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ABOOD AND ITS PROGENY: CONFLICTING PERSPECTIVES ON SAFEGUARDING UNION SECURITY AGREEMENTS AND INDIVIDUAL RIGHTS IN THE PUBLIC SECTOR

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It cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.¹

INTRODUCTION

Against the backdrop of these words unfolded the modern-day concept of public sector agency shop agreements. Reflected in this language is the expansion of the private sector labor law model into the public sector, paralleling the advent of unionization among public sector employees. One controversial aspect of this model is the agency shop agreement as a permissible variant of the closed union shop provision popularized in the late 1930's.² Essentially viewed as a logical economic outgrowth of the principles of

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2. A closed shop provision requires an employee, as a condition of employment, to become a member of the union prior to being employed. Such an arrangement, while lawful under the National Labor Relations Act of 1935, has since been proscribed by the Taft-Hartley Amendments. A union shop provision, on the other hand, requires an employee, as a condition of employment, to become a member of the union within a specified period, usually 30 days from date of hire. The inclusion of this type of provision in a collective bargaining agreement is sanctioned by the National Labor Relations Act, except where otherwise pre-empted by state right-to-work laws. An agency shop provision merely requires an employee to pay an amount equal to the periodic union dues uniformly required as a condition of continued employment, without becoming a member of the union. The distinction between union shop and agency shop agreements became blurred by the U.S. Supreme Court decision in NLRB v. General Motors Corp., 373 U.S. 734 (1963) which held that the membership requirement authorized under the union security proviso to the Labor Management Relations Act, section 8(a)(3), related to the "core" obligation of paying the apportionable fees.
3. Practitioners in the labor relations field have regarded agency shop agreements as
exclusivity and fair representation, agency shop agreements require nonunion employees to tender payment of service fees equivalent to established membership dues as a condition of continued employment.

In the context of Abood v. Detroit Board of Education and its progeny, compelled contributions via the negotiation of an agency shop provision in collective bargaining agreements have been firmly established. Proponents argue that public sector union security (1) provides unions with financial stability and thus makes them more reliable bargaining representatives, (2) encourages a responsible union because the organization need not make excessive demands for the purpose of obtaining new adherents or retaining old ones in the face of competing considerations and, (3) ensures that employees pay for benefits that they inevitably receive as a result of the union's efforts on their behalf. Opponents, on the other hand, argue that the adoption of union security agreements places the public employer in the position of encouraging union membership, thereby violating the public employees' "right to work."

It is evident that a complete reconciliation of the two countervailing policies, the constitutionality of public sector agency shop agreements and the associational rights of public employees, has yet to be made. To accomplish such a reconciliation, there must be a more careful examination of the nature of unions operating within the public sector and the collective bargaining activities in economic tools for advancing collective bargaining services. Through the requirement that all employees share in the union's costs of fulfilling its statutory responsibilities, each individual becomes a recipient and third-party beneficiary of the "goods" acquired through collective bargaining and related services. For a further explanation of how such agreements are treated as effective economic mechanisms, see Levinson, After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights, 27 Am. U.L. Rev. 1 (1977).

4. Developed primarily from the private sector model, exclusive recognition occurs when a union, designated as the collective bargaining representative, is deemed the exclusive representative of all employees irrespective of union membership. Id. The duty of fair representation, on the other hand, is defined as "a statutory obligation to serve the interests of all members [of the bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967).


6. See Levinson, supra note 3.

7. Id.
which they participate. If political activity unrelated to collective bargaining and financed under its guise is to cease, a clarification as to the increased access that public sector unions maintain with governmental policy-makers through collective bargaining channels must be rendered.

The purpose of this Article is to explore the judicial attitude toward agency shop agreements, revisiting only briefly the period preceding Abood. Emphasis will be given to the disposition of agency shop cases by the Michigan courts. In Part I of the Article, state interests and other countervailing forces which undercut first amendment associational freedoms, as developed in Railway Employees’ Department v. Hanson,8 and refined in International Association of Machinists v. Street,9 are analyzed in relation to the federal policy favoring stability in labor relations. The constitutional imprimatur upon agency shop agreements was significantly expanded in the United States Supreme Court’s decision in Abood. This development serves as the focal point for Part II of the Article. And finally, in Part III, the author discusses the application and extension of compelling state interests and the first amendment penumbra of associational liberties within the context of the progeny of Abood.

I. CONSTITUTIONALITY OF UNION SECURITY AGREEMENTS

The basis for union security fee agreements can be traced back to the Labor Management Relations Act of 1947.10 Expressed within the legislative enactment was unequivocal recognition that union bargaining activities involved expenses that should be defrayed by union members and nonunion employees alike. The principal policy consideration turned, not only upon the elimination of the so-called “free-rider” who would be subject to reap the benefits of collective bargaining without assuming its costs, but also upon the promotion of labor stability by decreasing competing employee demands.11

11. See Fox, State Legislated Agency Shop Clause Requiring Payment of Service Charge by Non-Union Public Employees is Valid for Collective Bargaining Purposes But Compulsory Dues May Not be Used for Political Causes Opposed by Non-Union Members,
The United States Supreme Court's initial opportunity to interpret and analyze the impact of union shop agreements came some years later in the celebrated case of *Railway Employees' Department v. Hanson.* In *Hanson,* the Supreme Court upheld the constitutionality of an agency shop provision, thereby striking down a state right-to-work law which barred union affiliation as a condition of employment. The rationale for adopting this conclusion was expressed by the Court as follows:

It is said that the right to work, which the Court has frequently included in the concept of "liberty" within the meaning of the Due Process Clause, (see *Truax v. Raich,* 239 U.S. 33; *Takahashi v. Fish & Game Commission,* 334 U.S. 410), may not be denied by the Congress. The question remains, however, whether the long-range interests of workers would be better served by one type of union agreement or another. That question is germane to the exercise of power under the Commerce Clause—a power that often has the quality of police regulations. See *Cleveland v. United States,* 329 U.S. 14, 19. One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work. See *Webb, History of Trade Unionism; Gregory, Labor and the Law.* To require, rather than induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce.

