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ARE PUBLIC-SECTOR UNIONS
SPECIAL INTEREST POLITICAL PARTIES?

Edwin Vieira, Jr.*

Exclusive representation and compulsory bargaining in the context of government employment present important constitutional questions, which the United States Supreme Court recently considered in Abood v. Detroit Board of Education. In this Article, Professor Vieira offers a detailed, thought-provoking, and frequently controversial analysis of the Supreme Court decision and of the underlying issues relating to the rights of public employees and the political activities of public-sector unions. He concludes that such unions as the National Education Association are in fact political action organizations, posing possible threats to representative government that have received inadequate recognition.

"If this government becomes oppressive," Melancton Smith prophesied in the New York Convention, "it will be by degrees: it will aim at its end by disseminating sentiments of government opposite to republicanism, and proceed from step to step in depriving the people of a share in the government."1 Today, there are disquieting proofs of Smith's foresight—not the least of which, and the subject of this Article, is compulsory public-sector collective bargaining. In previous articles, I have demonstrated that exclusive representation and compulsory bargaining in public-sector employment are repugnant to the Thirteenth Amendment, as a form of slavery,2 and to the First Amendment, on several grounds.3 This Article continues and elaborates upon the work begun there.

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2. In my monograph Syndicalism, I demonstrated that the system of exclusive representation central to every existing compulsory bargaining scheme in public employment is repugnant per se to the Thirteenth Amendment, as a violation of dissenting employees' freedom of contractual self-determination. Vieira, OF SYNDICALISM, SLAVERY AND THE THIRTEENTH AMENDMENT: THE UNCONSTITUTIONALITY OF "EXCLUSIVE REPRESENTATION" IN PUBLIC-SECTOR EMPLOYMENT, 12 WAKE FOREST L. REV. 515 (1976) [hereinafter cited as Syndicalism]. For the definition of "dissenting employees" used herein, see id. at 522-24.

3. In my article Exclusive Representation, I elaborated on a suggestion from Syndicalism and explained how exclusive representation is also unconstitutional per se under the First Amendment, as a violation of dissenting public employees' freedom of petition. Vieira, Exclusive
I shall begin by critically reviewing the Supreme Court's most recent pronouncements on the subject of compulsory public-sector unionism in *Abood v. Detroit Board of Education*—pronouncements which implicitly recognize the centrality and controlling nature of questions I have posed elsewhere to the constitutional debate now raging around exclusive representation and compulsory bargaining in public-sector employment. Then, I shall investigate whether public-sector unions such as the National Education Association (NEA), American Federation of Teachers (AFT), and American Federation of State, County, and Municipal Employees (AFSCME) are political-action organizations in fact and law, and whether their participation in compulsory public-sector collective bargaining through the exclusive representation device inter alia distinguishes them from other political-action organizations as special interest political parties.

The discussion will follow this plan:

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In both places, although without detailed discussion, I further indicated that compulsory public-sector collective bargaining through the exclusive representation device is inconsistent with the republican form of government which the Constitution guarantees in Article 4, section 4—at least when militant, politically active unions assume the status and exercise the prerogatives of an exclusive representative. *Syndicalism*, supra note 2, at 818-26; *Exclusive Representation*, supra, at 573-74.

I. *Abood* and the Fundamental Constitutional Issues of Compulsory Public-Sector Unionism

*Abood* involved a challenge by nonunion public school teachers to an agency shop agreement. The teachers claimed that the agreement abridged their rights, under the First and Fourteenth Amendments, not to associate with the defendant union, a private organization engaged in political and ideological activities to which they were opposed. The trial court dismissed their complaint, and the highest state court to hear their appeal affirmed. On appeal, the Supreme Court vacated the judgment on the ground that the teachers could not be constitutionally required to finance such political activities of the union as were not germane to collective bargaining. It then remanded the cause for further proceedings on the issue of what remedy would be appropriate where the union illegally expended fees collected under the agency shop arrangement. Over the protests of Justices Powell and Blackmun, and Chief Justice Burger, however, the rest of the Court concluded that the agency shop scheme was constitutionally valid insofar as it required the teachers to provide financial support for the union's collective-bargaining activities.

*Abood* is a peculiar and disquieting decision. Not the least confusing aspect of the case is the welter of discordant opinions it produced. First, a tortuous plurality opinion of Justices Stewart, Brennan,
White, and Marshall held that, consistent with the First and Fourteenth Amendments, a state may condition the employment of public school teachers on their financial support of the collective-bargaining activities of a union which represents a majority of the employees in an appropriate bargaining unit—but not on their financial support of the union's political and ideological activities unrelated to its duties as exclusive representative. 9 Second, a petulant concurring opinion of Justice Rehnquist reiterated his personal view—for it finds no support in decisions of the Court—that a state may condition public employment howsoever it sees fit, without let or hindrance by the First and Fourteenth Amendments. 10 Third, an anxious concurring opinion of Justice Stevens expressed his doubt that the plurality had properly addressed the First Amendment issue at all, since its purported remedy for admitted violations of the constitutional liberties of nonunion teachers might prove to be unworkable. 11 And fourth, an acerbic concurring opinion of Justices Powell and Blackmun and Chief Justice Burger in fact dissented on the substantive ground that the plurality unjustifiably failed to apply the proper strict constitutional standards to the agency shop. 12 Moreover, if we presume that Justice Rehnquist, having abandoned his notions about the nonbinding nature of Supreme Court opinions on dissenting Justices, will reaffirm as a legal judgment his personal agreement with Justice Powell on the merits of the agency shop issue; 13 and if we presume that, the plurality's purported remedy having proven no remedy at all, Justice Stevens will also join Justice Powell; 14 then we must conclude that, when the case inevitably returns to the Court for reconsideration, a majority will declare the agency shop unconstitutional. 15 This makes Abood an insecurely contingent precedent at best.

The holding of Abood is unclear in another respect. Justice Stewart said in his opinion that the Court had upheld the constitutionality of

9. 431 U.S. at 211-42. The reports style Justice Stewart's opinion as that of the Court, but analysis proves this designation to be inaccurate, at least with respect to the constitutional issues with which we shall be primarily concerned.

10. Id. at 242-44 (Rehnquist, J., concurring). Justice Rehnquist has apparently forgotten that his "institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be." Hudgens v. NLRB, 424 U.S. 507, 518 (1976).

11. Id. at 244 (Stevens, J., concurring).

12. Id. at 244-64 (Powell and Blackmun, J.J., and Burger, C.J., concurring).

13. As Justice Rehnquist said, "Had I joined the plurality opinion in Elrod v. Burns, I would find it virtually impossible to join the Court's[i.e., the plurality's] opinion in this case." Id. at 242.


15. All the Justices agreed on the mediate disposition of the cause: vacation of the lower court decision and remand for further proceedings on the issue of a proper remedy. Id. at 241-42 (Stewart, J.); 244 (Powell & Blackmun, J.J., and Burger, C.J., concurring).
the agency shop "as such" against a challenge under the First and Fourteenth Amendments. In contrast, Justice Powell said that the plurality had not ruled properly on the constitutionality of the agency shop (having failed to apply the correct standard of review), but had ruled on the constitutionality of exclusive representation, even though the lower courts and the litigants never raised the issue. Surely a case which can provoke such a divergence of views must embody some remarkable legal concept. Therefore, I shall next investigate what Abood held with respect to the agency shop and to exclusive representation, illuminating the important, unanswered questions which some of the Justices perceived, if only "through a glass darkly."

A. The Agency Shop and Exclusive Representation

Exclusive representation and the agency shop are two related but distinct aspects of compulsory unionism.\(^{16}\) Exclusive representation is the system through which a union that numbers among its members a majority of the employees in an appropriate bargaining unit becomes the unique spokesman for all employees therein with respect to the negotiation of terms and conditions of employment and the adjustment of grievances with their employer.\(^{17}\) The agency shop usually assumes the form of an agreement between an employer and a majority union which conditions the employment of nonmembers of that union on their payment to it of a fee equivalent either to full union membership dues or to the costs of collective bargaining incurred by the union on their behalf.\(^{18}\) Generally, union partisans rationalize the agency shop on the "free-rider theory": the notion that performance of the supposedly burdensome duty of representing nonmembers in collective bargaining establishes an equitable claim in the majority union to recovery in the nature of quantum meruit against those employees.\(^{19}\) Debate on the constitutional merits of

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16. For a review of compulsory unionism which focuses on the several varieties of union security, see T. Haggard, Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements (1977), reviewed in 29 S.C.L. Rev. 437 (1978).
17. On exclusive representation in the public sector, see Syndicalism, supra note 2, at 520-21 & nn.7, 11, 526-42.
18. On the types of compulsory union membership devices operative in public-sector employment, see id. at 520 n.10, 521-22 & nn.12-16.
19. The appellee union and its amici in Abood relied strongly on this argument, although they did not concede the quantum meruit limitation on the agency fee. Brief for Appellees at 21-23, 29-35; Brief for the National Education Association as Amicus Curiae at 13, 11-16; Brief for the American Federation of Labor and Congress of Industrial Organizations and for the International Union, UAW as Amici Curiae at 45-50, 52 n.33.

At least one state court has recognized the quantum meruit requirement — interestingly enough, with respect to the very statute challenged in Abood. Central Mich. Univ. Faculty
the agency shop, then, usually accepts as an irrebuttable premise the validity of exclusive representation. If it did not, discussion would immediately shift to the legal merits of that device, to which issue the whys and wherefores of the agency shop are irrelevant.

This logical and constitutional priority of exclusive representation to the agency shop largely vitiates the significance of contemporary constitutional litigation on compulsory unionism, the great body of which (as Abood attests) addresses a merely derivative issue, while necessarily conceding the only question worth asking in the ultimate analysis.20 It is possible in cases of this kind, of course, for counsel to suggest, as they did in Abood, that the court abstract the agency shop problem from that of exclusive representation.21 But it is unlikely (again, as Abood attests) that any court other than one imbued with the most sensitive constitutional scruples will bother to do so. This is especially true because unions and their adherents continuously importune courts, as they did in Abood, to decide the agency shop question on the basis of essentially ex parte popular notions, economic misconceptions, and legal myths surrounding exclusive representation.22

For these reasons, both the agency shop and exclusive representation figure prominently in Abood. The main concern of this article, however, is exclusive representation—and, indeed, not even what the two major opinions in Abood said about it, but what they did not say. Nonetheless, we must first briefly review those opinions with respect to the subsidiary agency shop issue.

1. The constitutionality of the agency shop “as such”

Despite all its seemingly expansive language, the plurality opinion in Abood is extremely narrow. For, at most, it upheld the constitu-

Ass'n v. Ux, No. 77-1040, slip op. at 2 (Mich. Ct. App. July 29, 1977). The requirement is also implicit in the case upon which the Abood plurality primarily relied, Railway Employees' Dep't v. Hanson, 351 U.S. 225, 235, 238 (1956) ("financial support required relates . . . to the work of the union in the realm of collective bargaining"); "requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is [constitutional].")


21. See Brief for Appellants at 148, 149; Reply Brief for Appellants at 39.

22. E.g., the unsupportable proposition that judicial opinions have established the constitutionality of exclusive representation in both the public and private sectors. For a particularly egregious instance of this kind of misrepresentation, see Brief for the National Education Association as Amicus Curiae at 9, 31, 40-41. Even the Abood plurality shrank from lending its explicit imprimatur to this obvious falsehood.
tionality only of an empty abstraction: what I shall denote the agency shop "as such."

The appellants in Abood had argued that the state statute, which permitted the appellee employer and union to condition the employment of nonunion public school teachers on their payment of agency fees to the exclusive representative, was repugnant to the First and Fourteenth Amendments for two reasons. First, since collective bargaining with a public employer is inherently and inescapably political in nature, any expenditures of dissenters' funds by a union on such activity are simultaneously and necessarily expenditures on a form of political activism, which in effect coerce political conformity among teachers contrary to the plain teaching of numerous Supreme Court decisions. Second, since the statute (as authoritatively construed by the state courts) does not limit the uses to which an exclusive representative may legally apply agency fees, but instead permits public-sector unions to expend the fees to finance the partisan political campaigns of candidates for election to public office, the agency shop scheme is fatally overbroad, whether or not spending for political purposes germane to collective bargaining is constitutional. The plurality agreed that the latter theory stated a constitutional claim for relief, but then rendered worthless that decision by ruling erroneously that the sole remedy was for the state courts to fashion some form of restitutionary relief, rather than to enjoin enforcement of the statute.

23. See, e.g., Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in politics ... or other matters of opinion or force citizens to confess by word or act their faith therein"). For the complete argument, see Brief for Appellants at 63-76, 79-99.

24. See, e.g., NAACP v. Button, 371 U.S. 415, 432 (1963). For the complete argument, see Brief for Appellants at 76-78, 206-10. In its main brief, the appellee union admitted its intention to use agency fees for partisan politics. Brief for Appellees at 11 & Appendix B.

25. 431 U.S. at 237-42. Although it is not my intention to perform a complete autopsy of Abood, two subsidiary points are worthy of an extended footnote, the more obvious one being the illusory nature of the remedy proffered by the plurality. The plurality suggested that the lower courts fashion a remedy for the union's admittedly unconstitutional actions by requiring it, in some undefined way and at some undefined time, to disgorge that portion of the dissenting employees' agency fees which it expended on political activism unrelated to collective bargaining. Yet, at the same time, the plurality conceded that the distinction between political action related to public-sector collective bargaining and that not so related is "hazy." 431 U.S. at 236. How, then, will such a remedy work? Rather badly, I submit.

First, the remedy will require that the dissenting employees engage in potentially endless litigation, at vast expense, to secure constitutional freedoms.

Second, even a full evidentiary record in Abood will not suffice to define the dividing line between legal and illegal union political activism. Only a lengthy series of cases, minutely exposing the operations of several public-sector unions under various circumstances, can provide the painstakingly detailed factual background required as a practical matter to establish a meaningful definition. But the necessity for such litigation will create the very chilling effect...
It rejected the former, more expansive theory, however, on the ground that "an agency shop provision in a collective-bargaining agreement covering government employees is, as such, constitution-

upon First Amendment liberties which every Justice on the Court, at one time or another, has condemned as inconsistent with the guarantees of the Bill of Rights. See, e.g., Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 194-95 (1971) (Marshall, J., dissenting) (citing numerous other authorities); Baggett v. Bullitt, 377 U.S. 360, 371-79 (1964); Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964). In short, the mechanics of achieving the suggested remedy are foreign to the axiom of constitutional jurisprudence that First Amendment liberties, above all others, must receive the most expeditious and least burdensome protection possible. See, e.g., Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-42 (1968); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); Blount v. Rizzi, 400 U.S. 410, 417-18 (1971).

Third, even if the lower courts could define the difference between union political activism related to collective bargaining and that not so related, and were to order the union to rebate agency fees unconstitutionally expended, this would in no way vindicate the employees' First Amendment freedoms. For it is the spending of the money on political activism, not its mere retention by the union, which affronts the Bill of Rights. Nonetheless, it is the spending which the plurality opinion sanctioned, by denying the employees any relief save restitution. No wonder, then, that Justice Stevens expressed concern that the plurality had not "avoid[ed] the risk that [the agency fees] will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." 431 U.S. at 244. The plurality did not avoid that risk; they made it a certainty. Thus, the plurality's remedy is no relief at all. Instead, it is judicial protection and encouragement of the constitutional wrong, an abdication of judicial responsibility which even those untrained in the law can descry and decry. See Editorial, Overriding Interest, Wall Street Journal, June 1, 1977, at 16, cols. 1-2.

