

> This difference in emphasis may reflect a recognition that, while a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary because of union security and checkoff provisions . . . . It is therefore arguable

the courts should acknowledge the important link between member contributions and their union's political influence[130] and the need for an effective, broad-based internal mechanism by which to obtain such contributions.[131] Accordingly, the courts should exercise caution in impos-

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> that the federal interest in the relationship between members and their unions is much greater than the parallel interest in the relationship between stockholders and state-created corporations. In fact, the permanent expansion of § 610 to include labor unions was part of comprehensive labor legislation, the Taft-Hartley Act of 1947, while the 1907 Act dealt with corporations only with regard to their impact on federal elections.

Id. at 81 n.13.

Dissenting in *Bellotti*, Justice White criticized this distinction between corporate shareholders and union members and argued that the *Abood* protections should apply to both. First, while admitting that investment decisions are made voluntarily, he argued that the use of corporate funds for unrelated political expenditures is outside the investor's realm of expectations and hence her "consent." 435 U.S. at 816-18. Second, he saw no qualitative distinction between shareholders forced by conscience to withdraw their investments and union members forced to quit their jobs. Both, said White, deserve protection: "The State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities." *Id.* at 818; *see also* Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 1004 (1980) (view that shareholders' actions are voluntary inconsistent with finding of compulsion in union context).

One commentator has noted that democratic opportunities and the ability to shape the political direction of the organization are greater in labor unions than in corporations. Comment, *Regulation of Union Political Activity: Majority Rights and Remedies*, 125 U. PA. L. REV. 386, 423 n.205 (1977). Under this view, corporate shareholders require at least as much constitutional protection as union members against political expenditures made without their consent.

Historical evidence belies the labor-corporate distinction that the *Bellotti* and *Cort* cases seek to draw. President Theodore Roosevelt, in calling for the prohibition of corporate political contributions, stated that the primary justification for banning such contributions was not their corrupting influence but the proposition that "directors should not be permitted to use stockholders' money for such purposes." President's Annual Message, 40 CONG. REC. 96 (1905).

[130] *See supra* note 5 and accompanying text.

[131] For example, in 1975 the Kentucky Education Association (KEA), an arm of the National Education Association, instituted a "reverse check-off system" to fund its political arm. Rather than give employees the option to choose to make contributions, it automatically deducted contributions *unless* the employee checked off an objection at the outset of union membership. Employees were fully informed of the system, which was adopted at a statewide delegate assembly, and were allowed both to prevent future deductions and to receive a refund for past contributions. Under the system, contributions to the Association's PAC (KEPAC) fund during the first year climbed from a previous quarterly high of $5740 to a high of $82,081, while the number of members contributing jumped from a previous high of 2854 to no less than 21,463, with a total

ing escrow and advance dues reduction requirements upon unions.

The following recommendations are based on a balancing of the strong government interest in maintaining industrial peace through agency shop arrangements against the individual's interest in preventing both permanent and temporary deprivation of associational rights. They also embody a practical desire to reduce vexatious litigation, as well as a policy judgment that labor should play an active political role, within the constraints of the first amendment.

A. Reporting Mechanism

Courts or legislatures should adopt a reporting mechanism by which employees, the public, and the courts could readily ascertain the level of union political involvement and its relation to overall collective bargaining activities. Many of the challenges to union rebate plans have proved unwieldy for the courts because they lack manageable information concerning union political and ideological expenditures.[132] Courts must thus engage in extensive, independent factfinding to ascertain the percentage of dues used for political purposes. Simplifying the information search would help courts provide relief to dissenting employees.

The information necessary to adjudicate dues disputes could be secured by supplementing existing union reporting requirements. Section 201 of the Landrum-Griffin Act requires that labor organizations provide detailed financial information on their assets, liabilities, receipts, salaries, and loans, as well as "other disbursements made by it includ-

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membership during the year of 27,000. Kentucky Educators Pub. Affairs Council v. Kentucky Registry of Election Fin., 677 F.2d 1125, 1128 (6th Cir. 1982).