The Court's recognition that the requirements for financial support of the collective bargaining agent by those who receive the benefits of its work is not violative of the first or fifth amendments was perfected in *International Association of Machinists v. Street.* In *Street,* railroad employees sought to enjoin the enforcement of a union shop agreement which required all employees...
to join the union and pay initiation fees, assessments and dues to retain their jobs. The nonunion employees' argument was that the fees promoted the propagation of political and economic doctrines contrary to their personally held political views.\(^\text{17}\)

Here, the Court addressed the first amendment argument only to the extent of declining to approve compulsory financial support by employees where a political expenditure, not related to collective bargaining, was involved, thus preserving the individual right of support or abstention. While it did not directly confront the first amendment issue, it did unequivocally reaffirm the holding in *Hanson* by upholding the validity of agency shop agreements.\(^\text{18}\)

The decision of the majority in *Street* precipitated two vigorous but opposing dissents.\(^\text{19}\) It was in the dissents that the competing considerations advanced against promoting labor peace and stability crystallized. While recognizing the obvious reluctance of the Court to address the first amendment constitutional issues, the Black dissent argued that section 2, Eleventh of the Railway Labor Act abridged first amendment rights by compelling political support from unwilling and unwitting employees, for "whether there is such abridgment depends not only on how the law is written, but also on how it works."\(^\text{20}\) Black observed that neither advocating nor propagating ideological doctrine and philosophies under the Railway Labor Act conforms to the charter of political and religious liberty advanced by the first amendment. Thus, Black concluded that the statute, in permitting the application of the union shop contract, violated the freedom of speech guarantee of the first amendment.\(^\text{21}\)

In the second dissent, authored by Justice Frankfurter and concurred in by Justice Harlan, it was held that the statute should not be given a restrictive reading, and that Congress, in authorizing union shop agreements, did not intend to restrain or limit the scope of activities in the expenditure of union funds. On the contrary, Congress expanded the parties' freedom of choice by rendering union shop agreements permissive. Legislative efforts in this

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17. *Id.* at 744-45.
18. *Id.* at 749.
19. *Id.* at 780-97 (Black, J., dissenting); *Id.* at 747-819 (Frankfurter, J., dissenting).
20. *Id.* at 789 (Black, J., dissenting).
21. *Id.* at 791 (Black, J., dissenting).
area were prompted by the abuses which existed in the industrial sector. Thus, concluded both Frankfurter and Harlan, the legislative history of the Act demonstrated that Congress, fully aware of union permeation into the political substructure, supported an expansive reading of "appropriate" union expenditures.  

In both Hanson and Street, the majority refused to define union political involvement in areas unrelated to collective bargaining, except to note that assessments used to force ideological conformity with union goals would involve first amendment considerations. The Court recognized, however, in Street, though not in Hanson, that the Railway Labor Act authorized union shop dues expenditures for purposes germane only to collective bargaining, contract administration and grievance adjustment.

The test for protecting first amendment freedoms was formulated by the Supreme Court during the interval between the Hanson and the Street decisions. As a precursor to the latter, the Court, in NAACP v. Alabama," recognized the right to associate as an "inseparable aspect" of freedom of speech under the first and fourteenth amendments. This recognition was extended in Elrod v. Burns, where the Court established the principal legal test to be applied in those situations which juxtapose associational freedoms against the legitimacy of agency shop agreements. The Court observed that when government action has a deterrent effect on first amendment rights, the government action "must survive exacting scrutiny," meaning the interest advanced by the government must be paramount. The Court noted that "the burden is on the government to show the existence of such an interest . . . [and] care must be taken not to confuse the interest of partisan organizations with governmental interests [since] only the latter will suffice."

The Supreme Court, however, did not apply the "exacting scrutiny" test in the Street case. Ostensibly, two propositions have

22. Id. at 818 (Frankfurter, J., dissenting).
23. Id. at 757-64.
25. Id. at 460.
27. Id. at 362-63.
28. Id. at 362.
29. Id.
been advanced as to why the Court rendered a decision without conducting a constitutional inquiry into the violation of first amendment rights: (1) the Court refused to recognize the first amendment right not to associate; or (2) the Court recognized the first amendment right but found that government interests in preserving labor stability justified the infringement upon such a right.30

The failure of the Court to work *Street* through a demanding analysis and the Court’s subsequent reliance on the case in *Abood* raise some valid questions as to the importance attached to the constellation of first amendment rights. In large measure, the Court deftly evaded the primary constitutional issue as to when infringement of an employee’s right of association is justified by the government interests advanced.