The second interesting point relates to the problem of statutory overbreadth which the plurality recognized but refused to address. See 431 U.S. at 232-33. A basic issue in Abood was whether the agency shop is the least restrictive means of accomplishing a valid state objective. See Jurisdictional Statement at 6; Brief for Appellants at 4. The appellants, the appellees, the lower courts, and every Justice in the plurality explicitly agreed that (1) the agency shop, as a matter of state law, permits the union to expend agency fees on political activism unrelated to collective bargaining; (2) such spending amounts to a form of coerced political and ideological conformity which is unconstitutional per se under the First and Fourteenth Amendments; and therefore (3) the dissenting employees are entitled to an appropriate remedy for the wrong. Yet, despite this consensus, no member of the Court asked whether the agency shop is thereby invalid on its face on grounds of overbreadth, although such an inquiry is traditionally mandatory in adjudication involving First Amendment and other fundamental liberties. See, e.g., Wooley v. Maynard, 430 U.S. 705, 712 (1977) (Burger, C.J.); Elrod v. Burns, 427 U.S. 347, 363 (1976) (Brennan, White, and Marshall, JJ., plurality opinion); Young v. American Mini Theatres, Inc., 427 U.S. 50, 83-84 (1976) (Powell, J., concurring); id. at 94-96 (Blackmun, Brennan, Marshall, and Stewart, JJ., dissenting); Hynes v. Oradell, 425 U.S. 610, 620 (1976) (Burger, C.J.); Greer v. Spock, 424 U.S. 828, 852-53 (1976) (Brennan, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 238-39 (1976) (Burger, C.J., concurring and dissenting in part); Erznoznik v. City of Jacksonville, 422 U.S. 205, 215-16 (1975) (Powell, J.); Storer v. Brown, 415 U.S. 724, 760 (1974) (Brennan and Marshall, J.J., concurring); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973) (Stewart, J.); Broadrick v. Oklahoma, 413 U.S. 601, 611-15 (1973) (White, J.) (collecting cases); id. at 627-28 (Brennan, Stewart, and Marshall, J.J., dissenting); California v. LaRue, 409 U.S. 109, 123-26 (1972) (Marshall, J., dissenting); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (Marshall, J.J.); Brown v. Oklahoma, 408 U.S. 909, 912-13 (1972) (Rehnquist and Blackmun, J.J., and Burger, C.J., dissenting); Gooding v. Wilson, 405 U.S. 518, 522-23 (1972) (Brennan, J.); Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, White, and Marshall, J.J., dissenting and concurring in part); Dandridge v. Williams, 397 U.S. 471, 484 (1970) (Stewart,
ally valid” under the rule enunciated in the Court’s earlier private-sector Hanson decision. Moreover, the plurality held that Hanson controlled not only the result but also the methodology of constitutional adjudication, in a manner unprecedented in First Amendment litigation.

That Hanson in no way compelled such a result is evident. Although dealing with what one might loosely style a First Amendment issue, Hanson applied only the de minimis “rational basis” test, not the strict “compelling state interest” and “least restrictive alternative” standards of judicial review uniformly required in every other modern case which involved an actual infringement upon fundamental individual freedoms. However, the legal issue addressed in Hanson, a private-sector case, is easily distinguishable from the problem pre-

As authoritatively construed by the state courts, the agency shop in Abood is the most, not the least, restrictive means, since it requires that the aggrieved employees—not the union—take expensive and time-consuming action to protect liberties which everyone conceded the union plans to violate. Obviously the state legislature could have designed a far less restrictive but equally workable system by explicitly limiting the chargeable agency fees to the proven costs of collective bargaining and by providing an administrative hearing procedure through which dissenting employees could challenge the assessment before the union spent those fees for illegal purposes. See, e.g., MINN. STAT. ANN. § 179.65, subd. 2 (Supp. 1977). That it did not do so should have been dispositive of the First Amendment issue and of the remedy. For it is not the province of the Supreme Court to attempt to remedy a state statute’s admitted and incurable abridgement of fundamental freedoms. That task is for the state legislature. Compare United States v. Jackson, 390 U.S. 570, 582 (1968) (Stewart, J.); Cameron v. Johnson, 390 U.S. 611, 616-17 (1968) (Brennan, J.); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (Stewart, J.).

26. 431 U.S. at 217 (emphasis added), question presented and answered on the basis of Railway Employees’ Dept. v. Hanson, 351 U.S. 225 (1956). Throughout this article, I have substituted the term “agency shop” for “union shop.” These two forms of compulsory unionism are not equivalent, either in practical operation or in legal implication. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. at 217 n.10 (Stewart, J.). For our purposes, however, the differences are not important. Besides, some commentators contend that, at least under federal law, the agency shop is the most stringent form of compulsory union membership allowed. See T. HAGGARD, supra note 16, Part II.

27. Before Abood, Justice Powell noted, “it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. . . . The [plurality], for the first time in a First Amendment case, simply reverse[d] this principle.” 431 U.S. at 263.

sented in *Abood*. Although private employers may, in the absence of statute, condition employment as they choose, the state and federal governments, even in the exercise of their internal operations, may not condition public employment on a waiver or surrender of First or Fourteenth Amendment liberties.\(^29\)

In *Hanson*, a nonunion employee challenged the provision of the Railway Labor Act which authorizes railway employers and unions to negotiate compulsory unionism arrangements.\(^30\) Because this provision of federal law expressly preempts otherwise applicable state right-to-work laws proscribing compulsory unionism, *Hanson* argued that it violated the First and Fifth Amendments. Rejecting this claim, the Court ruled that "[t]he [agency] shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required [railways and unions] to enter into [agency] shop agreements." Admittedly, the Court continued,

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\text{[i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute authorizing [agency] shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.} \(^{31}\)
\]

On the merits, however, the *Hanson* Court held the congressional decision to authorize compulsory unionism agreements, notwithstanding contrary state law, to be a "question . . . of policy with which the judiciary has no concern," and to be in no way repugnant to the First or Fifth Amendments.\(^32\)

Of course, once one identifies the private rights which the federal statute allegedly invaded, he can readily concur in the *Hanson* hold-


\(^{31}\) 351 U.S. at 232 (footnote omitted).

\(^{32}\) Id. at 234, 238.
ing, if not in its equivocal explanation of that result. In the absence of either a state right-to-work law or the federal authorization of private union security arrangements, a nonunion employee in the private sector has no common law or constitutional immunity against, or right to complain of, an agreement negotiated between his employer and a union which conditions his employment upon payment of fees to the union. Enactment of a state right-to-work law may provide him with a statutory immunity and right, but that is all. If, under those circumstances, Congress preempts the state's power to intervene in labor relations affecting interstate commerce (as it did in the Railway Labor Act), of what immunity or right has it deprived the dissenting employee? Certainly not an immunity or right guaranteed by the First Amendment; and, if the congressional action satisfies the standards of the rational basis test as a proper exertion of commerce clause authority, certainly not an immunity or right guaranteed by the Fifth Amendment, either. In fact, the overall effect of federal preemption of a state's right-to-work law is merely to return the parties essentially to the common law status quo ante, under which a dissenting private-sector employee has no immunity or right against compulsory unionism, by hypothesis. This being the case, in the Hanson situation it is more correct to say that no violation of the First Amendment can occur, than that one has not occurred. But if, in the Hanson situation, no violation of the First Amendment can occur, Hanson and its private-sector progeny are necessarily irrelevant to the totally different constitutional context of public-sector employment, where First Amendment principles are fully applicable ab initio.

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33. See 351 U.S. at 232 n.4, where the Hanson Court said, apropos of nothing involved in the case, that "[o]nce courts enforce the agreement the sanction of government is, of course, put behind them." The Abood plurality seized upon this obscure dictum without explaining what relevance it had to the legal issues actually tried in Hanson. Abood, 431 U.S. at 218-19 n.12.


35. Actually, under federal law employers and unions operating in interstate commerce have statutory authorization only to exercise less than their full common law powers and privileges, since at common law the full closed shop is legal, whereas under the Railway Labor and National Labor Relations Acts it is an impermissible form of compulsory unionism. See Railway Labor Act § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1970); National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). Rather than suffering deprivations of rights as compared to common law, then, nonunion employees enjoy an expansion of their rights against employers and unions otherwise amenable to compulsory unionism arrangements more stringent than those now allowed under the federal statutes.
Thus, the *Abood* plurality's reliance on *Hanson* is without rational support. To be sure, the plurality purported to find in *Hanson* the same sort of governmental action which inheres in the typical public-sector unconstitutional conditions case.\(^{36}\) The obvious error here is that, while all legislative, executive, and judicial action is *governmental* action in the vulgar sense of the term, it is not and cannot be governmental action *subject to constitutional restraint* if its only effect with respect to a complaining party is to restore, affirm, secure, or enforce his common law rights, powers, privileges, or immunities—or, as in *Hanson*, his common law absences of right, disabilities, duties, or liabilities. Justice Stewart was linguistically correct, of course, in his observation that "[t]he plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." Legally, however, his comment precisely reverses constitutional cause and effect. There was no, and could not have been any, First Amendment violation in *Hanson* because that case involved no governmental action *subject to First Amendment scrutiny*.\(^ {37}\) There is and can be no governmental action subject to constitutional restraint if, as in *Hanson*, a legislature properly exercises delegated power to authorize two private parties mutually to exercise a common law power and privilege (such as the power and privilege of an employer and union to negotiate a compulsory unionism agreement), even though such authorization logically recognizes as well a correlative absence of common law right in some other private party (such as the absence of right in a nonunion applicant to secure employment unconditioned on such an arrangement). Neither is there nor can there be governmental action subject to constitutional restraint if a court properly exercises jurisdiction to enforce a common law right of one private party against another (such as the right of a union to require an employer's compliance with the terms of a valid compulsory unionism agreement), even though such enforcement logically recognizes as well a correlative common law disability in some third private party (such as the disability of a nonunion applicant to offer or accept employment unconditioned on that provision).\(^ {38}\) Otherwise, a legislature or judiciary could "constititutionalize" all private, common law action simply by authorizing or

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36. 431 U.S. at 218-19 n.12, 226-27 & n.23.
38. Thus the absurdity of, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948), which was irrelevantly cited with approval in *Railway Employees' Dept. v. Hanson*, 351 U.S. at 232 n.4, and in *Abood v. Detroit Bd. of Educ.*., 431 U.S. at 218-19 n.12 (Stewart, J.).
enforcing it, thereby destroying the fundamental distinction between the state and society, and replacing our system of limited government with an effectively totalitarian regime.\(^3\)

Furthermore, even if one interprets *Hanson* as involving governmental action subject to First Amendment restraints, and characterizes private-sector unionism as inherently ideological (albeit not, strictly speaking, political) in nature, he still need not accept the *Abood* plurality's conclusion. The plurality, of course, explicitly premised its argument upon these assumptions.\(^4\) However, it was the unarticulated assumption subtending them which posed the real question for decision, the question the plurality begged: namely, if federal authorization of an agency shop in private employment compels ideological conformity within the ken of the First Amendment, on what basis could *Hanson* be correct in finding no constitutional violation *when the Court applied only the rational basis test*? The answer, I believe, is *on no basis*.\(^4\) Yet nowhere did the *Abood* plurality even suggest that *Hanson*’s validity, as a First Amendment decision, might be subject to challenge, although the appellants raised precisely this point from the very onset of the case.\(^4\)

In any event, since *Abood* came to the Court on appeal of a dismissal for failure to state a claim upon which relief could be granted, it brought with it “no evidentiary record of any kind.”\(^4\) There were, in short, *no facts* as to what collective bargaining through exclusive representation entailed; *no facts* as to how the union expended agency fees (except its admission of intent to channel some monies into partisan political activism unrelated to collective bargaining); and *no facts* as to the nature of the union as an organization, its institutional purposes, or its substantial activities.\(^4\) Therefore, the *Abood* plurality

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39. Logically, for Justices Stewart, Brennan, White, and Marshall to have interpreted and applied *Hanson* as they did in *Abood* implies they also believe that, if Congress enacted a law which simply authorized private parties to exercise their pre-existing common law powers and privileges to enter into contracts in interstate commerce, all private commercial contracts negotiated thereafter would constitute “governmental action” in the sense those Justices attributed to compulsory union membership arrangements negotiated under the Railway Labor Act. As governmental action, moreover, all such ostensibly private contracts would be subject to every constitutional limitation applicable to government. But if so, they would also be subject to congressional and judicial intervention designed to enforce those limitations of organic law. Therefore, in effect, government would assume, by simple fiat, total power to control the substance of every commercial transaction within the United States.

40. 431 U.S. at 226-32.

41. See *Syndicalism*, *supra* note 2, at 813-16.


43. 431 U.S. at 236-37.

44. Of particular importance to the last-mentioned point is Justice Stevens’ comment that “[o]ur knowledge of the facts is limited to a bald assertion that the Union engages ‘in a number
could have done no more than to hold that the agency shop "as such" has a rational basis: namely, that some circumstances might exist, sometime, somewhere, and for some reason, which might justify requiring dissenting public employees to provide financial support to some kind of employee organization engaged in some sort of activities that involve dealing in some way with the dissenters' employer with respect to some aspects of their terms and conditions of employment. But, of course, no one ever seriously doubted this. Even Justice Powell conceded the "possible" constitutionality of the agency shop "as such." 45

The Abood plurality opinion, then, is but an empty shell. If one were to ask, "on what activities may a union, serving as an exclusive representative, constitutionally expend dissenting employees' agency fees?" the plurality could respond only, "on activities 'germane to [the union's] duties as collective bargaining representative.' " 46 If one inquired further, "what activities are 'germane to those collective-bargaining duties?';" the plurality could answer only, "whatever activities sufficiently relate to those decisions of public authorities which 'might be seen as an integral part of the bargaining process.' " 47 And if one then pressed to know, "which decisions of which public authorities might be 'an integral part of the bargaining process'?" the plurality could say only, "we have no occasion . . . to try to define a dividing line." 48 Therefore, if the Abood plurality opinion is ever to acquire any meaning, it will be only through further, laborious litigation over the agency shop—not the chimerical agency shop "as such," but the agency shop as it exists in real factual records, describing the actual behavior of actual individuals and organizations engaged in what they claim to be collective bargaining.

In fine, Abood itself tells us nothing of practical significance about the constitutionality of the agency shop, except that the real legal questions are yet to be addressed or answered. One is entitled to ask, therefore, why the correct disposition of the case would not have been to postpone any constitutional decision, other than that the appellants had alleged a valid claim for relief in the lower court. This would have allowed the parties on remand to adduce a complete fac-

and variety of activities which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve" . . . What, if anything, will be proved at trial is a matter for conjecture." Id. at 244 n*.

45. Id. at 262. See also id. at 263 n.16 (agency shop possibly justified where "narrowly defined economic issues" or "processing of individual grievances" are concerned).

46. Id. at 235-36 (footnote omitted).

47. Id. at 236.

48. Id.
tual record, documenting with particularity both the nature and substance of the agency shop and the character of the union as a political-action organization.49

2. The assumed validity of exclusive representation under the private-sector analogy

*Abbood* provides even less guidance on the issue of exclusive representation than it does on the agency shop, despite the comments of Justice Powell that, although the Court "[i]n *Madison School District* . . . expressly reserved judgment on the constitutional validity of the exclusivity principle in the public sector," the *Abbood* plurality "decide[d] this issue summarily" and "sustain[ed] the exclusivity principle."50

The record establishes beyond dispute that the question of the constitutionality of the exclusive representation device under the First, the Fourteenth, or any other Amendment or constitutional provision did not arise, and could not have arisen.51 No challenge to exclusive representation appeared in the complaint.52 Neither did the lower court purport to rule on the matter.53 Nor did any of the parties present such a question to the Supreme Court.54 Indeed, the parties explicitly reserved argument on the constitutional merits of exclusivity, recognizing that the "appeal . . . does not raise the question. . . ."55 Moreover, the *Abbood* plurality itself defined the question for decision as the limited one of "whether an agency shop provision in a collective-bargaining agreement covering government

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50. 341 U.S. at 261, citing City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm’n, 429 U.S. 167, 175 (1976), which was discussed with respect to this point in *Exclusive Representation, supra* note 3, at 588-70, 593-94.