In *Kentucky Educators*, the Sixth Circuit found that the scheme violated neither state law prohibitions against "coerced" political contributions, the "strict segregation" and "knowing free choice" requirements of *Pipefitters*, nor the first amendment safeguards of *Abood*. *See supra* note 62 & notes 46-56 and accompanying text. It distinguished an earlier district court decision, Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102 (D.D.C. 1978), noting that KEPAC's "reverse check-off," unlike that employed by the national association, was linked with the initial union membership decision and did not require a separate written request. 677 F.2d at 1132-33.

It should be noted that membership in the KEA was entirely voluntary and not a condition of employment, that there was no record of discrimination against members for refusal to contribute to KEPAC, and that the immediate action was to enjoin a state prosecution rather than an action based on federal election law or the first amendment. Nevertheless, the apparent financial success of the particular "reverse check-off" system, coupled with its constitutional blessing by the courts, may indicate a means by which unions can effectively and constitutionally exert political influence.

[132] *See supra* note 58.

ing the purposes thereof."[133] In addition, the Act allows the Secretary of Labor to prescribe the categories used in making these disclosures. It should be feasible, by combining these requirements with the reporting requirements imposed on union PAC's by the federal campaign disclosure laws,[134] to provide a readily accessible means by which courts can calculate the portion of dues or fees used for political or ideological purposes.[135] In addition, placing the weight of the Landrum-Griffin Act's criminal sanctions[136] behind this determination would ensure the reliability and accuracy of the figures. Coupled with the Supreme Court's further definition of germane collective bargaining activities in *Ellis*,[137] such a system would allow courts to ascertain readily *which* and *how much* of the union's expenditures are permissible.[138]

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[133] Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431 (1982). The act requires the disclosure of certain information concerning the internal operations of unions and provides a "Bill of Rights" for union members.

[134] 2 U.S.C. § 434 (1982). The Act requires candidates for federal office and political action committees to file annual, quarterly, and special reports disclosing receipts, expenditures, and cash on hand during the reporting period. The frequency of the required reports is determined by: (1) whether the applicable year is an election year and (2) the overall level of contributions and expenditures. The candidates and committees must disclose the name, address, and occupation of persons contributing over $100 in any calendar year, and must identify the recipient, date, purpose, and amount of any expenditure over $100.

[135] One commentator has suggested requiring a union to prepare a schedule of estimated yearly disbursements before collecting fees from nonmembers and to make such schedules available to all employees. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 188 (1977). The State of California has adopted such an approach for its public employees. Under CAL. GOV'T CODE § 3515.7(e) (West Supp. 1985) an employee organization is required to keep "an adequate itemized record of its financial transactions" and to make available to employees a "detailed written financial report" annually. The problem, of course, lies with ensuring the accuracy of such figures, and the existence of such an account sheet would presumably not preclude suits alleging good faith disputes as to either the calculation or administration of the rebate. *See, e.g.*, Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976). For these reasons, an integrated approach, involving the sanctions of the Landrum-Griffin Act and the Federal Election Campaign Act, is suggested.

[136] Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 439 (1982).

[137] *See supra* text accompanying notes 109-23.

[138] The success of this system presupposes a final resolution of the issue of which union activities may be financed through mandatory fees. In *Ellis*, the Court held that the test for permissible expenditures under a union security agreement was "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." 104 S. Ct. at 1892. While essentially a restatement of the *Abood* "germaneness" test, *see supra* notes 46-51 and accompanying

B. Advance Dues Reduction Plans

Unions should be required to institute advance dues reduction plans before implementing union or agency shop contracts, unless they do not

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text, the Court noted that it permits unions to assess employees for "not only the *direct* costs of negotiating and administering collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings *normally or reasonably employed* to implement or effectuate the duties of the union as exclusive representative." 104 S. Ct. at 1892 (emphasis added).

Using this standard, the Court upheld the Ninth Circuit's determination that union conventions, social activities, publications, and death benefits could be financed through compulsory dues. *Id.* The Court reviewed the role of each activity to the performance of its statutory function, including the election of officers and communications with its members, and the awareness of Congress of such activities at the time Section 2 (Eleventh) was enacted.