A distinction which the author believes to be valid here, despite the unwillingness of the Supreme Court to confront the constitutional issues, is that public sector bargaining differs markedly from private sector bargaining. It is axiomatic that the two types of expenditures raised in the foregoing cases, political and bargaining, have fundamentally different objectives. As a consequence, a different set of standards would apply based upon the nature of the expenditures. Public employment relations are immersed in local political dynamics and affected by economic gyrations. It is conceivable that the Supreme Court’s failure or unwillingness to address the key constitutional issues stemmed from its inability to develop a formula which would permit a clear-cut line of demarcation to be drawn between activities strictly political in nature, and those which further collective bargaining and contract administration efforts.

II. *Abood* AND ITS IMPACT ON THE CONCEPT OF UNION SECURITY

In 1969, a complaint for declaratory relief was filed in Wayne County Circuit Court challenging the constitutional and statutory validity of the agency shop provisions of the collective bargaining agreement between the Detroit Board of Education and the De-

The plaintiffs’ primary contention was that a substantial part of the sums exacted from teachers, pursuant to the agency shop clause, was used for the advancement of political, social and ideological causes unrelated to the purpose of collective bargaining. For this reason, plaintiffs argued, compulsory payment deprived them of the constitutional protection of association and other rights under the first and fourteenth amendments and their penumbras.

The dismissal of the initial action by the court culminated in the filing of a new action in which essentially identical allegations were asserted. As in the previous case, the plaintiffs did not seek to restrain any expenditures of the monies collected, nor did they identify with specificity the causes to which they took intellectual umbrage. Almost simultaneously with the commencement of this new action was the enactment of an amendment to Section 10 of the Public Employment Relations Act of 1973 (PERA). The Act, in relevant part, stated

\[ \text{n} \text{thing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in Section 11 and to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.}\]

The purpose of the Act’s amendment was to reinforce the public policy in Michigan of stabilizing and rendering more effective public sector labor relations. This would be accomplished by permitting employees in a bargaining unit to contribute financially to the exclusive bargaining agent by tendering a service fee uniformly required of union members.

The trial court’s grant of summary judgment to the defendants

31. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). This case was originally filed in Wayne County as Warczak v. Detroit Bd. of Educ. It was ultimately resurrected, subsequent to its dismissal, in essentially identical substantive form in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). In 1972, the Michigan Supreme Court vacated the dismissal order in Warczak and remanded the case to the circuit court for a further review based upon the intervening decision in Smigel v. Southgate Comm. School Dist., 388 Mich. 531, 202 N.W.2d 305 (1972)(which held that agency shop clauses were precluded by language in the Public Employment Relations Act). Both Warczak and Abood were then consolidated for hearings but dismissed at the circuit court level. (See infra note 64).

upheld the validity of the agency shop clause. The Michigan Court of Appeals affirmed this decision.\(^{33}\) An appeal by the plaintiffs was denied by the Michigan Supreme Court\(^{34}\) and the United States Supreme Court ultimately interceded.\(^{35}\)

Speaking through Justice Stewart, the Court upheld the constitutionality of the agency shop arrangement as one which did not violate the first and fourteenth amendments. Relying on the *Hanson* decision, the Court held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment."\(^{36}\)

Further, embracing the doctrine of exclusivity advanced in federal labor law, the Court observed that, pursuant to Michigan law, employees of local government enjoy comparable rights of self-organization and collective bargaining.\(^{37}\) In advancing this position, the Court recognized the broad discretion which states maintain in determining and limiting the terms and conditions of their own public employment. The Court noted, however, that the use of service fees for political or social, religious and ideological purposes, unrelated to the collective bargaining sphere and to which public employees objected, was in fact unconstitutional, and constituted an abridgment of first amendment rights.\(^{38}\)

In dealing with the appellants' pivotal argument that public employees have a weightier first amendment interest than private employees, the Court established the predominant distinction as one between employers and not employees. This distinction was analyzed as follows:

> Public employees are not basically different from private employees; on the whole, they have the same sort of skills, the same needs, and seek the same advantages. 'The uniqueness of public employment is *not in the employees* nor in the work performed; the uniqueness is in the special character of the employer.'\(^{39}\)

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37. *Id.* at 223.
38. *Id.* at 234-35.
The Supreme Court additionally discussed the problem of establishing appropriate refund arrangements where a "compulsory dues" provision had been negotiated, and where service fees were used for political and ideological purposes. Remedies to which plaintiffs might be entitled included (a) an injunction against expenditures for political causes opposed by the plaintiffs, (b) restitution of a portion of the funds exacted from the plaintiffs in the proportion that union political expenditures opposed by the plaintiffs bore to the total union expenditures, and (c) the reduction of future exactions by the same proportion. 40

The discernible difficulty in formulating remedies other than routine remand and denial of the requested injunction stemmed from the Court's recognition that had the teachers informed the union of their objections, any subsequent expenditures could be deemed to constitute a violation of first amendment rights. Their apparent failure to do so, however, did not impact upon the validity of the request, but rather culminated in the failure to vindicate their rights by fully exhausting contractual internal remedies. 41

The separate concurring opinion of Justice Powell, which supported the specific order of remand, observed that the very nature of public employee collective bargaining was political. 42 In the normal context, state adopted union shop agreements may be likened to "coercive government regulation;" thus, the constitutional rights of the employees required a substantial protection which the Court failed to afford them. 43 Observing a distinction in what the government may permit private employees to do, the government could authorize private parties to enter into voluntary agreements containing terms it could not adopt as its own. On this basis, objection was leveled against the two-tiered analysis of the plurality opinion, which placed the burden of litigation upon the employees, and not the state, to show that the exaction of such fees served a paramount government interest. 44