51. E.g., Bradstreet v. Potter, 41 U.S. (16 Pet.) 317 (1842) (Court will not render opinion on "ulterior points" in case, although parties desire it, where points not properly raised).

52. Appendix to Brief for Appellants at 6-15, 39-52.

53. Id. at 94-104.

54. Jurisdictional Statement at 6, Brief for Appellants at 4; Brief for Appellees at x.

55. Brief for Appellants at 148. To like effect are the following disclaimers: "We must and shall refrain from addressing the merits of [the exclusive representation] issue, secure in the knowledge that they will wend their tortuous way to this Court, sooner or later." Id. "We repeat: Our concern here is not to attack the principle of exclusive representation as such." Id. at 149. "[T]he states are free to adopt the federal model of majority rule and exclusive representation (which appellants do not challenge). . . ." Brief for Appellees at 34. "In our main brief, we recognized that the exclusive representation device is not immediately in issue in this appeal. . . ." Reply Brief for Appellants at 39.
employees is, as such, constitutionally valid." And the record contained no facts with respect to exclusive representation, which prompted the plurality to reiterate that “[a]ll we decide is that the general allegations in the complaint, if proven, establish a cause of action under the First and Fourteenth Amendments [with respect to the agency shop].”

But, while the Abood plurality opinion did not sustain the exclusivity principle as a matter of constitutional law, it did contain passages approbating that device as a “familiar doctrin[e]” and a “central element” in contemporary labor relations. “The designation of a single representative,” explained Justice Stewart at one point.

avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating disension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Furthermore, continued the plurality at a later juncture in its opinion,

[t]he governmental interests advanced by the agency shop [in public employment] are much the same as those promoted by similar provisions in [the private sector]. The confusion and conflict that could arise if rival teachers' unions, holding quite different views [as to terms and conditions of employment], each sought to obtain the employer’s agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. . . . The desirability of labor peace is no less important in the public sector, nor is the risk of “free riders” any smaller.

Thus the plurality expressed support for exclusive representation in public employment by cataloguing its supposedly beneficial effects and drawing an analogy to purportedly similar experience in the private sector.

The plurality only assumed, however, that the Supreme Court had sanctioned exclusive representation in private employment and that a private-sector analogy is applicable to public employment. Nowhere

56. 431 U.S. at 217 (emphasis added).
57. Id. at 237.
58. Id. at 220.
59. Id. at 220-21.
60. Id. at 224.
did it refer to any previous Court decisions sustaining exclusivity under the First Amendment or any other provision of the Constitution. Indeed, three of the four decisions Justice Stewart cited dealt only with statutory interpretation and application; and the fourth, while it dealt with constitutional issues under the *Fifth* Amendment, did so on the basis of a construction of exclusivity which avoids significant *First* Amendment problems altogether. 61 Neither did the plurality provide judicial or scholarly support for the notion that the public and private sectors are indistinguishable in terms of the constitutional considerations that must inform labor relations policy. Nor could it have done so. For, in both instances, the plurality's gratuitous assumptions are without support.

The constitutionality of exclusive representation in the private sector is an open question. 62 Moreover, the case history indicates that


62. When the constitutionality of the National Labor Relations Act was first in issue, the Labor Board selected its test cases so as ‘intentionally . . . to avoid presenting the Court with the ‘touchy’ and . . . doubtful question’’ of the constitutionality of exclusive representation. L. J. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 187 (1974). Thus, when in *Jones & Laughlin* a private employer challenged the act on various constitutional theories, the Court avoided the issue of exclusive representation by interpreting the statute as “not prevent[ing] the employer ‘from refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine’.” NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (footnote omitted). Similarly, in a contemporaneous employer challenge, in *Virginian Ry.,* to the constitutionality of the Railway Labor Act, the Court held that exclusive representation under that statute did not preclude individual contracts between the employer and dissenting employees. Virginian Ry. v. System Fed’n No. 40, 300 U.S. 515, 548-49 (1937). The *Abood* plurality referred to these very pages in support of exclusivity, without explaining what exclusivity meant under *Virginian Ry.* 431 U.S. at 220-21. Only seven years later, in two cases raising issues of statutory construction alone, did the Court re-interpret these private-sector acts so as to preclude individual contracts. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944) (National Labor Relations Act); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944) (Railway Labor Act). Neither of these decisions, however, reconsidered the constitutional questions raised in *Jones & Laughlin* or *Virginian Ry.,* although the statutory constructions adopted in the latter cases formed the necessary predicates for their constitutional holdings. See Comment, The Mechanics of Collective Bargaining, 53 HARV. L. REV. 754, 789-91 (1940).

The contemporaneous *Steele* decision also failed to pass on the constitutionality of exclusive representation. There, the Court created the duty of fair representation precisely in order to *avoid* serious constitutional questions of due process and equal protection surrounding exclusivity. Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944). The *Abood* plurality expanded on the importance of this duty, again without explaining its constitutional significance. 431 U.S. at 221-22. No other case arose after *Steele* that implicated the constitutionality of exclusive representation until *Madison School District,* which recently declared that the device could not preempt the First Amendment privilege of a dissenting public school teacher to address his employer at a public meeting on a matter then the subject of collective bargaining between the teacher’s exclusive representative and employer. City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm’n, 429 U.S. 167 (1976).
“exclusive representation” can mean radically different things to different people: from a system which permits individual employment contracts to one which proscribes them. Therefore, a detailed factual record describing with minute specificity what exclusive representation entails in a particular case is an absolute prerequisite to meaningful adjudication of its constitutionality.

Similarly, the reality and applicability of the private-sector analogy are hardly matters settled beyond dispute. Indeed, contrary to the loose implications of the Abood plurality, judicial decisions for more than a generation have consistently held that there is no private-sector analogy properly applicable to government which will sustain an extension of every practice accepted in private-sector collective bargaining to public-sector employment. And those commentators who have investigated the subject agree that the private-sector analogy is without substance. Moreover, even the plurality inadvertently conceded the incompetence of the analogy where exclusive representation is concerned. At one point in his opinion, Justice Stewart invoked the authority of Professor Clyde Summers for the proposition that “[t]he uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer.”

Yet, having admitted that very real differences exist between collective bargaining in the public and private sectors, Justice Stewart failed to draw the obvious conclusion. The private-sector analogy might be applicable to the agency shop, the primary burden of which falls upon supposedly indistinguishable employees in both the private and public sectors. But on its face, the analogy is inapplicable to exclusive representation, which primarily burdens employers, because the constitutionally relevant attributes of employers are totally dissimilar in the public and private sectors.

The failure to refer to any judicial decision upholding the constitutionality of exclusive representation in private-sector labor relations,

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63. Compare Winston-Salem/Forsyth County Unit, Educators Ass’n v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974), with Norwalk Teachers Ass’n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Hagerman v. Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947).


and to adduce a rational basis for applying a private-sector analogy to the public sector, is not the sole or most serious demerit of the Abood plurality's comments on exclusive representation. In addition to this, the comments themselves are either irrelevant, question-begging in nature, or based upon misconceptions or misrepresentations of the realities of public-sector employment. For instance, the supposed governmental interest in eliminating "free riders" relates only to the agency shop. If exclusive representation did not exist, majority unions would be under no duty to represent dissenting employees in collective bargaining, and therefore could rationally claim no corresponding right to financial reimbursement for their alleged services. Again, the supposed governmental interest in securing labor peace does not establish the validity of exclusive representation, but simply raises a further constitutional problem—namely, what is labor peace, and can government attain it without the serious restrictions upon individual employee freedom which exclusivity unavoidably occasions? 66

Finally, the other points raised by Justice Stewart rest upon errors of fact and law that even neophytes in the area of labor relations can easily expose, but which I shall treat more circumspectly for the reader's full enlightenment. Let us begin by considering some basic facts about the alleged necessity for exclusive representation in public and private employment. First, and perhaps conclusive of the whole issue, there is no empirically demonstrable necessity for the exclusive representation device in either public or private employment. Indeed, fully three-quarters of the total private labor force, and more than two-thirds of America's nonagricultural employees, do not belong to unions; and, in recent years, private-sector unions have suffered an absolute decline in membership. 67 The minority position of

66. Elsewhere, I have shown that the "labor-peace" apology for exclusive representation is actually a transparent euphemism for labor-union extortion, and therefore absolutely disqualified as a basis for the constitutionality of majority rule. Syndicalism, supra note 2, at 712-23; Exclusive Representation, supra note 3, at 530-47. The Abood plurality was not unaware of the realities of the "labor-peace" theory but, in keeping with Wittgenstein's dictum, "Wovon man nicht sprechen kann, darube muss man schweigen," chose to ignore them. See Brief for Appellants at 137-47.

unions thus rebuts any presumption, arising out of their politically preeminent and legally privileged status, that somehow the market system would collapse into chaos were it not for their intermediation with employers through collective bargaining. In addition, in public-sector employment, history teaches that for over three centuries no one seriously considered exclusive representation or other forms of compulsory unionism necessary, desirable, or even permissible. Prior to the 1950's, government generally proscribed public-employee unions as incompatible with the public's interest in undivided loyalty among its workers. Yet during this period the public service functioned quite adequately, without constant interruptions by union strike threat pressure made possible in large part by the exclusivity device. The alleged need for exclusive representation, then, has no basis in experience, and finds a convincing refutation there.

Second, there is no logical necessity for the exclusive representation device in public employment. It is quite possible for a public employer to deal with each of its employees as an individual, or with each similarly situated group of employees as a class, without confusion. Indeed, the very assumption of exclusivity is that appropriate bargaining units exist because employees are so similarly situated and sufficiently individualized by their circumstances that it is proper to require them to deal with their employer through a single representative. But, if that is the reality of labor relations, public employers suffer from no inherent disability to discover and act rationally upon it. They are perfectly capable of differentiating among individuals and groups, of categorizing them according to rational work-related criteria, and of establishing terms and conditions of employment which respond to and reflect these differences. Therefore, the need for a union to intervene in this process is not one which logic dictates.

tage of the work force, . . . is directly attributable to the weakness in the law. . . . If we cannot replenish our ranks through organizing, the labor movement will lose . . . strength and vitality. . . ."

68. Actually, contemporary unions are and must be committed enemies of the market system, their protestations to the contrary notwithstanding. See Syndicalism, supra note 2, at 576-78. For one important example of how contemporary private-sector unions are in the vanguard of the forces responsible for injecting ever-increasing chaos into the American economy, compare Petro, Unemployment, Unions and Inflation: Of Causation and Necessity, 26 THE FREEMAN 387 (1976), with O'Driscoll & Shenoy, Inflation, Recession, and Stagflation, in THE FOUNDATIONS OF MODERN AUSTRIAN ECONOMICS 185 (E. Dolan ed. 1976).

69. E.g., Perez v. Board of Police Comm'rs, 78 Cal. App.2d 638, 650-51, 178 P.2d 537, 545 (1947). Contemporary support for this view appears in Petro, supra note 64, at 146-60 (arguing that government may constitutionally proscribe union membership for public employees where the organization threatens to press for collective bargaining or to promote strikes).
Third, there is no legal necessity for the exclusive representation device in public-sector employment. The Constitution imposes no duty on private employers to treat all similarly situated employees equally. It is legally possible, therefore, for private employers discriminatorily to penalize their employees for their (the employees') beliefs, associations, and so on. For example, a private employer might offer better terms and conditions of employment to nonunion employees than to their union member co-workers, or better terms to members of one union than to adherents of another. If we assume that this power to discriminate is invidious, and that the Constitution authorizes government to intervene to limit it, we can sympathize with the statutory scheme of the National Labor Relations Act, which requires employers to deal with their employees in a nondiscriminatory fashion, through a single representative. But this possible rationale for exclusivity in the private sector has no relevance to public employment, where employers have no license to deny their employees equal protection. The Constitution already serves as each public employee's "exclusive representative," in that it denies his employer any power to discriminate against him unless some rational, work-related basis exists for the distinction. The supposed need for a union to fill the role of exclusive representative, then, is not one born of legal considerations.

Last, there is no administrative necessity for the exclusive representation device in public-sector employment. In the absence of a statutory duty to negotiate in good faith, inter-union rivalry in the public service poses few problems for public employers. There can be no legally binding demands, relative to terms and conditions of employment, because no union is in a position to make such demands. A fortiori, there can be no conflicting demands, because the Constitution requires the employer in any event to offer all similarly situated employees equivalent employment benefits, regardless of their union affiliations or lack thereof. Practical problems could arise.


71. Cf., e.g., United States v. United Mine Workers, 330 U.S. 258, 274 (1947) (notion that employees need legal protection from employers' "'interference, restraint, and coercion' . . . obviously does[not] apply to the Government as employer or to relations between the Government and its employees") (refusing to apply Norris-La Guardia Act to United States as operator of certain mines).

of course, if a legislature imposed a duty on public employers to negotiate in good faith with all individual employees, or with all employee unions. Under those circumstances, an employer might indeed face the dilemma of bargaining with different unions over terms and conditions of employment applicable to the same employees, or with different unions each demanding different terms and conditions for distinct groups of otherwise similarly situated employees. Exclusive representation is not necessary to remedy this absurd and nonexistent situation, however. For the legislature merely to revoke the multilateral bargaining duty would suffice. The alleged need for exclusivity, therefore, is not a matter of the public employer’s administrative convenience.

With this background, we can now evaluate the arguments the Abood plurality advanced on behalf of exclusivity. The claim that exclusive representation “frees the [public] employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements . . . not subject to attack from rival labor organizations” is triply defective. First, legally enforceable conflicting demands from different unions cannot exist absent a statutory duty in the employer to negotiate in good faith with more than one union. But no jurisdiction enforces such a multilateral duty; nor has any sensible person ever suggested that any jurisdiction do so. Legally allowable conflicting demands cannot exist either, since the Constitution prohibits public employers from acceding to demands that they discriminate invidiously among employees by arbitrarily favoring some over others. And if the demand for discrimination is not invidious, because based on a reasonable work-related distinction which the employer has discretionary authority to take into account, then it is not, rightly understood, conflicting at all. Of course, conflicting demands can and always will exist in the metaphorical sense that different employees, with different values, will attempt to inform their employer of the particular terms and conditions of employment they believe will best serve the public welfare by most effectively harmonizing the varied interests of everyone concerned. Exclusivity cannot remove these conflicts, however. It can only suppress them, thereby depriving the employer of sources of information vital to the performance of its duties on behalf of the public,73 and generating alienation and frus-

73. As the Court noted in Madison School District, “[t]eachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers’ expressions to . . . [their employer] on matters involving the operation of the schools would seriously impair the . . . [employer’s] ability to govern the [school] district.” 429 U.S. at 177.
tration among those employees whose voices cannot filter through the heavy insulation of union hostility, indifference, or plain bureaucratic inefficiency.\textsuperscript{74}

Second, exclusive representation does permit single agreements, but so does the process of common law contract between employers and individuals or distinct groups of similarly situated employees. Furthermore, absent exclusivity, how as a practical matter could there be, and why would any sensible employer ever enter into, more than one agreement establishing \textit{different} terms and conditions of employment for the \textit{same} employees? Who has ever seriously contended that such a situation would prevail without exclusive representation?\textsuperscript{75}

Third, agreements which exclusive representatives negotiate are no less subject to attack than those negotiated through common law contractual offer and acceptance. Moreover, that a public employer may adopt the view of one union over that of another, or of one individual over that of the entire remaining work force, as to which terms and conditions of employment best fulfill its needs is always possible, but usually irrelevant. I say "usually," because there may be occasions where the employer's choice is the product, not of intellectual conviction, but of illegal influence. But if, as I suggest, exclusive representation is precisely a means for certain unions to exert unconstitutional influence over the process of governmental decision-making, it hardly merits approbation because it renders the effects of that pernicious influence-peddling less subject to attack than common law contract.