In an act of major significance to union organizing efforts, however, the Court held that the costs of such organizing efforts could not be imposed upon nonmembers. Relying on a statutory construction of Section 2 (Eleventh) rather than the first amendment, the Court reasoned that nonmembers received no tangible benefit from the extension of union power beyond the already organized bargaining unit. *Id.* at 1894. Accordingly, support of such costs was beyond the intent of Congress' efforts to minimize the "free rider" problem. *See supra* note 11 and accompanying text. In addition, the Court held that litigation expenses unconnected with the union's representative function (in this case monies spent to challenge the airline industry's mutual aid pact, protect rights of employees during bankruptcy proceedings, or defend against Title VII job discrimination actions), could not be financed by compulsory dues. *Id.* at 1895.

In a separate opinion, Justice Powell argued that union conventions served only a minimal representative function and instead enabled unions to further their political objectives. Accordingly, he would have denied, or at least limited, the use of compulsory dues to support such conventions. *Id.* at 1899.

By basing its holding on Section 2 (Eleventh), the Court avoided the issue of whether activities not directly related to collective bargaining, yet not constituting an impermissible political activity, violate the first amendment. The Court left the door open for a constitutional challenge to compulsory support for organizing costs and similar expenditures should they be authorized by Congress or state collective bargaining statutes.

This issue has been the subject of numerous commentaries. *See, e.g.*, Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591 (1981); *see also* Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 186 (1975); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 197 (1977); Comment, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 WIS. L. REV. 134, 153. While not specifically addressing the issue of organizing costs, Professor Gaebler proposed a two-prong test remarkably similar to the Court's eventual formulation in *Ellis*. Recalling Justice Frankfurter's dissent in *Street* and Professor Wellington's criticism of that decision, *see supra* note 44, Gaebler noted that, particularly in the public sector, union political activity may more directly advance its collective bargaining goals than the "traditional" areas outlined by the Court. Thus, he urged that the twin goals of eliminating free riders and promoting

presently participate or plan to participate in political or ideological causes. Part of the difficulty with union rebate schemes stemmed from the lack of incentives for unions to provide such schemes. Most appear to have done so.[139] Others, notably the Railway Clerks, delayed implementing their rebate systems.[140] It seems clear that at a minimum a union should be required to comply with judicial mandates for the protection of minority employees in exchange for the benefits of a union security agreement. In the absence of compliance, it may be appropriate to enjoin the union from imposing its agency shop contract, as suggested by Justice Whitaker in his concurring opinion in *Street*.[141] While appearing to deepen the courts' involvement in dues disputes, the availability of such an injunction would prevent rather than spawn litigation. First, a potentially interminable delay in implementing an agency shop contract would provide a powerful incentive for the union to establish a reduction system. Second, an injunctive action would be limited to the issue of whether a different dues schedule existed and thus avoid the need for extensive factfinding. In addition, an exception could be made for unions, typically small locals, that do not engage in political or ideological activity.[142]

C. Limitations on Escrow Payments

The ordering of escrow payments should be limited to the disputed amount. When the amount is not immediately ascertainable, the payment should be limited to a standard estimate based on past experience and sufficient to protect employees against interim deprivation of their rights of association.

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labor peace, together with the protections offered by the duty of fair representation, justify a broader approach.

As a result, Gaebler advocates an inquiry into whether the activity in question is "reasonably calculated to further union efforts to obtain employment-related benefits" and the extent to which the activity is limited to representational objectives. Gaebler, *supra*, at 619. Such an analysis recognizes a broad government interest in facilitating the pursuit of union goals through "nontraditional" political activities, *see supra* notes 24 & 125-31 and accompanying text. However, it continues to restrict certain activities, such as direct political contributions and lobbying efforts on issues of broader public impact, as infringements of first amendment rights of association.

[139] *See supra* note 57 and accompanying text.

[140] *See supra* text accompanying notes 72-73.

[141] International Ass'n of Machinists v. Street, 367 U.S. 740, 779-80 (1961); *see supra* note 37.