The views expressed by Justice Powell attacked the core of the majority's determination that public sector agency shop was not

40. Id. at 238-40 (citing Street, 367 U.S. at 774-75, and Railway Clerks v. Allen, 373 U.S. 113, 122 (1963)).
41. The constitutional sufficiency of internal remedies was not addressed.
42. 431 U.S. at 257 (Powell, J., concurring).
43. Id. at 253.
44. Id. at 255.
fully subject to constitutional restraints. Having given superficial endorsement to agency shop as here conceptualized, the Court failed to address individual rights where the notion of exclusivity might be questionable. Moreover, it failed to define, either definitively or artificially, the parameters of the "political spending" exception.

III. Compelling State Interests Versus First Amendment Freedoms in the Context of the Progeny of Abood

Since the United States Supreme Court's decision in Abood sanctioning the validity of public sector agency shop provisions in collective bargaining agreements, the courts of various jurisdictions have been called upon to address the constitutionality of such provisions under similar and dissimilar circumstances. This section will focus on the interpretive treatment given to agency shop agreements by the Michigan courts.

45. See supra notes 5, 6, 7 and accompanying text.
46. Recently, the Supreme Judicial Court of Massachusetts ruled that two tenured school teachers were not required to submit to the association's rebate procedures mandated by state statute or to pay the service fee, pending the resolution of the challenge. Mandating resort to the rebate procedure here would produce a further constitutional difficulty because of the requirements that the entire fee be paid to the association pending proof of legitimacy. The teachers should not be required to suffer an interim constitutional deprivation, while the association is deprived of funds to which it is entitled by statute and agreement. The burden of justifying the fee or permissible amount must rest on the organization. School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982).

Virtually simultaneous with the issuance of this decision was a Ninth Circuit United States Court of Appeals decision captioned Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Employees, 685 F.2d 1065 (9th Cir. 1982). In this case, the employees brought an action against the union, contesting the facial validity of the dues payment obligation imposed by the union shop agreement. The court of appeals held that (a) the union's program, by which each protesting employee received a rebate on his or her pro rata share of union disbursements for political and ideological activity, vindicated plaintiff's rights, and (b) union expenditures for conventions and union litigation not having as its subject matter contract negotiations and grievance processing/adjustment promoted the union and rendered it a more effective vehicle through which employee rights were preserved. Thus, objecting employees could be required to absorb a fair share of the cost of the activities. With respect to the specific political challenges, the court held that costs germane to the work of the union in the realm of collective bargaining could be sustained, and the trial court's application of the preponderance of the evidence standard to prove the proportion of political to total union expenditures was correctly applied.

47. Labor arbitrators, as well as courts, have been required to address the issue of public sector agency agreements. In Michigan, the seminal case in this respect is Garden City Educ. Ass'n, MEA/NEA and Garden City Public Schools. The case involved the interpreta-
The general inquiry will bear upon the merits of applying various forms of private union security schemes to that of the public sector. The important factor to be considered in evaluating the extent to which courts have permitted union security to intrude or impinge upon protected employee interests is whether private and public sector union security law constitutes a constitutional "distinction without a difference."48

The Michigan regulatory scheme for the conduct of labor-management relations at the local level, patterned after federal law, serves as the statutory labyrinth in which much of the court's analysis has been directed.49 The regulatory scheme is a congruent outgrowth of the upsurge in public sector labor organization.50 The United States Department of Labor recently commented on this upsurge, noting that

[i]n recent years the level of public employee labor relations activity has increased dramatically. In October, 1973, there were 14.1 million public employees, an increase of more than one half million over the previous year. Not only have the ranks of public employment continued to swell, but the extent of organization has also been growing at an ever faster rate. Since 1960, membership in public sector unions and employee associations has more than doubled . . . . As can be expected, the development of legislative and policy decisions and guidelines has also acceler-

49. Most state statutes which were enacted replicated the model of the National Labor Relations Act.
ated with this dynamic growth. More states have taken it upon themselves to enact laws or establish administrative relations across the country.\textsuperscript{51}

The right to negotiate an agency shop provision which culminates in the termination of a non-payer was upheld soon after the Public Employment Relations Act came into existence in Michigan. In \textit{Oakland County Sheriff's Department & Oakland County Board of Supervisors v. Metropolitan Council 23, American Federation of State, County & Municipal Employees, AFL-CIO}, the right to negotiate such provisions was given judicial sanction, even in the absence of specific statutory authority.\textsuperscript{52} With the enactment of the amendment to the Public Employment Relations Act (PERA)\textsuperscript{53} in 1973, the negotiability of the agency shop provision was confirmed.\textsuperscript{54}