The \textit{Abood} plurality's further claim that exclusivity "prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization"\textsuperscript{76} has two basic demerits. First, legitimate rivalry and dissension could arise only if the law permitted, or required, a public employer to discriminate invidiously among similarly situated employees; but no such constitutional permission or statutory requirement exists. Absent such law, of course, various unions and their members may still disagree among themselves over what terms and conditions of employment are best for all concerned. But exclusivity cannot eliminate such differences of opinion among employees. As is typical of every form of

\textsuperscript{74} For a classic illustration from the private sector, see Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), another case the real import of which the \textit{Abood} plurality did not comprehend.

\textsuperscript{75} Does there now exist such chaos, for example, in North Carolina, a state which explicitly proscribes public-sector collective bargaining? \textit{N.C. GEN. STAT.} §§ 95-97 to 95-100 (1975).

\textsuperscript{76} 431 U.S. at 220-21.
collectivism, it can only transform potentially soluble disagreements at one level into uncompromisable hostilities at another, primarily by shifting employees' attention from efforts to communicate and cooperate with their employer to efforts to attack and destroy each other's unions. Experience proves that exclusive representation is hardly a foolproof formula for eliminating dissension among public employees, if, in fact, it is not a major cause of a large measure of such dissension as now exists.\textsuperscript{77}

Second, the \textit{Abood} plurality talked of the advantages to the employee of collectivization, but did not explain what these advantages are. If Justice Stewart believes that public employees gain advantages from participation in inter-union warfare for exclusive representative status, his conception of benefit is one which even union leaders admit to be false.\textsuperscript{78} If, on the other hand, he meant to refer only to the enhanced bargaining power which exclusivity provides, his commonplace insight does not support the implicit conclusion that exclusive representation is therefore constitutional. For whether government, consistently with the Constitution, may enhance the political bargaining power of any group within society is precisely the question which the Court eventually must answer.\textsuperscript{79}

The plurality's next claim that "designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"\textsuperscript{80} is intellectually valueless for three reasons. First, the Constitution precludes the problem in any event. A public employer may not apply different terms and conditions of employment to employees without a rational, work-related basis for doing so. But, if the employer has such a basis, those employees form a distinct group,

\textsuperscript{77} A classic example is the decade-long struggle between the NEA and AFT for domination of the New York schools, a pitiless campaign of internecine guerrilla warfare waged without concern for the costs to teachers, students, parents, or taxpayers. For an excellent study of the AFT which elaborates on these points, see \textit{R. Braun, Teachers and Power: The Story of The American Federation Of Teachers} (1972). As Braun demonstrates, among AFT "warriors" "there is a distinct . . . . lack of . . . . concern for the values of education, the principles of popular participation in the operation of social institutions or the lofty reliance we like to place in the schools as transmitters of knowledge and all that is best in American culture." \textit{Id.} at 16.

\textsuperscript{78} \textit{See}, e.g., Transcript, Options in Education, National Pub. Radio Program No. 91, "The Great Debate III," Sept. 12, 1977, at 16: \textit{Moderator} — "This open warfare in New York State between the NEA and the AFT, and the competition around the country raises a question: who benefits, who benefits from it?" \textit{Albert Shanker, AFT President} — "It's not the teachers, I'll tell you that."

\textsuperscript{79} I analyze the "bargaining-power" argument in detail in \textit{Syndicalism}, \textit{supra} note 2, at 723-33.

\textsuperscript{80} 431 U.S. at 220.
for which representation by the spokesman from another distinct group, with arguably distinct interests and problems, hardly appears a reasonable means to avoid confusion. Second, administrative practicalities also preclude this problem. It strains credulity to conceive of large numbers of public administrators so lacking in sense that they willingly assume the administrative burden of applying conflicting labor agreements to various segments of an identical work force. Third, abolition of exclusivity would not create the problem. Absent exclusive representation, all public employees would have a common law power and privilege to offer appropriately individualized contracts to, and to accept such contracts offered by, their employer, if those contracts reflected rational, work-related differences among employees or groups of employees. Such individualized contracts, furthermore, could not be the source of confusion—since each employee’s contract, where there is a rational, work-related distinction between him and another individual, is a unique agreement with no necessary connection to or effect upon any other such agreement.

The plurality’s final claim that “the evils . . . the exclusivity rule in the Railway Labor Act was designed to avoid” “are no different in kind” 81 from those present in public employment is simply a restatement of the question-begging private-sector analogy. It is a restatement, moreover, which carefully refrained from revealing that the Railway Labor Act, as originally construed in Virginian Railway, did not prohibit employers and individual employees from contracting for terms and conditions of employment different from those negotiated collectively through the exclusive representation device. This restatement even more carefully avoided admitting that for seven years—from Virginian Railway and Jones & Laughlin in 1937, to J.I. Case Co. and Order of Railroad Telegraphers in 1944—courts enforced the rule of “limited exclusivity” without perceptibly evil results. 82 And most carefully of all, the plurality shunned any suggestion that the evils that the exclusivity rule may cause in the public sector are significantly different in kind from those it occasions in private employment, and therefore invalidate the private-sector analogy.

81. Id. at 224.
I have guided the reader through this meticulous analysis to prove beyond cavil that the Abood plurality’s arguments for exclusive representation in public employment establish no case whatsoever for that device. That being so, we may turn our attention to more important matters.

B. The Constitutional Implications of the Political Nature of Public-Sector Collective Bargaining and the Political Activism of Public-Sector Unions

Central to a correct decision of the exclusivity issue is recognition that public- and private-sector collective bargaining (and unionism) differ in at least one critical factor: namely, the political nature of the former and the non-political nature of the latter. In the public sector, government, the embodiment of the political process, is the employer; and public-sector unions such as the NEA, AFT, and AFSCME are deeply involved in political activism in an attempt to control the actions of government. Furthermore, as distinguished from employees in the private sector, public employees enjoy a constitutional privilege and right as against their employers, the First Amendment freedom of petition, that great political freedom which “the very idea of a government, republican in form, implies.” 83 Therefore, it is true (as I have shown elsewhere) that the differences between public- and private-sector collective bargaining translate into differences in First Amendment rights, and in many other legal relations as well. 84 And these differences turn on the political nature of public-sector bargaining, and the political activism of public-sector unions.

1. Recognition of the issues by the Abood Court

Every member of the Abood Court concurred, to some extent or other, in these views and their implications. First, no one denied that public-sector collective bargaining is inherently political in nature. On the basis of a wide-ranging survey of the literature, the plurality conceded that “decisionmaking by a public employer is above all a political process.” 85 Justice Powell also spoke forthrightly of public-sector collective bargaining, especially in public education, as “political in

84. I deal with freedom of petition in public-sector employment in Exclusive Representation, supra note 3, at 574-603.
85. 431 U.S. at 228. The plurality’s sources appear at 227 n.24. For a more complete discussion, see Brief for Appellants at 62-76
any meaningful sense of the word." And even the nonconformist Justice Rehnquist explicitly agreed with these judgments.

Second, all of the Justices noted as a commonplace that public-employee unions regularly engage in political activism as an adjunct of collective bargaining and otherwise. Justice Powell seized upon the key issue when he asked "whether a union in the public sector is... distinguishable from a political candidate or committee," and answered that, in his view,

no principled distinction exists.

The ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership. ...[The] objective [of a teachers' union] is to bring school board policy and decisions into harmony with its own views... to obtain favorable decisions—and to place persons in positions of power who will be receptive to the union's viewpoint. In these respects, the public sector union is indistinguishable from the traditional political party in this country.

The plurality, too, spoke with natural ease of how "public-employee unions attempt to influence governmental policy-making," and suggested that both lobbying and partisan political campaigning for the election of candidates to public office are part and parcel of their normal collective-bargaining activities. And Justice Rehnquist likened public-sector unions and their necessary activities to political parties or political campaigning and management.

Third, everyone agreed that one unavoidable effect of compulsory public-sector collective bargaining is to enable and encourage public-employee unions to exercise extraordinary political influence. As Justice Rehnquist recognized, "[s]uccess in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in it being administered in another way." From this observation readily followed Justice Stewart's concession, for the plurality, that public-sector bargaining "gives the employees more influence in the decision-making process than is possessed by employees similarly organized in the private sector." Justice Stewart might also have said: more potential

86. 431 U.S. at 257-58 (footnote omitted).
87. Id. at 243-44.
88. Id. at 256-57 (footnote omitted).
89. Id. at 231, 234, 236.
91. Id. at 243.
92. Id. at 229.
political power, specially sanctioned by law, than any other group in the political process enjoys. But Justice Powell sufficiently emphasized this point when he noted that,

[i]f power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the school board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decisionmaking process had been unconstitutionally diluted.\textsuperscript{93}

Finally, no one challenged the applicability of \textit{Elrod v. Burns}\textsuperscript{94} to the type of situation present in \textit{Abood}. The plurality referred to \textit{Elrod} as a leading freedom of association case, and explicitly reaffirmed its holding that requiring an individual "to associate with a political party" as a condition of "holding a job as a public school teacher" is unconstitutional per se.\textsuperscript{95} To be sure, the plurality did not invoke \textit{Elrod} to strike down the agency shop "as such," because \textit{Abood} offered no record characterizing the AFT and its affiliates as a kind of political party. But Justice Rehnquist had no difficulty in judicially noticing what the record failed to show, although he refused to follow the teaching of \textit{Elrod}.\textsuperscript{96} And Justice Powell drew the logically and legally necessary conclusion from his observation that "no principled [constitutional] distinction exists" between a public-sector union such as the AFT and "a political candidate or committee" or "the traditional political party in this country."\textsuperscript{97} In short, all of the Jus-

\textsuperscript{94.} \textit{Elrod} held that government could not constitutionally require nonpolicymaking public employees, as a condition of their employment, "to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party." 427 U.S. 347, 355 (1976).
\textsuperscript{95.} 431 U.S. at 233-34.
\textsuperscript{96.} \textit{See id.} at 242-44.
\textsuperscript{97.} \textit{Id.} at 256-57 (footnote omitted). "What distinguishes the public sector union from the political party," Justice Powell continued,

— and the distinction is a limited one — is that most of its members are employees who share similar economic interests and who may have a common professional perspective on some issues of public policy. . . . But I am unable to see why the likelihood of an area of consensus in the group should remove the protection of the First Amendment for the disagreements that inevitably will occur. \textit{Certainly, if individual teachers are ideologically opposed to public sector unionism itself, one would think that compelling them to affiliate with [a] union by contributing to it infringes their First Amendment rights to the same degree as compelling them to contribute to a political party.}\textsuperscript{Id.} (emphasis added).
Public-sector unions agreed, directly or indirectly, that a state statute would be unconstitutional per se under the First and Fourteenth Amendments which required public employees, as a condition of employment, to associate with an organization substantially enough involved in political activism to be likened to a political committee or party.

Summarizing, the Abood Court recognized four vital points: (1) public-sector collective bargaining is inherently and unavoidably political in nature, because it is part of the process of governmental decision-making; (2) because of their participation in the inherently political process of public-sector collective bargaining and in other forms of political activism, public employee unions are themselves political organizations not unlike traditional political parties; (3) because of the special privilege of compulsory collective bargaining, public-sector unions have an opportunity to exercise political influence and power not available to any other segment of the community; and (4) because of Elrod inter alia, the foregoing facts strongly suggest the per se unconstitutionality of collective bargaining through the exclusive representation device in public employment.

2. Fundamental questions of fact and law not sufficiently investigated in Abood

Although I consider Justice Powell's insights on the nature of public-sector unions irrefutable, I choose not to rely on judicial notice to establish the political character of organizations such as the NEA, AFT, or AFSCME. The Abood plurality made no attempt to challenge Justice Powell's sweeping factual conclusions; but neither did it explicitly concur in them. Therefore, I shall pose and answer in detail the questions which Justice Powell more or less took for granted:

Are the NEA, AFT, and AFSCME "political-action organizations," as the courts have defined that term? And are they, as a necessary consequence of the logic of compulsory public-sector collective bargaining itself, the peculiarly virulent form of political-action organizations that I denote as "special interest political parties"?

II. Public-Sector Unions as Political-Action Organizations in Fact and Law

My initial task is to consider political-action organizations in terms of their factual characteristics and their legal implications, and to determine whether public-sector unions are a special category of such organizations. To accomplish this task, I shall: (a) establish a methodology of analysis; (b) review the law of political-action organi-
zations as it now stands, applying it to a typical public-sector union; (c) transcend the mechanical application of legal principles to facts and consider whether, as a matter of logic, public-sector unions must be militant political-action organizations; and (d) demonstrate that such unions as the NEA, AFT and AFSCME are not only political-action organizations, but, more importantly, “special interest political parties.”

A. The Nature of the Problem and the Methodology for its Solution

Although as a matter of constitutional law there is undeniable merit in his comment that “no principled distinction exists” between a public-sector union and a political committee, Justice Powell was not strictly correct in concluding that “the public sector union is indistinguishable from the traditional political party in this country.” It is true that the ultimate objective of a union in the public sector, like that of a political party, is to influence public decision-making in accordance with the views and perceived interests of its membership. But in an era in which government intervention in economic and social affairs has increasingly politicized and fragmented the community, many groups and organizations share this same objective, without thereby becoming political parties. On the other hand, what Justice Powell felt distinguishes public-sector unions from political parties is that union members are employees who share similar economic interests, while members of traditional parties such as the Republicans and Democrats often come from many different and mutually antagonistic groups. This suggests, in my view, that public-sector unions are particularly intense manifestations of “party,” in the sense that they are “a number of persons united in opinion or action, as distinguished from, or opposed to, the rest of [the] community.” Evidently, mere analogies are not enough. Rather, we must recognize that public-sector unions are organizations sui generis, and must pro-

98. I shall focus primarily on the NEA with only limited adversions to the AFT and AFSCME, because material in the public record is more available from the NEA than from any other public-sector union with which I am familiar. Not only does the NEA itself boldly publish masses of documents describing in tiresome detail its tendentious aims and activities, but also its spokesmen regularly receive detailed media coverage. And, as the largest and most militant public-sector union, it is the subject of continuous comment and debate by friends and foes alike in various public forums. All of this information, then, is sufficiently notorious to be judicially noticeable.

99. 431 U.S. at 257.

100. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1784 (2d unabr. ed. 1934) [hereinafter cited as WEBSTER'S].
ceed on that basis with a detailed analysis of them and of their special environment, compulsory public-sector collective bargaining.

Two mutually complementary methods suggest themselves. To establish a background against which to view a union such as the NEA, we can first evaluate the purposes and activities of other groups and associations which the law deems political-action organizations. Then, to sharpen our focus, we can consider the peculiar logic and necessities of compulsory public-sector collective bargaining and the role that public-sector unions play in it. Together, these investigations should provide us with a factual and legal picture of high resolution, which will emphasize the unique aspects of our subject.