[142] *See* Note, 36 ST. JOHN'S L. REV. 164, 169 (1961); *see also infra* text accompanying note 153.

In *Abood*, the Supreme Court recognized that membership or compulsory association with a union through payment of representation fees connotes agreement with, or at least acquiescence in, its economic and political goals.[143] Minimization of the objectionable association is consistent with, and in fact required by, the first amendment.[144] As noted in *Ellis* and elsewhere,[145] the temporary use of dissenting employees' dues under the "demand and return" system may not only itself create a constitutional deprivation, but may discourage employees from seeking to remedy the broader, permanent deprivation. Thus, courts should protect against the "interim deprivation,"[146] provided the means do not intrude on the legitimate government interest in promoting or permitting union security agreements.

The *Greenfield* approach, by escrowing the employee's entire dues payment, permits the type of interference with collective bargaining that the Supreme Court has long sought to avoid.[147] A more logical and less intrusive method would be to limit the escrow payment to a portion of the overall dues payment more closely resembling the actual amount in controversy. This could be done on a case-by-case basis, taking into account the individual union's history of political activity. Alternatively, the courts could adopt a standard estimate, perhaps twenty percent of the overall dues payment, which experience indicates well exceeds the amount needed to protect the employee.[148] This amount could be es-

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[143] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

[144] *Id.*

[145] *See supra* notes 79-94 and accompanying text.

[146] *Id.*

[147] *See supra* text accompanying notes 88-94.

[148] *See supra* note 104. In response to a recent judgment, the Communications Workers of America (CWA) recently instituted a system by which the union itself would escrow 40% of the total agency fee pending adjudication. Olsen v. Communications Workers of Am., 559 F. Supp. 754, 771 (D.N.J. 1983). The system has recently been upheld on appeal. Olsen v. Communications Workers of Am., 741 F.2d 598 (3d Cir. 1984); *see infra* notes 151-56 and accompanying text.

A similar approach has been utilized by the National Education Association (NEA) in its public employee contracts in Ohio, Illinois, New Jersey, and other states. At the end of the fiscal year, NEA selects an arbitrator with experience in public sector labor relations to determine the percentage of union fees used for germane activities. Thereafter, when the employee files a written notice of objection, NEA automatically establishes an interest-bearing escrow account in the name of the employee. The account consists of the nongermane percentage of the employee's total fees as determined by the arbitrator, plus a "cushion" of 5% of the total fees. Thus, if the arbitrator held that 11% of the total fees were used for nongermane purposes, the union would, upon objection, automatically escrow 16% of the employee's total fees pending intraunion appeals and any court action. NEA Brief, *supra* note 58, at 24-29. According to the NEA, this

crowed pending adjudication. The figure could serve as a presumption, rebuttable by the union or the employee at an evidentiary hearing.

The approach outlined is conducive to either judicial or legislative implementation. An advisory opinion by the Maine Supreme Court indicates that such an approach presents no first amendment infirmities.[149] The state legislature sought to implement a recently negotiated state employee contract, which required that nonunion members pay an agency fee equal to eighty percent of regular membership dues. The court held that the first amendment did not require that "fair share" payments be preceded by an evidentiary hearing, although their validity could be challenged in an appropriate judicial proceeding.[150]

This compromise approach was recently adopted by the Third Circuit in *Robinson v. New Jersey*.[151] The district court had invalidated a state public employee statute[152] authorizing the use of agency fees for lobbying activities aimed at improving wages and working conditions.[153]

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system renders it "highly improbable that any of the objector's monies will be spent for such [nongermane] activities" and that employees' first amendment concerns are "fully vindicated." *Id.* at 29.

[149] Opinion of the Justices, 401 A.2d 135 (Me. 1979).

[150] *Id.* at 148.

[151] 741 F.2d 598 (3d Cir. 1984).

[152] N.J. STAT. ANN. §§ 34:13A-21 (West Supp. 1983).