In \textit{Rockwell v. Crestwood School District},\textsuperscript{55} the Michigan Supreme Court, relying upon its previous decisions in \textit{Detroit Police Officers Association v. Detroit},\textsuperscript{56} and \textit{Regents of the University of Michigan v. Employment Relations Commission},\textsuperscript{57} held that striking teachers who were discharged were not engaged in lawful and protected concerted activity for the purpose of collective bargaining or "other mutual aid and protection within the meaning of section 9 of the PERA."\textsuperscript{58} The Court, in sustaining the discharges, observed that PERA governs in a conflict between the Teachers' Tenure Act, which permits imposition of discipline only after charges, notice, hearing and determination, and PERA which contemplates imposition of discipline before a determination of whether the Act has been violated.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{51} \textit{Summary of State Policy Regulations and Public Sector Labor Relations}, U.S. Department of Labor-Management Services Administrator, Division of Public Employee Labor Relations (1975).
  \item \textsuperscript{52} MERC Labor Opinions 1(a)(1968).
  \item \textsuperscript{54} The constitutional validity of the amendatory act was established in \textit{Abood}. 431 U.S. 209 (1977).
  \item \textsuperscript{55} 393 Mich. 616, 227 N.W.2d 736 (1975).
  \item \textsuperscript{56} 391 Mich. 44, 241 N.W.2d 803 (1974).
  \item \textsuperscript{57} 389 Mich. 96, 204 N.W.2d 218 (1973).
  \item \textsuperscript{58} 393 Mich. at 638, 227 N.W.2d at 745.
  \item \textsuperscript{59} \textit{Id.} at 628, 227 N.W.2d at 741.
\end{itemize}
Whether the procedures established in the Teachers' Tenure Act for teacher termination would have to be complied with where a non-payer was concerned was the key issue in *Swartz Creek Education Association v. Swartz Creek Community Schools & State Tenure Commission.* The defendant, in this case, filed an unfair labor practice charge against the Swartz Creek School District on the basis that it was enforcing an agency shop provision under an existing labor contract which required her to pay security fees to the Association on pain of discharge. The charge, as reviewed by MERC, was deemed to be non-meritorious. Based on this decision, the School Board and the Association included an agency shop provision in the subsequent contract executed for the year 1974-75. Challenged subsequently, and on review before the Michigan Teachers' Tenure Commission, it was held that the agency shop provision as negotiated was indeed constitutional, but the failure to tender prescribed dues and fees was an insufficient basis upon which to discharge a teacher pursuant to the Teachers' Tenure Act.

Further confirmation to the validity of agency shop clauses was given by the Newaygo County Circuit Court in *White Cloud Education Association v. Board of Education of the White Cloud Public Schools.* Speaking through Judge Thomas, the court said:

> [t]his Court holds that the present controversy is a matter of public employment labor relations and therefore the Public Employment Relations Act is dominant and controlling (*Rockwell v. Crestwood School District*, 393 Mich. 616 (1975)). The Public Employment Relations Act expressly authorizes Plaintiff and Defendant to enter into a labor agreement and to include in that agreement an agency shop provision. This Court sees no inconsistency between the Public Employment Relations Act and the facts of the case at bar. The inconsistency advocated by the Defendant is between the Public Employment Relations Act and a decision of the State Teachers' Tenure Commission as reported in *Kathryn Jackson v. Swartz Creek Community Schools.*

With a well-lubricated arsenal of judicial dicta in hand, the
Michigan Court of Appeals and the Michigan Supreme Court were then called upon to address the issue of compulsory security fee exaction vis à vis the Teachers' Tenure Act.

In *Detroit Board of Education v. Parks*, the issue of whether the Public Employment Relations Act pre-empted the Teachers' Tenure Act was confronted by the court of appeals. *Parks* involved the discharge of a tenured teacher who tendered 1973-74 service fees under protest to the Detroit Federation of Teachers, the designated exclusive bargaining agent for the teachers. She thereafter refused to pay, even after *Abood* was decided. Consequently, in 1978, she was discharged from her position. She appealed her dismissal to the State Tenure Commission, asserting that the Michigan Teachers' Tenure Act precludes discharges of this type unless the Board was able to support the "reasonable and just cause standard" set forth in section II of the Act. She further contended that the discharge occurred without any of the procedural safeguards accorded to those persons maintaining vested property rights.

The court recognized the need to maintain due process safeguards through the procedural application of the Michigan Teachers' Tenure Act. Parks, or any other similarly situated tenured teacher, would therefore be entitled to notice and an opportunity to be heard prior to discharge for failure to pay agency shop fees.

The court, recognizing the Board as having a valid interest in the enforcement of the agency shop provision, concluded that this interest should not be outweighed by an employee's interest in pressing a claim of entitlement sufficient to justify a property right. Irrespective of the taint engendered by the lack of procedural due process, the court of appeals held that Parks' discharge

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64. 98 Mich. App. 22 (1980); (originally consolidated with Warczak v. Detroit Bd. of Educ., 60 Mich. App. 92 (1975)). Parks was originally a plaintiff in the *Warczak* case. The order of Judge Kaufman, issued in January of 1970, stated that the agency shop clause contained in the collective bargaining agreement was valid and "does not contravene the Constitution of the United States or of the State of Michigan or the statutes of the State of Michigan including PERA and the Tenure Act." This judgment was vacated by the Michigan Supreme Court in 1972, and remanded to the circuit court for further proceedings. 389 Mich. 755 (1972). *Abood* was then filed and consolidated with *Warczak* for the remand proceedings. The defendants again prevailed on a motion for summary judgment. The order of Judge Kaufman held that PERA authorized prospective and retrospective agency shop clauses and, in essence, restated the 1970 order. The plaintiffs thus appealed this decision to the Michigan Court of Appeals.

was unambiguously authorized by the agency shop clause between the Detroit Federation of Teachers and the Board, and was not prohibited or affected by anything in the Tenure Act.66

Thus, once again, the Michigan Court of Appeals sustained the supremacy of the Public Employment Relations Act as the dominant law regulating public employee labor relations.67 Relying upon the authority of cases previously cited, the court made only an oblique reference to the issue of whether the exaction of agency shop fees as a condition of employment is constitutionally permissible.68 The court of appeals concluded that such fees were permissible so long as they were used for collective bargaining purposes, and the failure to tender the fees would be sufficient to raise a tenured teacher's conduct to a level of "reasonable and just cause" justifying dismissal.