B. The Law of Political-Action Organizations

Generally speaking, a political-action organization is one which, through its officials, staff personnel, and members, engages in certain types of political activities to a "substantial" extent—or, even more compellingly, for which those activities are "essential" to its institutional purposes and goals. Therefore, the specific, practical problem in determining whether a public-sector union such as the NEA is a political-action organization involves definitions and criteria. The tasks at hand are to: (1) define the adjective "political," and related terms; (2) catalogue the "political" activities characteristic of common political-action organizations; (3) establish criteria of "substantiality" and "essentiality;" and (4) determine what kind, quality, and quantity of evidence is necessary to prove substantiality and essentiality, and who has the burden of proof with respect to facts in dispute.

1. The problems of definitions, criteria, and sources

The nature of this article compels me repetitively to employ an adjective which is as protean in its denotations and as subjective in its connotations as it is common in usage and liable to abuse. To avoid ambiguity and equivocation, therefore, I shall use a narrow and precise definition of the term "political." Moreover, throughout this


102. I shall limit the term “political” to a set of objective definitions drawn from relevant and responsible sources either unimpeachable for their accuracy in general, or distinguished by the particular authority they bring to bear on the question here. The first category comprises popular and legal dictionaries. From literally dozens of competent reference works, I have chosen two standard volumes: BLACK'S LAW DICTIONARY (rev. 4th ed. 1968) [hereinafter cited as BLACK'S] and WEBSTER'S.

The second category includes judicial opinions, statutes, and administrative regulations (together with decisions thereunder). The judicial opinions I have found are not uniform in nature.
Article I shall consider only what activities would suffice to characterize an organization as a "political-action organization" in a sense cognizable under constitutional law.

One set deals with the term "political" as specifically (and narrowly) defined in various statutes, regulations, or precedents—for the purpose of applying it to record evidence in the context of a familiar regulatory scheme. Another set deals with the term under circumstances in which no statute, regulation, or precedent defines it—leaving to the court the task of performing that exegesis in harmony with some legislative, executive, or judicial policy. And a third set deals with the term where it is least amenable to narrow definition—namely, the expansive field of constitutional law, especially First Amendment jurisprudence. Cf. Bridges v. California, 314 U.S. 252, 263 (1941) (First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow"). Accord, Wood v. Georgia, 370 U.S. 375, 383-85 (1962).

The statutes, administrative regulations and decisions thereunder to which I shall refer generally address two particular and familiar types of political activity: support for the partisan political campaigns of candidates for election to public office; and lobbying and like activities to influence governmental action, usually of the legislative branch. One such statute is the Hatch Act, 5 U.S.C. §§ 1501-08, 7324 (1970). This statute prohibits public employees, in either the federal or the state governments, from "tak[ing] an active part in political management or in political campaigns." Working on a case-by-case basis, since 1907 the Civil Service Commission has promulgated a body of law defining the phrase quoted above, most of which appears in a little-known service entitled POLITICAL ACTIVITY REPORTER [hereinafter cited as P.A.R.]. The Supreme Court recently upheld the Commission's definition, when it was attacked for its overbreadth and vagueness. Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571-80 (1973) (federal employees); Broadrick v. Oklahoma, 413 U.S. 601, 607-08 (1973) (state employees). As these decisions emphasize, however, the Commission's definition does not purport to be all-inclusive. See id. at 609-18.

Another statute is the Federal Election Campaign Act, 2 U.S.C. § 441(b) (Supp. 1977), reenacting the repealed Corrupt Practices Act, 18 U.S.C. §§ 610-17 (1970). This statute regulates financial contributions and expenditures to partisan political campaigns of candidates for election to national office. The Supreme Court described the earlier act as one which "involved . . . the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." United States v. United Auto Workers, 352 U.S. 567, 570 (1957).


A fourth statute is the 1954 Internal Revenue Code. The Code exempts certain religious, charitable, scientific, literary, and educational organizations from federal income taxation. I.R.C. § 501(c)(3). Moreover, contributions to these organizations are deductible from the contributor's taxable income, taxable estate, and gift tax. I.R.C. §§ 170(a)(1), 170(c)(2), 2055(a)(2), 2522(a)(2). Both the organization's exemption and the contributor's deduction continue only so long as "no substantial part of [the organization's] activities . . . is carrying on propaganda or otherwise attempting to influence legislation." I.R.C. §§ 170(c)(2), 501(c)(3), 2055(a)(2), 2522(a)(2). I.R.C. § 501(c)(3) also requires the organization not to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of a candidate for public office." Although, prior to the 1976 amendments, other sections did not recite this restriction on partisan political activism, the Internal Revenue Service inserted it throughout the Code. Compare Treas. Reg. § 1.170-1(f)(2)(ii) with Treas. Reg. § 1.501-1(c)(3)(iii) (1976). The Tax Reform Act of 1976 codified the Service's interpretation by adding the § 501(c)(3) restriction to the other provisions.
2. The logical anatomy of a political-action organization

Using a deductive approach, I shall begin with Webster's definition of "political" as:

[0]f or pertaining to . . . the conduct of government, referring in the widest application to the judicial, executive, and legislative branches . . . , or incidental to, the exercise of the functions vested in those charged with the conduct of government[;]103

and as

[0]f or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of a state. . . .104

Given this, one needs no extraordinary insight or imagination to provide the following tentative but self-evidently correct general definition:

A political-action organization is a formal group of individuals sharing certain common interests that attempts to a substantial degree, or the essential purpose of which is, to determine, control, intervene or participate in, or influence: (i) the selection of, or the exercise of the functions vested in, those executive, legislative, administrative, or judicial officials charged with the conduct, operation, or management of government; or (ii) the formulation or implementation of public policy.

Note that the standard for decision relates to intention, not capability or competence. That an organization may be led by, or composed of, fools or blunderers who inevitably fail to achieve their political goals is irrelevant to its nature as a political-action organization. The test is one of political action, not success.105

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105. See, e.g., NEA REP., Oct., 1977, at 11, in which the NEA claimed sweeping political success in the 1976 elections, including a "critical role played by [NEA members] in the Carter victory." (statement by NEA President John Ryor). But the fruits of victory have apparently rotted on the vine. See, e.g., NEA REP., May-June, 1977, at 5 (meeting with Carter to emphasize the NEA's "concern about statements by some of Carter's appointees in opposition to cabinet status for education"); NEA ADVOCATE 4 (Sept. 1977) (urging NEA affiliates "to gener-
A political-action organization, then, attempts to exercise those political rights that "consist in the power to participate, directly or indirectly, in establishment or management of government." 106 While it would be premature to develop fully the consequences of this observation, it is not too soon to alert the reader to one of them: that his or its legal ability to participate in the political process defines the political rights of an individual or association; and, to the extent a political-action organization exercises an extraordinary legal ability to participate in the political process, its political rights are presumptively superior to those of all other citizens.

But I anticipate what comes later. Here, on the basis of my tentative definition of a political-action organization, I shall only deduce the general types of activity that such an organization must logically employ to determine, control, intervene or participate in, or influence the selection of government officials, and the exercise of their functions. First, consider the selection of government officials. The people choose public officers either directly, through political elections, or indirectly, through appointment by those who are elected. 107 A political-action organization, therefore, may be one which intervenes or participates to a substantial degree in the partisan political campaigns of candidates for election to public office at the local, state, or national level. Or it may be one for which such activism is essential to the achievement of its institutional goals. 108 The income tax regulations, for example, define an "action" organization (in part) as one which "participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office." 109 As is common, participation in partisan political campaigns can include endorsement of a candidate by the organization itself; financial contributions to his political war chest by

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108. I say may rather than is because the sources indicate, and I consider it obvious, that a political-action organization need not engage in every form of political activity to merit the designation as such.

its members, often through an affiliated political-action committee; and personal services donated to the campaign by the organizations' officials, staff personnel, or members. But the partisanship vel non of the organization, in terms of its connection to a particular party label, is not the controlling factor. "[O]ne may be a partisan for a person, an issue, a candidate without feeling an identification with one political party or the other." 110 It is enough that the organization urges or aids in the election to public office of persons who it believes will adopt or execute in governmental affairs those political principles or practices which it seeks to promote. This is partisan political activism, howsoever neutral the organization may be with respect to formal affiliation or de facto identification with one traditional political party or another. 111

Second, consider the exercise of the functions vested in government officials. These functions are either mandatory or discretionary in nature. Either some constitutional provision, statute, administrative regulation, or judicial decision prescribes their fulfillment; or their satisfaction remains a "political question" in the broad sense of the term. 112 Where mandatory duties are concerned, the persons seeking their exercise can proceed either by way of request or by way of command. Any request for governmental action, even if that action is mandatory, is a species of petition, whether its import be great or petty, its content political or nonpolitical, or its motivation selfish or unselfish. 113 Procedurally, the interested party and its agents may contact officials or fonctionnaires directly or, through propaganda and agitation, may convince members of the public to apply indirect pressure on its behalf. 114 Substantively, in the case of mandatory duties,


112. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) ("political questions" involve matters where "the right to decide is placed [in the legislature]"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("political questions" involve "how the executive, or executive officers, perform duties in which they have a discretion").

113. Webster's, supra note 100, at 1832 defines petition as "[a] formal written request addressed to an official person or organized body having power to grant it." On its all-encompassing nature, see, e.g., Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1342-43 (7th Cir. 1977).

114. As used herein, "propaganda" means the "dissemination of ideas[and] information . . . for the purpose of helping . . . an institution[or] cause." Webster's, supra note 100, at 1983.
petitions are requests that government officials conform their behavior to legal (or perhaps moral) standards. Where they have not done so, one of three causes is possible: the officials abstractly know and respect the law, but have inadvertently failed to implement it. Or they would respect and implement the law if they knew it, but are ignorant of it. Or they know, or have reason to know, the law, but both disrespect and have some other motive for disregarding it. Petition, therefore, may be an appeal to conscience (that is, to the good faith of officials or fonctionnaires), an appeal to reason (that is, to the merits of a legal issue), or an appeal to consequences (that is, to the threat of sanctions, in the form either of commands from superior authority or, ultimately, of censure by the public through electoral defeat and removal from office). But, if these appeals fail, the petitioner must seek a command for governmental action, usually through judicial intervention in the form of litigation to define, enforce, or protect legal rights, powers, privileges, or immunities. A political-action organization, therefore, may be one which engages in litigation to a substantial degree, or for which litigation is essential to the realization of its programs or policies.

Conversely, where discretionary governmental authority is concerned, the persons seeking its exercise can proceed only by way of request. Again, such requests are a species of petition—specifically, lobbying, which I shall define as all legal attempts by interested parties to influence discretionary action on the part of legislative, executive, administrative, or other governmental officials or bodies.

"Agitation" means "the excitation of public feeling by discussion." Id. at 50. To me, the term propaganda connotes reasoned (although not necessarily correct) arguments directed to the intellects of a relatively limited group, whereas agitation suggests an appeal to mass emotion or passion, especially of the base variety—vulgar envy, greed, or revenge. Both terms may, but need not, have sinister overtones of "public address with selfish or ulterior purpose" and be characterized by the coloring or distortion of the facts." Seesongood v. Commissioner, 227 F.2d 907, 910-11 (6th Cir. 1955). Anyone who has performed the distasteful labor of studying the NEA's, AFT's, and AFSCME's major publications will have no compunction about applying these terms to them.

115. On the last mentioned point, see Franchise Realty Interstate Corp. v. S.F. Loc. Joint Exec. Bd., 542 F.2d 1076, 1078, 1080 (9th Cir. 1976) (to "threaten members of city board with lack of political support" is an "attempt to petition a governmental body").


117. "The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time ..., makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association." Id. at 431.

118. This definition is more expansive than the usual one: "the total of all communicated influences upon legislators with respect to legislation." Cellar, Pressure Groups in Congress,
Procedurally, lobbying involves either direct contacts between the interested party or its agents and public officials, or indirect contacts by members of the public responding to the interested party’s propaganda or agitation.\footnote{Lobbying also includes such ancillary tasks as the solicitation, collection, or receipt of monies for lobbying purposes. See 2 U.S.C. § 266 (1970).} Substantively, lobbying consists of requests that government officials conform their exercises of discretion to a particular policy line. Three distinct situations may confront the lobbyists: the officials are not disposed to further any identifiably private interests at the expense of their conception of the public interest, or are suspicious of or antagonistic to the particular interests the lobbyists represent, which the officials perceive as private interests. Or the officials may conceive of any private interest of which they approve as a public interest, or are willing to promote such ideologically congenial interests despite their private character on the theory that the public interest is merely a myth in any event. Or the officials may further whatever interest best serves to perpetuate them in office, power, prestige, and so on. Lobbying, therefore, may be an appeal to the public good—that is, to the generally beneficial nature of the policy proposed.\footnote{An organization such as the National Rifle Association, which opposes legislation extending federal encroachments upon fundamental Second Amendment guarantees, is involved in lobbying for what I perceive as a generally beneficial policy: the maintenance of constitutional liberty in this country, for which the Second Amendment is the last line of defense. Conversely, an organization such as NEA, which promotes legislation establishing a federal right to compulsory public-sector collective bargaining through the exclusive representation device, is involved in lobbying for what I consider an anti-social purpose: the subversion of republican, representative government. The merits of their positions on these issues are irrelevant, however, to the status of both NRA and NEA as political-action organizations insofar as attempts to influence legislative action are concerned.} Or it may be an appeal to some private ideology—that is, to the creation or exploitation of narrow political blocs with which government officials identify. Or it may be an appeal to personal profit—that is, to the officials’ avoidance of public censure through the electoral process and replacement in office by individuals who will promote the policy line in question, or to their amalgamation of electoral support from special interest groups, through endorsements, financial contributions, or the provision of campaign services. A political-action organization, therefore, may be one which engages in such lobbying to a substantial degree, or for which lobbying is essential to its institutional purposes. The income tax regulations, for instance, define an “action” organization (in part) as one “a

\footnote{319 ANNALS 1, 3 (1958); accord, WEBSTER’S, supra note 100, at 1448. But it will further simplify discussion to use a single familiar term to refer to all forms of petition of non-judicial governmental officials and bodies.}
substantial part of [the] activities [of which involve] attempting to influence legislation by propaganda or otherwise," and which either 
"[c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation," or "[a]dvocates the adoption or rejection of legislation." 121

Before drawing a conclusion from this analysis, though, I should advert briefly to a further definitional issue implicit in it throughout. At several points in the discussion, I have referred to the need for a political-action organization to reach the public. But the term "public," as the term "political," is protean in denotation and connotation. Webster's, for example, defines it both as "[t]he general body . . . of a nation, state, or community" and as "a particular body or aggregation of people." 122 In the case of membership organizations built on special economic, professional, social, or ideological interests, there are three distinct "publics" to consider: (1) the institutional public, which constitutes the set of all members and potential members of the organization; (2) the allied-interest public, which constitutes the set of all groups, associations, organizations, or unaffiliated individuals who share one or more of the objectives, programs, policies, priorities, or values of the organization; and (3) the general public, which includes everyone else. With respect to the first, an organization such as the NEA must attempt to maximize the size of its membership through aggressive recruitment (what unions call organizing). A union must also enhance its members' personal understanding of, and intensify their commitment to, organizational aims through constant indoctrination (internal propaganda and agitation). And, it must increase the level of participation and quality of performance of its members in institutional activities through encouragement, solicitation, training, assistance, and direction (which cumulatively I shall call mobilization). With respect to the allied-interest public, the organization must attempt to form coalitions for cooperative and coordinated action with other groups. And with respect to the general public, it must attempt to create or exploit a favorable climate of opinion towards itself and its goals, and an unfavorable one towards its opponents, through public relations (external propaganda and agitation). A political-action membership organization, moreover, will likely engage in **each** of

121. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1977). See also I.R.C. § 4945(e)(1)-(2), which denies tax exemption with respect to expenditures for "any attempt to influence any legislation through an attempt to affect the opinion of the general public or any segment thereof," or for "any attempt to influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation. . . ."