[153] Relying on *Abood*, the district court held that the statute violated the first amendment because such activities were not germane to the normal collective bargaining process. Anticipating *Ellis*, the court held that the union's cumbersome rebate procedure and the "arbitrary" manner in which the rebate was calculated violated *Allen* by placing an intolerable burden of proof on the employees. *Robinson*, 547 F. Supp. at 1318-19. Specifically, counsel to the union, the Rutgers University chapter of the American Association of University Professors (AAUP), urged the union to maintain meticulous records carefully defining what expenditures could be included in the representation fee. It nonetheless advised the union that it could assess nonmembers the maximum 85% of the overall membership fee allowed by the state statute, based on undocumented "experience in other states." *Id.* at 1303.

In fashioning a remedy, the court cited *Greenfield* and Justice Stevens' concurrence in *Abood*, noting that the New Jersey statute, unlike that in *Greenfield*, permitted the employer to withhold the service fee from the teachers' salary. Thus, according to the court, the New Jersey scheme effected an even more acute deprivation of rights of association. *Id.* at 1319. Initially, however, the court refused to enjoin payment of all representation fees until a satisfactory system was established because of the possible adverse effect on collective bargaining. Instead, it required only that the portions of the employees' fees going to the state and national associations be placed in escrow. The court explicitly recognized that other nonmembers might seek relief and that the local union was the least likely to engage in partisan political activity in the interim. *Id.* at 1324.

In later proceedings, however, the court enjoined collection of the entire agency fee,

The Third Circuit reversed, holding that "[s]o long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union," mandatory assessments to support lobbying were permissible under *Ellis*.[154] The court also held that "demand and return" systems were not inherently unconstitutional, and under *Ellis*, any "interim deprivation" could be remedied by either an advance reduction of dues or the placement of contested funds in an interest bearing escrow account.[155] The court noted that the challenged system met both requirements, because the statute set the maximum chargeable fee to nonmembers at eighty-five percent of the membership fee, and because the unions had created an escrow system for the remaining disputed amounts.[156]

D. Alternative Remedies

Alternatives to escrow payments, such as actions for declaratory relief, should be encouraged. In dealing with the "interim deprivation" issue, the courts should strive to provide a prompt, self-executing remedy that will avoid interference with legitimate union activities and overtaxing the judicial system. A declaratory judgment action to establish the legal rights of the parties at the outset of the dispute would be a relatively simple, inexpensive means of achieving this goal.[157]

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because of the legislature's failure to amend the statute to exclude lobbying-related activities and to provide an advance notice and hearing procedure by which an employee could challenge the amount of the agency fee imposed. Robinson v. New Jersey, 565 F. Supp. 942 (D.N.J. 1983); *see also supra* text accompanying note 138.

[154] 741 F.2d at 609.

[155] *Id.* at 612.

[156] *Id.* The district court had held that "no demand and return system can protect an objecting non-member's First Amendment rights." 565 F. Supp. at 946. The Third Circuit rejected this blanket condemnation, Robinson v. New Jersey, 741 F.2d at 611-13, and instead held that "the constitutional infirmity of the demand and return systems, if any, depends on the adequacy of the return arrangements." *Id.* at 612. The court noted first that by limiting representation fees to 85% of the total member fees, the statute itself provided a 15% "cushion" against nonpermissible political and ideological activities. *Id.* Further, the unions' escrow procedures provided an additional "cushion." The defendant locals utilized the system employed by the NEA, in which filing of an objection letter resulted in an immediate escrowing of the disputed amount plus an additional 5%. *Id.* at 613; *see supra* note 148. Similarly, defendant AAUP escrowed 100% of the representation fee, while defendant CWA automatically escrowed 40% of the overall fee. 741 F.2d at 614; *see supra* note 148.