_Parks_ and its consolidated cases were appealed to the Michigan Supreme Court.69 In a majority opinion authored by Justice Brickley, the court held that a tenured teacher may be discharged for failure to pay agency service fees to the authorized bargaining agent despite the fact that a less harsh penalty could have been agreed upon by the parties.70

After a tenuous beginning, the court concluded that the Teachers' Tenure Act was inapplicable to labor disputes of this ilk. The court deemed PERA the dominant law regulating public employee labor relations, and all other conflicting statutes were diminished pro tanto.71 PERA, observed the court, authorized the use of agency shop clauses in collective bargaining agreements, and therefore such clauses should be given judicial recognition and enforce-

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69. Detroit Bd. of Educ. v. Parks, 417 Mich. 268, 335 N.W.2d 641 (1983). While the _Abood_ appeal was pending in the United States Supreme Court, the complaint in _Kyes_ v. Detroit Bd. of Educ. was filed. _Kyes_ was thereafter consolidated with _Abood_ and _Parks_.
70. _Id_. at 278, 335 N.W.2d at 646.
71. _Id_. at 280, 335 N.W.2d at 647.
The court stated that

[w]e find it inconceivable that, in adopting the phrase 'to require as a condition of employment' from federal law, the Michigan Legislature did not also intend to adopt the construction placed on that language by the federal courts. Even without this authority, we would find it difficult to allow any other interpretation than the obvious 'condition of employment' as used in section 10(1)(c) means that employment may be conditioned on payment of the agency service fees.73

Appellants argued alternatively that the availability of remedies less oppressive than discharge precluded a finding that discharge was a permissible remedy.74 The court noted that PERA is permissive, and alternative remedies can be provided.75 Where, however, parties in a collective bargaining relationship have expressly designated the remedy of discharge in their governing document, discharge is appropriate.76 The court rejected the contention that the Teachers' Tenure Act requires just and reasonable cause for employment termination and that this provision can co-exist with PERA. It affirmed that PERA was the only controlling statute in these circumstances and noted that a closer inspection of PERA's purpose disclosed "a repugnancy between it and the reasonable and just cause standard of the Teachers' Tenure Act."77 The court rationalized PERA's supremacy as follows:

The primary purpose of the Teachers' Tenure Act is to maintain an adequate and competent teaching staff, free from political and personal interference. Boyce v. Royal Oak Board of Education, 407 Mich. 312; 285 N.W.2d 196 (1979). The Act was not designed to cover labor disputes . . . . The procedures of the Teachers' Tenure Act are designed to protect a tenured teacher from discharge for improper reasons, reasons other than those of professional competency . . . . We cannot conclude that the Legislature intended to also use this elaborate procedure for the simple purpose of determining whether a teacher has, in fact, paid his agency service fees.78

Thus, with the decision in Parks, the Michigan Supreme Court squarely confronted and disposed of an issue which had dominated

72. Id. at 277-78, 335 N.W.2d at 646.
73. Id. (emphasis added).
74. Id. at 278, 335 N.W.2d at 646.
75. Id.
76. Id. at 279, 335 N.W.2d at 647.
77. Id. at 280, 335 N.W.2d at 647.
78. Id. at 281-82, 335 N.W.2d at 648.
the labor relations scene for at least six years. PERA’s domination in regulating public employee labor relations was confirmed.

The critical inquiry which the courts have keenly, or otherwise, avoided is the legality of dues expended for subjects falling outside the scope of collective bargaining. There has been no attempt on the part of the Michigan judiciary to define, with specificity, the issues advanced in the seminal case of *Abood*. This became evident when the Michigan Supreme Court rendered its decision in *Falk v. State Bar of Michigan*.79

The plaintiff in *Falk*, an attorney, challenged Rule 4B of the Rules of the State Bar of Michigan concerning the payment of dues. The dues requirement is mandatory for active members of the State Bar of Michigan. Attorneys must submit to the fee assessment in order to secure membership in the State Bar.

One aspect of the challenge leveled by Falk pertained to the State Bar budget appropriation for 1977-78. The appropriation included $108,443.00 to be funneled to public relations efforts designed to improve the image of the Bar.80 In addition, plaintiff contended, numerous expenditures were made to support the activities of the American Bar Association and the State Bar of Michigan, which groups publicly espoused positions prompting legislative, executive and administrative action, and which were deemed violative of the right of association and expression.81

Unlike *Abood*, this case did not deal with a prior protest to the union, or other applicable administrative body, as a prerequisite to invoking judicial relief. Not only was the dues payment obligation under direct attack, but the plaintiff buttressed his position by alleging that dues were paid and political expenditures were made.