122. WEBSTER'S, supra note 100, at 2005.
these activities as an adjunct to whatever forms of political activism it finds necessary or useful.

The logical analysis thus completed, I conclude that:

A political-action organization is a formal group of individuals sharing certain common interests that attempts to a substantial degree, or the essential purpose of which is, to determine, control, intervene or participate in, or influence: (i) the selection of, or the exercise of the functions vested in, those executive, legislative, administrative, or judicial officials charged with the conduct, operation, or management of government; or (ii) the formulation or implementation of public policy, by means of any of the following activities—partisan-political campaigning, lobbying, propaganda and agitation, or litigation.

Moreover, if it is a membership organization, it will also employ the ancillary means of membership recruitment, indoctrination, and mobilization; form coalitions with other groups; and utilize general public relations.

In any particular case, of course, the exact structure and operation of a political-action membership organization will depend upon several contingent factors, including its financial and human resources, the opportunities it perceives to employ those resources, the tactical and strategic appreciations which counsel it to seize or to let pass such opportunities, and the visibility and identifiability of its actions to observers. Therefore, one might expect that a political-action organization with wide-ranging interests and sophisticated capabilities will appear in various garbs at different points in time, with respect to different issues, and from the distinct perspectives of different observers. Now, it may function as a traditional political party; now, as a lobbying organization; now, as a font of propaganda and agitation. Nonetheless, despite these chameleon-like changes in institutional coloration, emphasis, and approach from time to time, the organization will retain and continuously display the essential quality of a movement: namely, its goals or actions require or constitute mobilization of large numbers of individuals to participate in political activism on a continuous basis. A uniquely qualified practitioner in this field once observed that

the strength of a movement and its right to existence can be developed only as long as it remains true to the principle that struggle is a necessary condition of its progress. . . . Therefore a movement must not strive to obtain successes that will be only immediate and transitory, but . . . must show a spirit of uncompro

123. A. Hitler, Mein Kampf 294 (unexpurgated, J. Murphy transl. 1939).
We shall see hereinafter that this is a peculiarly apt description of the essentially aggressive character of such militant political-action membership organizations as the NEA, AFT, and AFSCME.

With these conclusions in mind, let us now leave the realm of a prioristic reasoning and undertake a semi-empirical investigation of this problem.\textsuperscript{124}

3. Activities characteristic of political-action organizations

Reference to the various sources I described earlier both confirms my logical deductions with respect to the general categories of activity which characterize political-action organizations, and supplies a further detailed compendium of specific activities with which to evaluate the operations of the NEA, AFT, or AFSCME. Unfortunately, this survey will tend in many particulars to be somewhat impressionistic rather than definitive. Subject to this caveat, let us now consider the five major categories of political activism—partisan politics, lobbying, propaganda and agitation, litigation, and organizing.

First, we shall consider partisan politics. The ultimate goal of partisan political activism is to gain political power through the electoral process, by changing the composition of government as a result of the election or defeat of certain political leaders.\textsuperscript{125} In general terms, partisan politics involves “becom[ing] prominently identified with political movements, parties, or factions or with the success or failure of . . . any candidate for public office.”\textsuperscript{126} According to one familiar phrase, it imports “participat[ing] or interven[ing], directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.”\textsuperscript{127} This may involve, for example, serving

\textsuperscript{124} In the sphere of human action, the validity of purely empirical analysis is questionable, if such analysis is possible at all. See, e.g., L. VON MISES, THE ULTIMATE FOUNDATION OF ECONOMIC SCIENCE: AN ESSAY ON METHOD (1962). What follows, however, will not be purely empirical, since the judicial decisions, statutes, and so on presuppose and apply to the facts a body of knowledge on political action which they do not draw immediately from them. See, e.g., Hammerstein v. Kelley, 235 F. Supp. 60, 61 (E.D. Mo. 1964), aff’d, 349 F.2d 928 (8th Cir. 1965).


\textsuperscript{127} Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1977). A “candidate for public office” is “an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local.” Id. Accord, Osheim, 2 P.A.R. 734, 738 (1966).
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as a delegate to a party convention;\(^{128}\) "evaluating the qualifications of all potential candidates [for particular offices] and then selecting and supporting a particular slate;"\(^{129}\) "rating candidates for public office on a nonpartisan basis" and "disseminating these ratings to the public,"\(^{130}\) or "[using] its publications and broadcasts to attack candidates and incumbents," even though "not formally endors[ing] specific candidates for office."\(^{131}\) According to another popular description, it means "taking an active part in the management or affairs of any political party's partisan political campaign"\(^{132}\)—for instance, by serving as a delegate to a party convention;\(^{133}\) by acting as an officer of a party committee;\(^{134}\) by "[s]oliciting support for and advancing the aims of a political party and distributing literature designed to favor [it]";\(^{135}\) by acting in any way on behalf of a candidate for elective office affiliated with, or sponsored or endorsed by, a party organization;\(^{136}\) or by soliciting or collecting financial contributions for the benefit of a political party, committee, or candidate.\(^{137}\)

More specifically, partisan political activism includes participation in two major areas: internal political party affairs and political campaigns. To be sure, a political-action organization can engage in partisan politics without attempting to control, influence, or intervene in party matters. But, because control or influence over party platforms, nominations, and activities magnifies and focuses the effect of a political-action organization's participation in the electoral process, one would expect to find serious, and certainly militant, organizations of

\(^{128}\) E.g., Harkness, 3 P.A.R. 215 (1973) ("uncommitted" delegate to Democratic Nat'l Convention); Kennedy, 2 P.A.R. 280 (1946).

\(^{129}\) Rev. Rul. 67-71, 1967-1 C.B. 125. This is so "even though . . . [the] process of selection [is] completely objective and [is] intended primarily to educate and inform the public about the candidates."

\(^{130}\) Rev. Rul. 67-368, 1967-2 C.B. 194 (candidates analyzed on basis of "education and experience").


\(^{135}\) Turner, 1 P.A.R. 614, 615 (1951). This is so even if "a specific election campaign [is] not pending at the time."

\(^{136}\) E.g., Rogers, 1 P.A.R. 555 (1949).

\(^{137}\) Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 132, 142-43 (1947); accord, Mayfield, 1 P.A.R. 1001, 1003 (1967); Roschke, 1 P.A.R. 954, 958 (1967); Williams, 2 P.A.R. 244, 248-49 (1945); Stewart, 2 P.A.R. 78, 81-82 (1942) ("[i]f organizing extensive solicitation of political funds, taking control of the money and expending it . . . does not constitute political management[,] the term baffles definition").
that kind involved in party affairs to the limits of their capabilities. This involvement—on the part of their officials, staff personnel, and members—would include such typical activities as serving as an official or member of a political party, committee, or club; seeking candidacy for the position of or serving as a delegate or alternate to, participating in the official business of, or soliciting individuals to attend a party caucus or convention or in some other way "taking an active part in the affairs of a political club."

On the other hand, whether or not it intervenes in formal party functions, a political-action organization cannot operate effectively in the arena of partisan politics unless it takes an active part in political campaigns of one sort or another. Familiar campaign activities include, most obviously: becoming a candidate for election to public office at the local, state, or national level; nominating a candidate for such office by petition; promoting a candidate by a traditional public endorsement, or by an "objective and unbiased" or "nonpartisan" evaluation or rating; or supporting a candidate in various ways.


141. I place the term in quotation marks because, although popular lexicographers define it as "an organized series of operations or a systematic effort to influence voters," it is not a legal term of art with any precise, limited meaning. Webster's, supra note 100, at 386. Rather, if the question is what acts, in nature and number, are necessary to constitute a "campaign," no answer is possible; for there are no standards "as to the nature, number, quantity, or quality of things done, which would enable us to say that on one side a campaign exists, and on the other side there is none." Norris v. United States, 86 F.2d 379, 382 (8th Cir. 1936). The word simply refers to the actual behavior of a candidate or his adherents, whether or not directly connected with an electoral contest. Mulhair, 1 P.A.R. 607, 608 (1952).


144. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 551 n.3 (1973); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972), cert.
Among these ways of providing support, none is more important than the solicitation, receipt, or expenditure of political contributions—money being the necessary lubricant for the wheels of political power. This may involve inter alia establishing or implementing a plan for the systematic collection of political contributions; organizing or supervising their solicitation; instructing employees in methods of solicitation and receipt; soliciting, or attempting to influence individuals to make contributions; or receiving monies destined for a political campaign. But, in whatever form they may appear, the systematic solicitation and expenditure of campaign contributions are perhaps conclusive criteria of the importance of partisan political power.

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146. Jackson, 2 P.A.R. 491 (1955); Fleming, 2 P.A.R. 1, 2 (1943) (systematic collection of 2% of employees' salaries for benefit of political party central committee).


An individual is engaged in a campaign to solicit political contributions when he participates in the initial request for those contributions, serves as a conduit for the funds, or transmits them to a political party. Bates, 2 P.A.R. 690 (1963); Stone, 2 P.A.R. 690 (1963); Jackson, 2 P.A.R. 491 (1955) (setting amounts of contributions, designating an employee as recipient, and transmitting to political party); Murphy, 1 P.A.R. 572 (1951) (planned and systematic activity). It is, of course, irrelevant that those solicited made no actual contributions. Melrose, 2 P.A.R. 346, 354 (1949). Neither does it matter how the ultimate recipient actually expended the monies, if the donors subjectively believed at the time of their donation that the monies were destined for partisan political purposes. Flood, 1 P.A.R. 531, 532 (1951).
political activism to any group, and of the intensity with which it engages in such activism. Indeed, the income tax regulations actually define the term "political party" as

any committee, association, or organization . . . which accepts contributions . . . or makes expenditures . . . for the purpose of influencing or attempting to influence the . . . selection, nomination, or election of any individual to any Federal, State, or local elective public office, whether or not such individual . . . [is] selected, nominated, or elected.151

Thus, a political-action organization could scarcely reveal its character in a more convincing fashion than by developing and implementing a scheme for the systematic solicitation, receipt, and expenditure of partisan political contributions, especially if it is a membership organization which directs such solicitations to its own captive audience.152

A second and vital means of assisting the partisan political campaigns of candidates for elective office is through the provision of personal services. This may involve an individual in a leadership or advisory capacity, such as plotting strategy, managing a campaign, or establishing and operating a campaign headquarters.153 In a supervisory capacity it may include recruiting other individuals to participate as campaign workers, instructing them in their duties, or paying them for their services.154 And in a rank-and-file capacity, it may mean soliciting votes or engaging in various "get-out-the-vote" activities, serving at the polls, or performing other "nuts-and-bolts" campaign duties and chores.155 Whatever the exact nature of these services, though, a political-action membership organization will usually be uniquely situated and qualified, as well as motivated, to mobilize its officials, staff personnel, and members to perform them. And, in many instances, it may be capable of levels of performance

152. See Martin, 2 P.A.R. 726, 733 (1965) ("in the hierarchy of offenses arising under . . . the Hatch Act . . ., there is no more pernicious practice than the exaction of contributions from co-workers for political purposes").
155. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 551 n.3 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 617 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75, 82 n.11, 92 n.24, 94 (1947); Rankin, 2 P.A.R. 629, 629-30 (1960); Young, 1 P.A.R. 3 (1941); Smith, 1 P.A.R. 2 (1941); Branch, 1 P.A.R. 707 (1954); Barnes, 1 P.A.R. 396 (1948) (furnishing list of names and addresses to campaign committee).
which far exceed the best efforts of traditional political parties be-
cause a membership organization maintains its structure (including
mobilization programs) on a continuous basis while a political party
traditionally demobilizes to some extent between elections.

A third important way to participate in partisan political campaigns
is by soliciting popular support for, or opposition to, particular can-
didates. 156 In general, this involves familiar types and mechanisms of
propaganda, agitation, and public relations. 157 Probably most effec-
tive is use of the mass media. 158 Publication and distribution of vari-
os campaign materials may also prove useful, especially if they ap-
pear in regular organizational newspapers or magazines which can
saturate a definite audience with political position statements on par-
ties, candidates, or issues. This is true even if they take the less effec-
tive form of irregular literature such as letters, postcards, pamphlets,
circulars, posters, handbills, buttons, or emblems. 159 Finally, tradi-

156. United States v. U.A.W., 352 U.S. 567, 585 (1957); Christian Echoes Nat’l Ministry,
Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973);
Warnhuis, 1 P.A.R. 893 (1965); Cavanagh, 1 P.A.R. 743 (1954); Godinez, 1 P.A.R. 740 (1954);
Turner, 1 P.A.R. 614, 615 (1951) (“literature . . . seeks to build up a strong Socialist ballot in
order to repudiate at the polls the other political parties of this country”; “immaterial that a
specific election campaign was not pending at the time of its distribution”); Nicholson, 1 P.A.R.
16 (1944).

(1969); Haley, 1 P.A.R. 692 (1953).

158. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 551 n.3, 572-74 n.18
(1973); United States v. U.A.W., 352 U.S. 567, 584-85 (1957); Christian Echoes Nat’l Ministry,
Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973);
Northern Va. Regional Park Auth. v. Civil Serv. Comm’n, 437 F.2d 1346, 1349 n.3 (4th Cir.),
cert. denied, 403 U.S. 936 (1971); Johnson, 1 P.A.R. 889 (1967); Dees, 1 P.A.R. 878 (1965);
Mason, 1 P.A.R. 848 (1963); Villines, 1 P.A.R. 859 (1962); Massingham, 1 P.A.R. 792 (1959);
Evans, 1 P.A.R. 679 (1953); Shaw, 1 P.A.R. 672 (1953); McClaren, 1 P.A.R. 236, 240-41 (1946).