[157] A declaratory judgment is a statutorily created, equitable remedy that permits courts to determine the rights and legal relations of the parties based on a showing of

At least one court has sought to utilize declaratory judgments in lieu of escrow accounts. In *White Cloud Education Association v. Board of Education*,[158] the Michigan Court of Appeals modified its position in *Ball*[159] and held that escrow payments were not constitutionally mandated. Instead, by making an interim payment to the union followed by an immediate action for declaratory judgment, an employee may seek a "vindication of his constitutional rights" without the union being "crippled by nonaccess to that portion of the fee which will be used for collective bargaining and contract administration."[160]

CONCLUSION

The political use of agency shop fees raises difficult issues of law and policy and requires a thoughtful balance of important yet necessarily inconsistent interests. Courts must weigh employees' first amendment associational interests against the need for a robust and competitive political dialogue, in which unions play a crucial part. They must also balance the rights of majority and minority employees while redefining the traditional political role of the union.

Supreme Court treatment of this controversy has reflected the difficulty of this balance and an unrealistic hope that, given time and cooperation by the parties, the problem might disappear. The *Abood* Court's reliance on a private remedy administered by a party to the dispute to secure a newly recognized constitutional right epitomizes this ambivalence. Experience has proven the hope illusory, and state and lower federal courts have had to fill in the gaps left by *Abood*. Accordingly, the courts have created a hodgepodge resembling early twentieth century labor relations, in which individual courts rendered decisions

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future, rather than past or present harm. Courts may accelerate normal judicial procedures to provide a speedy hearing on a motion for declaratory judgment. *See, e.g.*, 28 U.S.C. § 2201 (1982); FED. R. CIV. P. 57. The purposes of declaratory judgments are to provide prompt relief at the outset of a dispute, promote efficiency and early settlement of disputes that might otherwise ripen into litigation, and guide the parties in their future relations. *See generally* 26 C.J.S. *Declaratory Judgment* §§ 1-16 (1956 & Supp. 1984). The action seems particularly suited to political dues disputes, because the alleged deprivation occurs at an early and identifiable time, the extent of the pecuniary deprivation is disproportionate to the costs and burdens of litigation, and the parties are involved in an ongoing legal relationship.

[158] 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal dismissed sub nom.* Jibson v. White Cloud Educ. Ass'n, 105 S. Ct. 236 (1984).

[159] 84 Mich. App. 383, 269 N.W.2d 607 (1978); *see supra* notes 85-87 and accompanying text.

[160] 300 N.W.2d at 555.

according to their views as to the desirability of union collective action.[161]

The resulting uncertainty reflects the worst of both worlds. Inconsistent application of the first amendment chills the very rights it is supposed to protect. As *Ellis* recognized, the reliance on internal union mechanisms, challengeable only through cumbersome and manipulable appeals procedures or costly litigation, provides little relief for the employee whose dues objection is truly based on individual conscience. At the same time, the law presently discourages unions from pursuing their collective bargaining goals through political and governmental means, since by doing so the union risks its financial health and its ability to represent its members properly.

By refining the "germaneness" test of *Abood* and applying it to several common yet nontraditional union activities, the Supreme Court in *Ellis* eliminated much of the uncertainty over the permissible use of compulsory union fees. The result will presumably be to narrow the range of disagreement between union and employee, and thus obviate somewhat the need to establish escrow accounts as a remedial measure. However, by designating escrow accounts as the preferred remedy while failing to offer concrete guidelines for their implementation, *Ellis* may have defeated its very purpose. The Court in *Ellis* failed to recognize the disparate effect of previous court-ordered escrow plans. As a result, it has encouraged lower courts to apply their own discretion as to the amount of the dues to be escrowed and the standard of proof that the union must follow to recover the dues. This in turn increases the likelihood that dues disputes will be used to impede legitimate collective bargaining rather than to safeguard individual rights. Steps should be taken to improve employee and court access to crucial information on union expenditures, prevent the unbridled use of escrow accounts and similar interim measures, and encourage prompter and simpler forms of relief. Unfortunately, the legacy of *Ellis* may be eventually to require a sixth Supreme Court disposition of this contentious issue, one that more realistically addresses individual and societal needs.

Gerald J. Miller

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[161] *See* F. BARTOSIC & R. HARTLEY, *supra* note 8, at 8; R. GORMAN, *supra* note 14, at 2; *see also* F. FRANKFURTER, THE LABOR INJUNCTION (1930).