The opinion of the Michigan Supreme Court did not produce a majority position.82 The Ryan perspective, concurred in by Moody

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80. *Id.* at 85, 305 N.W.2d at 202.
81. Falk set forth in his detailed brief the basis upon which the State Bar activities constituted a violation of the first amendment rights and freely-held religious beliefs. *Id.* at 85 n.3, 305 N.W.2d at 202 n.3.
82. Three separate opinions were issued by the Michigan Supreme Court. The first opinion, filed by Justice Ryan, and joined in by Justices Moody and Fitzgerald, held that Falk was entitled to partial relief. The second opinion was filed by Justice Williams in which he held that the plaintiff was not entitled to any relief. Justice Coleman joined in this opinion. The final opinion was issued by Justice Levin and joined in by Justice Kavanaugh. He held that additional evidentiary hearings were required. No member of the court, however, ad-
and Fitzgerald, held that Falk's strong reliance on Abood was misplaced. Noting that Abood concerned compulsory dues in a union organization, and not association in an integrated bar, the court said that the critical test as to whether "ideological expenditures not necessarily in derogation of First Amendment rights" rises and falls with the degree to which it is germane to the compelling state interest established.\(^{83}\) However, the compelling state interest in Abood differed significantly from the compelling state interest advanced by the factual matrix in this case. In Abood, the compelling state interest involved the promotion of labor stability, law enforcement and judicial support for union security agreements. In Falk, the compelling state interest was the administration of justice and the advancement of jurisprudence.

More importantly, however, assuming arguendo that the Ryan triumvirate would have found sufficient compelling state interest to justify intrusion or encroachment upon the first amendment, Falk's petition for special relief would nevertheless remain fatal. The opinion, which noted that the petitioner failed to specify the exact nature of the statements or activities to which he took intellectual or ideological offense, concluded that the challenges were leveled, not at the State Bar lobbying activities, but at the expenditures of funds to engage in such activities. Thus, the challenges were monetary and not ideological.

The only aspect of Petitioner's Request for Special Relief which a majority of the court conceded as legitimate was point (11) pertaining to the use of the State Bar's mailing list for commercial purposes. The court observed that the intrusion which results from the use of commercial mailings is not minimal.\(^{84}\) This conclusion relied principally upon Rowan v. United States Post Office Department\(^{85}\), where Chief Justice Burger noted that "[w]ithout doubt the public postal system is an indispensable adjutant of every civilized society. Communication is imperative to a healthy social order. But the right of every person to be let alone must be

\(^{83}\) Id. at 138, 305 N.W.2d at 228.
\(^{84}\) Id. at 118, 164, 305 N.W.2d at 218, 240.
placed in the scales with the right of the other to communicate."\textsuperscript{86}

Thus, the court held that the petitioner maintained the inherent right to lessen any intrusion into his private domain. Since mass mailings did not promote the purpose of administering justice, Falk had the right to demand the removal of his name from the mailing list.

The Williams' opinion meticulously addressed the validity of the constitutional challenges advanced by Falk. The opinion initially focused on whether first amendment rights are absolute. Relying on \textit{Koningsberg v. State Bar of California},\textsuperscript{87} Williams observed that freedom of speech and association are not absolute, despite its importance to the Constitution and society. However, Williams proceeded to note that, even though the first amendment is not absolute, the state must demonstrate a compelling state interest to justify any constitutional intrusion. A mere showing of a legitimate interest is inadequate to pass constitutional muster. The ability to exercise personal liberties in an essentially unrestrained manner is fundamental to a democratic form of government.

The most important aspect of the Williams' opinion was the determination of the appropriate test to analyze petitioner's constitutional challenges. Referring to the United States Supreme Court's \textit{Abood} decision, in which the Court abdicated the use of the "least intrusive means," it noted that the most logical test was "whether the state has a compelling interest involved, and if so, whether the Bar's complained of activities are germane to that interest."\textsuperscript{88} The opinion concluded by noting that "promoting improvements in the administration of justice and advancements in jurisprudence" is a compelling state interest, and deserves the protection of the state. "The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy."\textsuperscript{89}

Levin's opinion embraced the issues, facts and history of the case as set forth by Justice Ryan's and Justice Williams' opinions. Concluding that a determination of the issues in \textit{Falk} was ham-

\textsuperscript{86} Id. at 736, quoted in \textit{Falk}, 411 Mich. at 163, 305 N.W.2d at 239.
\textsuperscript{87} 366 U.S. 36, 49 (1961).
\textsuperscript{88} 411 Mich. at 138, 305 N.W.2d at 227-28.
\textsuperscript{89} Id. at 140, 305 N.W.2d at 228.
pered by the indefiniteness of both the principles advanced in Abbood and the record in Falk,\(^90\) Levin observed that only through official remand proceedings could an assessment be made as to the promotion of issues which are directly related to the practice of law and the administration of justice. Applying a standard of judicial scrutiny prior to such an assessment would be inconsequential.

On remand, the burden was placed on the petitioner to identify with particularity the nature of the infringement of first amendment rights. The burden on the State Bar was to demonstrate a solid connection between its activities and a state interest, as well as the impact which intrusive alternatives would have in furthering that interest.\(^91\)

Despite the variety of opinions issued in Falk, none of the justices were concerned that there was no exclusive bargaining agent through which third-party beneficiary rights were established and defined. The court in general treated compulsory membership in a

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90. *Id.* at 167-71, 305 N.W.2d at 242-44.