159. “Campaign” material is literature which seeks to persuade readers to promote or oppose
party aims or candidates for elective office. Brooks, 1 P.A.R. 901, 905 (1966). Of the voluminous
sources on this issue, see Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548,
551 n.3, 572 n.18 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 617 (1973); United States v.
(1947); Christian Echoes Nat’l Ministry, Inc. v. United States, 470 F.2d 849, 856 (10th Cir.
67-71, 1967-1 C.B. 125; Durick, 1 P.A.R. 898 (1966); Warnhuis, 1 P.A.R. 893 (1965); Adams, 1
P.A.R. 857 (1963); Mason, 1 P.A.R. 848 (1963); Sotelo, 1 P.A.R. 853 (1963); Stemcosky, 1
P.A.R. 781 (1958); McArdle, 1 P.A.R. 767 (1955); Cavanagh, 1 P.A.R. 743 (1954); De Garcia, 1
P.A.R. 741 (1954); Flanagan, 1 P.A.R. 685 (1954); Stickey, 1 P.A.R. 756 (1954); Slade, 1 P.A.R.
666 (1953); Jones, 1 P.A.R. 640 (1952); Turner, 1 P.A.R. 614 (1951) (defense rejected that “the
Socialist Labor Party never conducts a membership drive or asks anyone to become a party
member but merely encourages people to study its program”); Sanders, 1 P.A.R. 525 (1948);
Tinstman, 2 P.A.R. 313 (1948) (mailing 1500-2000 circulars, with cover letter, using mailing list
of veterans’ organization); Tugwell, 1 P.A.R. 291 (1948); Evans, 1 P.A.R. 331 (1947); McClaren,
1 P.A.R. 236, 237-38 (1946); Emery, 2 P.A.R. 53 (1943); Impson, 1 P.A.R. 15 (1943); Patterson,
2 P.A.R. 10 (1941).
tional political meetings, rallies, parades, and demonstrations are valuable too.\(^{160}\) Here again, a political-action membership organization will enjoy unique advantages, primarily in its ability to reach large numbers of people with its particular political message, and possibly as well to predict the effect of that message on those people and others whom one could reasonably expect them to influence.\(^{161}\)

Second, let us consider the major aspects of lobbying. The ultimate goal of lobbying is to control or influence, directly or indirectly, the discretionary action of legislative, executive, administrative, or other government officials. This usually involves the passage or defeat of legislation.\(^{162}\) Of course, lobbying is a form of political activism, whatever the type or character of the particular legislation involved. It is irrelevant that the legislation is arguably beneficial to the community or in the public interest, as opposed to serving private interests only;\(^{163}\) or that its subject matter is an appropriation of funds (rather than a regulation), civil rights, unionism, or even foreign law.\(^{164}\)

In general terms, lobbying involves contacting a legislative body, its committees, or its individual members for the purpose of proposing, supporting or opposing legislation. This may be done either directly "by the lobbyists themselves or through their hirelings," or indirectly by the members of some public whom the lobbyists have mobilized for that purpose.\(^{165}\) And with respect to indirect contacts, lobbying also includes general "propaganda (including advertising) related to [the promotion or defeat of legislation]."\(^{166}\)


More specifically, where a political-action membership organization is concerned, lobbying consists of internal preparation and external presentation. The former has two aspects: (1) evaluation and development of a legislative position or program may involve informal organizational means, such as "discussing and agreeing upon the positions... to be taken with respect to advocating or opposing various legislative measures;" 167 formal organizational means, such as establishing a separate legislative committee or like body to study and undertake other tasks with respect to legislative matters; 168 or recourse to outside assistance, such as soliciting "[attorneys'] advice on the construction and effect of proposed and pending legislation"; 169 and (2) internal preparation for lobbying often includes embodiment of the final legislative policy in formal organizational resolutions, statements, objectives, or programs. 170 This is followed by indoctrination of the membership and allied-interest public with the organization's goals, through such internal channels of communication as newspapers, magazines, or speeches of officials or staff personnel. 171

A political-action organization's external lobbying presentation also has two aspects: (1) to reach and influence government officials, the organization may employ direct contacts. To influence legislative action, it may hire professional lobbyists; 172 draft legislation or amendments thereto; 173 offer testimony or written submissions to legislative bodies; 174 approach legislators and their staff personnel in other

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168. American Hardware & Equip. Co. v. Commissioner, 202 F.2d 126, 128 (4th Cir.), cert. denied, 346 U.S. 814 (1953). Krohn v. United States, 246 F. Supp. 341, 345 (D. Colo. 1965) (local medical society has "legislative committee which works with the State Society Legislative Committee, the members of which are at times also the members of the State Society Legislative Committee"); Hammerstein v. Kelley, 225 F. Supp. 60, 64 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th Cir. 1965).


ways;\textsuperscript{175} or engage in special projects, such as a signature drive for a legislative referendum.\textsuperscript{176} To influence executive or administrative action, the organization may screen applicants for appointive office;\textsuperscript{177} aid executive officials in preparing a legislative program;\textsuperscript{178} present testimony, or solicit the testimony of others, before administrative boards;\textsuperscript{179} or make partisan political promises or threats.\textsuperscript{180} On the other hand, where the organization employs an indirect lobbying approach, it may request its various sub-units or members,\textsuperscript{181} readers of its publications,\textsuperscript{182} or the general public to contact legislators with regard to some issue.\textsuperscript{183} (2) An organization may also aim its external lobbying presentation at the general public, through propaganda and agitation designed to create or exploit a climate of opinion favorable to its legislative goals. Here, publicity campaigns,\textsuperscript{184} advertising in mass media,\textsuperscript{185} and articles in organizational publications with a wide circulation are the most familiar means employed.\textsuperscript{186}

Moreover, in all of these instances, where a political-action membership organization is involved whose members belong to a particu-


\textsuperscript{176} Washburn v. Commissioner, 283 F.2d 839, 843 (8th Cir. 1960), cert. denied, 365 U.S. 844 (1961).

\textsuperscript{177} Rev. Rul. 74-117, 1974-1 C.B. 128.

\textsuperscript{178} Id.

\textsuperscript{179} Franchise Realty Interstate Corp. v. San Francisco Loc. Joint Exec. Bd., 542 F.2d 1076, 1078, 1080 (9th Cir. 1976).

\textsuperscript{180} Id.

\textsuperscript{181} Krohn v. United States, 246 F. Supp. 341, 344, 345 (D. Colo. 1965); Hammerstein v. Kelley, 235 F. Supp. 60, 64-65 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th Cir. 1965); League of Women Voters v. United States, 180 F. Supp. 379, 382 (Ct. Cl.), cert. denied, 364 U.S. 822 (1960). In \textit{Hammerstein} in particular, the court noted that the "regular practice of urging the membership to contact their legislators in support of or opposition to specific legislation" was enough in and of itself to make the organization "virtually . . . a political action organization." 235 F. Supp. at 64-65.


lar economic group or profession, such as medical doctors or teachers, the organization will likely represent itself as the spokesman, not only for its actual members, but also for all members of the group or profession whatever their organizational affiliations *vel non*: it speaks as the "doctors' voice" or the "teachers' voice" in legislative matters.\(^{187}\) This (mis)representation, of course, may tend to increase the organization's prestige among vote-conscious public officials and those in the general public who accept uncritically the opinions of professional groups as imbued with a special expertise in certain legislative matters.

Third, let us review what the sources teach with respect to propaganda and agitation. The ultimate goal of political propaganda and agitation is to educate and inform the public with respect to the circumstances and interests of an organization. The objective is to create or exploit public understanding and acceptance of the organization's political claims, a climate of opinion favorable to those claims, and a propensity for action or forbearance in regard to their realization.\(^{188}\) In general terms, all propaganda and agitation is a form of advocacy, or the partisan espousal or defense of a cause, as opposed to an objective exposition of a particular subject matter. Indeed, the income tax regulations define an "action" organization (in part) as one that "advocates, or campaigns for" its political objectives, "as distinguished from engaging in nonpartisan analysis, study or research and making the results thereof available to the public."\(^{189}\)

More specifically, we can arrange activities properly describable as propaganda and agitation in a spectrum extending from a "pure" to several "applied" forms. Pure propaganda attempts merely to indoctrinate the public with a "line" about a group's economic or social situation, interests, or goals.\(^{190}\) The next logical step is to relate the organization's goals and claims to the political process by reference to some current issue of public policy.\(^{191}\)

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\(^{188}\) Gay Alliance of Students v. Matthews, 544 F.2d 162, 164 (4th Cir. 1976); Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974); Webster's, supra note 100, at 39; Black's, supra note 102, at 75; Haswell v. United States, 500 F.2d 1133, 1143-44 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975).


\(^{190}\) See, e.g., Gay Alliance of Students v. Matthews, 544 F.2d 162, 163, 164 (4th Cir. 1976); Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974).

may identify particular legal rights for the organization, or its members, as an appropriate response to the group's claims. Or it may suggest some other course or doctrine of redress, which only legislation or other political action can accomplish. At this point, it may connect the latter rights, or theory of redress, with existing or proposed national, state, or local laws, and disseminate information with respect to those laws. Where the relevant laws exist, propagandists may demand their enforcement. Otherwise they may encourage the passage, defeat, or amendment of legislation to suit their purposes. Finally, political propaganda and agitation may provide immediate rationalizations for direct action, the classic example being the "protest demonstration." A political-action organization, therefore, may engage in everything from abstract advocacy to illegal direct action, in pursuit of goals separate from or related to any other species of political activism.

Fourth, let us consider the phenomenon of political litigation. For a political-action organization, the primary goal of litigation is to assert group rights. It does not strive merely to settle private disputes between individuals, although such disputes almost invariably form the context in which more general goals are pursued. Rather, it seeks to secure or enforce collective rights, powers, privileges, or immunities for members of the organization generally. Litigation, therefore, is a substitute for partisan politics and lobbying, and is an embodiment of the realization that propaganda and agitation may not suffice in situations where the group is an extreme minority or its claims are highly unpopular. As the Supreme Court explained in Button, a political-action organization may not be a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the [group], at the same time and more importantly, makes possible the distinc-


194. International Ass'n of Machinists v. Street, 367 U.S. 740, 769 n.17 (1961); Sunset Scavenger Co. v. Commissioner, 84 F.2d 453, 456-57 (9th Cir. 1936); Hammerstein v. Kelley, 235 F. Supp. 60, 64 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th Cir. 1965); S. 1362, 2 C.B. 152 (1920).

tive contribution of [the] group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association. 196

Whether a political-action organization, through litigation, advances legitimate claims of a group or simply makes a nuisance of itself, the litigation it supports is a form of political activism.

Finally, we should give some thought to organizing (in the trade-union sense of the term). The ultimate goal of all organizing activities is to bring together for concerted action of one sort or another individuals who share a common goal. 197 Operationally, organizing includes: the establishment of a formal institutional structure, first for the group as a whole and then for sub-units such as chapters or affiliates; maintenance of or increases in membership through recruitment or raiding of rival organizations; mobilization of members to implement and support organizational programs and policies; and cooperation with other groups in ad hoc coalitions or alliances. Legally, to the extent an organization is a political-action organization, all of its organizing activities necessarily assume an indelibly political coloration. An organization cannot engage in any kind of activity until it has sufficient means to do so. Organizing supplies those means in terms of funds from membership dues, energy from members' services, and potential power from the group's collective commitment to its goals. If the organization intends or employs those means for political ends, they become political means. Therefore, the organizing which provides them becomes a derivative form of political activism.

This review of the literature permits me at last to offer a comprehensive definition:

A political-action organization is a formal group of individuals sharing certain common interests that attempts to a substantial degree, or the essential purpose of which is, to determine, control, intervene or participate in, or influence: (i) the selection of, or the exercise of the functions vested in, those executive, legislative, administrative, or judicial officials charged with the conduct, operation, or management of government; or (ii) the formulation or implementation of public policy, by means of any of the following activities—

1. participating in the internal affairs of partisan political parties, or endorsing or providing financial or other support or services to partisan political campaigns of candidates for election to public office at the local, state, or national level;

197. Gay Alliance of Students v. Matthews, 544 F.2d 162, 163, 164 (4th Cir. 1976); Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974).
2. engaging directly or indirectly in lobbying or like activities to influence legislative, executive, administrative, or other governmental action at the local, state, or national level;

3. endeavoring through propaganda and agitation employing any means or channel of communication to mold or exploit public opinion in ways favorable to any of its objectives, programs, policies, priorities, or values;

4. seeking to establish, maintain, or enforce through litigation or other judicial or administrative process legal rights, powers, privileges, or immunities for itself, its chartered affiliates, its members, or other individuals, groups, associations, or organizations which share any of its objectives, programs, policies, priorities, or values; or

5. recruiting, indoctrinating, encouraging, soliciting, training, assisting, or directing members to participate in any of the above-described activities.

4. Criteria for and sources of evidence of the substantiality and essentiality of an organization's political activism

The preceding definition still includes two undefined terms: "substantial" and "essential." But, again, the sources establish criteria of substantiality and essentiality, and identify the kinds of evidence which are relevant to factual inquiry.

First, "substantial" involvement in political activism generally means "important" or "material" involvement, "[c]onsiderable in amount, value, or the like."\(^{198}\) Evidently, the organization itself may admit as much, either by explicit statements or implicitly in its publications and documents.\(^{199}\) Absent an admission, the task devolves upon the trier of fact to compare the magnitude of the organization's political to its nonpolitical activities, in terms of some accounting standard such as monies or time expended on each category of activity.\(^{200}\) Here lies a crucial distinction between substantial and essential involvement: if political activism is essential to the achievement of an organization's objectives, the amount of nonpolitical activity in which it also engages is irrelevant, even if that amount is substantial.

In any event, for determining substantiality, a mere comparison of percentages of monies expended is inappropriate, since it "obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances in the context of the totality of the

\(^{198}\) WEBSTER'S, supra note 100, at 2514; accord, BLACK's, supra note 102, at 1597.


Nevertheless, the amount of monies an organization devotes to each category of its operations remains one important measure of its substantial involvement in political activism. To adduce this requires a careful imputation of purpose to each part of the organization’s budget, objective accounting standards and methodology for allocating its expenditures among various political and non-political categories of activity and proper placement of the burden of proof with respect to disputed facts. Several courts have employed such an approach. One held that more than fifteen percent of an organization’s total budget devoted to political activities was substantial, even though the actual dollar amounts were “minuscule when compared to legislative expenditures of many [other] organizations.” Conversely, another court ruled that less than five percent of the “time and effort” of an organization devoted to political activities was not substantial. And the income tax code now employs a sliding-scale test of substantiality in terms of percentages of an organization’s budget.

Another, albeit more subjective, technique for evaluating the substantial nature of an organization’s political activities is to estimate their relative importance in the context of all its endeavors. For example, one may consider whether the organization’s political activism is “not secondary or incidental” to its nonpolitical goals, is “a primary objective in [its] total operations,” or “is on an equal footing

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205. See Connecticut Light & Power Co. v. United States, 368 F.2d 233, 246 (Ct. Cl. 1966). If a dissenting public employee challenges under the First Amendment the exercise of the special privilege of exclusive representation by a public-sector union which he claims is a political-action membership organization, the burden of disproving the substantiality of its political activism with clear and convincing evidence would seem fairly to rest upon the union. See Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 50-52 (1971) (Brennan, J.)
207. Seasongood v. Commissioner, 227 F.2d 907, 912 (6th Cir. 1955). Note, though, that the organization’s “evidence was not successfully challenged either by adversary witnesses or destructive analysis.” Id. This decision, then, establishes only a prima facie lower limit on substantiality, implicitly subject to rebuttal by competent evidence.
208. I.R.C. § 501(h)(1976) limits lobbying activities of certain tax-exempt organizations to 20% of the first $500,000 of an organization’s expenditures for exempt purposes, 15% of the second $500,000, 10% of the third, and 5% of any remaining expenditures—with the total permitted amount not to exceed $1,000,000 per annum in any event.
with its [nonpolitical] efforts.”

A final method (which, however, tends to implicate the separate issue of essentiality) is to determine whether political action is within a power delegated to, or constitutes a responsibility of, the organization or one of its important sub-units—and, if so, whether that is because the organization perceives a continuing need to engage in such action to achieve its goals.

“Essential” involvement in political activism, on the other hand, is not a matter of sums and percentages, but of nature and logic: of “forming [or] belonging to . . . the inner or constituent character of” an organization, or of being “indispensable” or logically “necessary” to its existence or operation. The character of an organization is political if its founders established it for the purpose of engaging in political activism; its principal purpose or primary object is to engage in such activism; or its officials, staff personnel or members operate it primarily for political objectives. Similarly, political activism is indispensable or necessary to an organization when, in the organization’s (subjective) view, its goals require political action; when, in an observer’s (objective) view, it can attain its goals or become effective only through politics; or when political means alone are practicable for attaining its ends. And in some cases the essentiality of politics to an organization’s program is simply self-evident.