91. As this article went into print, the Michigan Supreme Court handed down another decision in the continuing saga of Falk v. State Bar of Michigan. In a unanimous *per curiam* opinion, the court held that

> [t]he plaintiff is not entitled to the relief prayed for in his ‘Petition for Special Relief.’ However, because the proceeding convinced the court that certain practices of the State Bar are inappropriate, the court, under its powers of superintending control, will appoint a committee to review those practices and activities and make recommendations to the court.

Falk, No. 60722 (Dec. 29, 1983).

Three separate opinions were also filed, reflecting the Justices’ spectrum of views. Justice Boyle, joined by Chief Justice Williams, held that while plaintiff’s first amendment interests were infringed by the Bar’s political activities, the government interest outweighed the injury. “This is not a case where plaintiff is being forced to personally express his own agreement with the political positions of the bar . . . . Plaintiff is required to support the legislative positions taken by the bar only through *indirect* financial contributions” *Id.* at 16 n.88. (of Justice Boyle’s opinion)(emphasis added). Moreover, the plaintiff did not meet the burden of proof necessary to demonstrate that the non-political activities of the Bar had infringed on a first amendment right. Justice Boyle observed that Falk’s primary objection to the non-political activities was that such activities had not conferred any economic benefit to him. This interest was not deemed subject to first amendment protection. Justices Kavanaugh and Levin concurred in this disposition.

Justice Ryan, joined by Justices Brickley and Cavanagh, held that compulsory dues for inclusion in the State Bar are valid: “[t]he State of Michigan had shown a compelling state interest in certain functions of the bar which could not be advanced by less intrusive means.” *Id.* at 4 (of Justice Ryan’s opinion). Justice Ryan held, further, that political and legislative activities are impermissible intrusions as are activities designed to further commercial and economic interests of the Bar. The Bar should determine the portion of dues paid which cannot be constitutionally justified, and reduce the dues accordingly. *Id.*
state bar organization as a situation which raises the issue of bargaining for the administration of justice versus political and economic activities. Although previous rulings of various courts may have skirted the principal issue, *Falk* did yield a specific mandate; the State Bar may freely, and without question, compulsorily exact dues and require association to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the first amendment rights of the objecting affected individuals.

The issues in *Falk* have spawned interesting legislative activity. In New Jersey, a statute was enacted in 1980 which imposed a limitation of eight-five percent of regular membership dues for agency shop non-payers. The trend, as perceived by this author, is that future challenges to an *Abood* infringement will not yield illuminating discourses or colloquies on whether the government has properly met its burden of proof to justify an intrusion into sacrosanct individual liberties, but rather the extent to which such intrusion can and will be judicially tolerated.

**CONCLUSION**

The most critical concern which percolates into the public sector mainstream and affects employment relations is the extent to which certain activities and functions fall within the rubric of the political spending doctrine. Unions, to function effectively, must acquire some degree of financial stability. Financial stability serves to foster reliability and responsiveness to the problems inherent in the workplace. To deal with the concerns raised by this Article, should the extent of recognition conferred by the local constituency upon the unions be taken into consideration? Should a different set of standards apply if the union is newly organized and requires substantial financial support before it can adequately engage in the bargaining activities tolerated and contemplated by court decisions?

Is a certain amount of political involvement necessary to preserve a balance within public sector employment relations? Is this activity to be tolerated to a greater level simply because the lines

between political and bargaining activities are unclear? A recent article noted that both historical and practical considerations militate against restrictive or narrow policies in the public sector.\footnote{Rehmus and Kerner, The Agency Shop After Abood: No Free Ride, But What’s the Fare?, CALIF. PUB. EMPLOYER REL. (1980).} “Union objectives and unions members’ economic interests are as directly affected by tax policies as bargaining wage rates.”\footnote{Id. at 11.} Thus, it becomes an undiluted truth that collective bargaining in the public sector is “inherently political.” To be successful in public sector unionism, some political activity is necessary. The right to organize and bargain was achieved through political activity; the gains sought for the membership through the negotiation process imbue it with political character.

For public sector unionism to remain a vital and viable force in protecting individual rights through collective action, agency shop clauses must be carefully constructed, but nevertheless permitted. Such permissiveness furthers the federal and state policy favoring stability in employment relations.

The role of the courts has dramatically changed since the Supreme Court’s decision in Abood. While courts may be called upon to ascertain deprivation of due process as it affects rebate plans, the critical focus of the courts will become, not whether the agency shop agreement is \textit{per se} constitutional, but rather, the extent to which political and ideological expenditures in direct contravention to the challengers’ liberties is to be given judicial sanction. Thus, the succeeding line of cases will be largely unaffected by the ideology of laissez-faire and traditional cultist economics and the countervailing ideology of \textit{ipso facto} permissibility of union security agreements. All agency shop agreements constitute some infringement upon free speech and association rights. Recognizing that such curtailment of individual liberties is necessary to promote the common good and common interest, the courts must act cautiously so as to avoid rendering short-sighted or narrow decisions. The court’s constitutional mandate is not to second-guess its legislative counterpart. Thus, the court’s role, post Abood and \textit{Falk} should be one of circumspection and surveillance, so as to ensure that collective bargaining activities are not a guise for advancing partisan
political interests. Only then can the federal and state policies favoring stability in labor relations be achieved.