Second, the sources also indicate what evidence is relevant to a
determination of substantiality or essentiality. Foremost are admis-
sions by the organization, either in legal proceedings or in publica-
tions it produces, crediting itself with political successes.\(^{219}\) Next, if
not equal, in importance are the organization's organic documents,
including its certificate of incorporation, charter, constitution or by-
laws;\(^{220}\) its stated objects or purposes;\(^{221}\) its rules;\(^{222}\) or its formal
resolutions.\(^{223}\) Indeed, it seems reasonable to conclude that its
founders have established an organization to engage in political ac-
tivism if its organic documents expressly empower it to have objec-
tives and to engage in activities which characterize a political-action
organization.\(^{224}\) Under such circumstances, even an outright dis-
claimer of those stated powers should receive little credence.\(^{225}\)

Official minutes or transcripts of meetings of the governing bodies
of an organization are also dispositive,\(^{226}\) as are its financial records
and those of its sub-units and affiliates.\(^{227}\) Public speeches and ad-
dresses by officials, staff personnel and other spokesmen are often

\(^{219}\) Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 551 n.3 (1973);
United Pub. Workers v. Mitchell, 330 U.S. 75, 82 n.11, 91 n.23 (1947); Roberts Dairy Co. v.
Commissioner, 195 F.2d 948, 950 (8th Cir.), cert. denied, 344 U.S. 865 (1952); Hammerstein v.
Kelley, 235 F. Supp. 60, 64 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th Cir. 1965).

\(^{220}\) Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 851-52 (10th Cir.
1972), cert. denied, 414 U.S. 864 (1973); Seasongood v. Commissioner, 227 F.2d 907, 909 (6th
Cir. 1955); American Hardware & Equip. Co. v. Commissioner, 202 F.2d 126, 127 (4th Cir.),
cert. denied, 346 U.S. 814 (1953); Roberts Dairy Co. v. Commissioner, 195 F.2d 948, 949 (8th
Cir.), cert. denied, 344 U.S. 865 (1952); Vanderbilt v. Commissioner, 93 F.2d 360, 362 (1st Cir.
1937); Slee v. Commissioner, 42 F.2d 184, 185-86 (2d Cir. 1930); Haswell v. United States,
500 F.2d 1133, 1136 n.3 (Cl. Cir. 1974), cert. denied, 419 U.S. 1107 (1975); League of Women
Voters v. United States, 180 F. Supp. 379, 380-81 (Cl. Cir.), cert. denied, 364 U.S. 822 (1960);

\(^{221}\) Gay Alliance of Students v. Matthews, 544 F.2d 162, 163 (4th Cir. 1976); Marshall v.
Commissioner, 147 F.2d 75, 77-78 (2d Cir.), cert. denied, 325 U.S. 872 (1945); Krohn v. United

\(^{222}\) Cornelius v. Benevolent Protection Order, 382 F. Supp. 1182, 1195 & n.21 (D. Conn.
1974).

\(^{223}\) Hammerstein v. Kelley, 235 F. Supp. 60, 64 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th
Cir. 1965).


\(^{225}\) Slee v. Commissioner, 42 F.2d 184, 185-86 (2d Cir. 1930) (trier of fact "not obliged to
conclude that the abandonment of what had been so formally declared was final").

\(^{226}\) Hammerstein v. Kelley, 235 F. Supp. 60, 64 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th
Cir. 1965).

\(^{227}\) Krohn v. United States, 246 F. Supp. 341, 343 (D. Colo. 1965); Hammerstein v. Kelley,
235 F. Supp. 60, 65 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th Cir. 1965); Haswell v. United
States, 500 F.2d 1133, 1145-47 (Cl. Cir. 1974), cert. denied, 419 U.S. 1107 (1975); Connecticut
Light & Power Co. v. United States, 368 F.2d 233, 245 (Cl. Cir. 1966).
equivalently useful indicators of organizational purposes, intent or programs.\textsuperscript{228} Perhaps more reliable in the general case, however, are private organizational files containing copies of correspondence with sub-units of the organization,\textsuperscript{229} its members,\textsuperscript{230} its agents and consultants\textsuperscript{231} or government officials.\textsuperscript{232}

The organization's various publications frequently present a broad-ranging survey of those activities which it considers most important or valuable, and cumulatively can provide material for a composite picture which in effect bears its "stamp of approval."\textsuperscript{233} Similarly, "the language, and its import, contained in the [organization's] advertising," may afford compelling evidence, if the trier of fact pays close attention to the intended "impact of the adroitly worded presentations" that often characterize such material.\textsuperscript{234}

Study of the policies of the organization, and of the routine activities and work-products of its officials, staff personnel and members is time-consuming, if an absence of appropriate records does not preclude it to a large extent. But it may prove the most rewarding source of all for an exhaustive analysis of what the organization and individuals connected with it actually do from day to day, month to


\textsuperscript{230} Hammerstein v. Kelley, 235 F. Supp. 60, 64 (E.D. Mo. 1964), \textit{aff'd}, 349 F.2d 928 (8th Cir. 1965) (letter from organization's legislative committee urging support of and opposition to named candidates in election).


\textsuperscript{232} \textit{Id.}


month, and year to year. Moreover, recorded patterns of individual behavior tend to support conclusions more objective than those which rest upon interpretations of vague or purposefully equivocal language in documents intended for consumption by the membership-at-large or the general public. In sum, a political-action organization itself provides the best evidence of its substantial activities and essential nature.

5. The NEA as a political-action organization

The NEA is the largest and most militant of contemporary public-sector unions, and therefore is a fit subject for analysis according to the criteria of political action, substantiality and essentiality I have defined. Furthermore, abundant evidence in the public record establishes beyond peradventure that the NEA is engaged in every variety and form of political activism which we have heretofore surveyed, and that its involvement is both substantial and essential.

This result is not accidental. For at least the last decade, the NEA has systematically attempted to increase and intensify its involvement in activism under the banner of so-called “teacher power.” Even as early as 1973, for example, NEA President Helen Wise was able to remark enthusiastically that “[t]he thrill of leading the NEA” derived from knowing that the teacher activist movement is under way in varying degrees in every state in the nation, and knowing that the NEA is really in motion. When this gigantic machine starts to move, nothing will stop it.

And only two years later, her eventual successor in office, John Ryor, could report exultantly that

[t]he question of NEA’s ability to achieve ‘teacher power’ has been answered definitively in the past several years. In that time, the term has grown from a wistful cliche to an unchallengeable reality. We’ve learned the components of power . . . and we’ve tested ourselves in every important battlefield: the halls of Congress, state legislatures, the courts of the nation, and, when necessary, on the pavements in front of school buildings. NEA is teacher power in 1975.

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NEA spokesmen have been no less vocal and candid in describing the components of teacher power—the means to the NEA’s “acquisition and consolidation of a power base” in American society, in such familiar terms as “plans of political action,” “the expansion and extension of . . . lobbying,” “improving the public image of teachers,” “legal-aid funds,” and “organizing for the concentration of teacher energy behind a goal and a single strategy”—that is, in terms of partisan politics, lobbying, propaganda and agitation, litigation and organizing. Moreover, the NEA has confined neither its pronouncements nor its programs to glittering generalities or half-hearted endeavors.

In the realm of partisan politics, the organization has worked indefatigably to construct a political machine of which even the most successful of American political bosses would be envious. In 1973, NEA President Wise described with excitement the tremendous ground swell of teacher activism that is making NEA a potent force in the political arena. Teachers everywhere are contributing their time, talents, and money to achieve the political clout we must have to elect candidates who will support [NEA policies].

The very next year, NEA President James Harris announced that this “ground swell of teacher activism” was no ephemeral phenomenon. “Education is in the political arena,” he declared, and I intend to keep it there. Every politician in the country now knows that teacher power is necessary for a successful campaign. This will be even more true in the future.

And by 1975, the future had arrived. “Teachers,” said Harris, are now recognized as one of the most formidable forces in national politics. We are rivaling—and in some cases even surpassing—in political influence other major national organizations which have been in this business a lot longer than teachers have.

If the comprehensive nature of, and the NEA’s commitment to, its program of intervention and participation in partisan political campaigns of candidates for election to public office at the local, state and national levels are any indication, Harris was indisputably correct.

240. 1974-75 NEA Handbook 6 (emphasis retained).
For example, the NEA and its chartered affiliates regularly collect, organize, analyze and publish political data, such as tallies of votes by individual members of Congress and state legislatures on legislative issues related to NEA objectives or policies. The organization also "maintain[s] liaison with" and intervenes in the internal affairs of traditional political parties. In 1975 and 1976, for an important instance, the NEA and its affiliates conducted a massive nationwide campaign to mobilize their members to seek selection as "delegates to both major political party conventions in an effort to have a voice in party platforms as well as in helping to select party nominees." As a result of this effort, NEA members constituted "the largest bloc of delegates and alternates of any single organization in the nation" at the Democratic National Convention. And NEA officials addressed party platform committees, while members won election to party governing bodies. Perhaps most impressive, though, was the NEA's participation in the Labor Coalition Clearinghouse, an ad hoc alliance of nine organizations, one goal of which was "to influence the candidates' positions on issues of concern to [the organizations'] members."

Endorsement of candidates and solicitation of votes are important aspects of the NEA's partisan political program. Since 1970, the organization has endorsed candidates for election to Congress, including 310 individuals in 48 states in 1974, and 349 in 49 states in 1976. In 1976, it made its first presidential endorsement as well, through an extraordinarily comprehensive procedure. Indeed, before 1976, no national membership organization other than the traditionally rec-

246. On testimony, see NEA REP., Sept., 1976, at 5 (NEA President John Ryor addresses Republican Platform Committee); id., June, 1976, at 2 (NEA Executive Director Terry Herndon addresses Democratic Platform Committee). On party offices, see id., May-June, 1977, at 4 (NEA member on executive committee of Democratic National Committee). The last-mentioned article also refers to the election to a party post of "an NEA political consultant [who] maintains relationships with the White House and both major political parties and aids teachers in their efforts to be full partners in the political process, as voters, campaigners, and candidates"—thus emphasizing the integrated nature of the NEA's partisan political activities.
ognized political parties had ever implemented a process for involving its members in the endorsement of a presidential candidate as thorough as that the NEA created. The immense effort, however, seemed worthwhile in light of an NEA survey which suggested that the organization’s action would favorably influence over ninety percent of its almost two million members. NEA Executive Director Terry Herndon also expressed his belief that the NEA endorsement would “impres[s]” its members, the “individuals . . . they contact” and “many other people” among the general public. In any event, the NEA has decided to “re-embrace the concept of endorsing a presidential candidate” in future years.

Neither the NEA nor its affiliates have been lax in implementing schemes for the solicitation, receipt and distribution of monies for partisan political purposes. The NEA-PAC, the NEA’s “independent political-action arm” and self-styled “teachers’ voice in politics,” serves as a conduit for funds destined to support the campaigns of candidates for election to national office. “NEA policy calls for state affiliates to devise a plan to collect a $1 voluntary contribution from all members each membership year for NEA-PAC,” and the NEA offers special incentives for affiliates to pursue this objective diligently. One of the most effective collection devices utilized to date is the “reverse check-off,” under which an automatic payroll deduction siphons the one-dollar voluntary contribution to the NEA-PAC absent an explicit dissent and request for refund by the aggrieved member. NEA partisans predictably rationalize the reverse check-off as an efficacious means “to participate in our democratic society” and to fulfill the purported “duty of every citizen” to contribute to political campaigns, but the courts disagree as to its legality under federal election campaign laws.

250. See NEA REP., Apr., 1975, at 5.
252. Transcript, supra note 161, at 17.
255. Id., May, 1976, at 3; id., Apr., 1975, at 5.
256. Id., May, 1975, at 6-7.
257. Id. at 6 (remarks of secretary of local NEA affiliate). See also NEA Resolution G-1, "The Educator as a Citizen," which affirms "the duty and responsibility of educators to involve themselves in the selection, election, and reelection of qualified, committed candidates who support the established goals of the NEA." 1976-77 NEA Handbook 228.
Most campaign laws, however, do not reach personal campaign services, another area in which the NEA is extremely active.\textsuperscript{259} Indeed, the NEA views the personal services its officials, staff personnel and members can contribute to campaigns as its greatest partisan political resource.\textsuperscript{260} To exploit this resource fully, the NEA and [its] state and local affiliates . . . cooperate through shared staffing and other programs to provide training and organizing assistance to the growing army of teachers now permanently hooked on the excitement of political involvement.\textsuperscript{261}

At leadership training programs throughout the country, the NEA and its affiliates continuously instruct their members in such campaign techniques as political organization, public relations, direct mail, telephone banks, door-to-door solicitation, voter registration and get-out-the-vote activities.\textsuperscript{262} That this instruction has more than a merely academic purpose is notorious.\textsuperscript{263} During election years, highly skilled NEA staff personnel, acting as "election pros," manage, direct, advise, assist or serve as liaison to campaigns at the local, state and national levels.\textsuperscript{264} Meanwhile, "[i]n storefront campaign headquarters, in education association offices, in their homes, NEA teacher-volunteers by the thousands became part-time politicians" by performing the necessary nuts-and-bolts duties of campaign work-

\begin{footnotesize}
\begin{enumerate}
\item Election Commission to expedite proceedings on the "reverse check-off"); Federal Election Comm'n v. NEA, No. 77-1705 (D.D.C., complaint filed Sept. 28, 1977) (enforcement action against the "reverse check-off").
\item NEA Now, Mar. 22, 1976, at 1 reports that:
\begin{quote}
[T]he new Federal election law limits NEA [financial] contributions . . . . But what teachers can really deliver to their favorites at all levels is not money power, but \textit{people} power.
Teachers—articulate, respected, persuasive individuals, perfectly distributed in every town and hamlet in America—make uniquely effective block captains, phone bank organizers, get-out-the-vote workers, canvassers. Teachers who volunteer for these and the many other nuts-and-bolts political chores that need to be done provide their candidate with a service money can't buy.
\end{quote}
\item NEA REP., Apr., 1975, at 4. This attitude is amazing in view of the NEA-PAC's estimate that NEA and its state and local affiliates "made available to candidates" somewhere between \$2.5 and \$3.0 million in monetary contributions in 1974. \textit{Id.} What enormous sum must its (unreported) members' campaign services be worth?
\item NEA Now, Mar. 22, 1976, at 1.
\item \textit{E.g.}, NEA REP., Dec., 1974, at 12-13. NEA Political Action Series (NEA Gov't Rel'ns, n.d.).
\item \textit{E.g.}, National Observer, Oct. 23, 1976, at 3, cols. 1-5.
\end{enumerate}
\end{footnotesize}
ers.\textsuperscript{265} Year after year, NEA members have “beat their brains out”\textsuperscript{266} to deliver “massive support”\textsuperscript{267} to political candidates through direct-mail campaigns,\textsuperscript{268} telephone contacts,\textsuperscript{269} door-to-door canvasses,\textsuperscript{270} get-out-the-vote drives\textsuperscript{271} and in other ways.\textsuperscript{272}

Moreover, their successes have reflected this level of commitment. In 1976, for instance, the “NEA-PAC scored the highest winning percentage among the large labor, liberal, and conservative interest groups in support of successful candidates. . . .”\textsuperscript{273} But not only the figures testify to the NEA’s effectiveness as a political-action movement; the successful recipients of its aid are even more vocal in their praise and thanks. No comment that I have seen has attributed less than “an important role in [the candidate’s] victory” to the NEA machine.\textsuperscript{274} Some have said simply that NEA assistance “figured very largely,” “played a major role,” provided “one of the real keys to . . . success,” was “the backbone of [the candidate’s] organization” or “probably made the difference.”\textsuperscript{275} But an equal number identified NEA intervention in their campaigns as “critical,” “crucial,” “essential” or (in some other language) decisive.\textsuperscript{276} Little wonder, then, that one of the major purposes of the 1975 increase in NEA membership dues was to maintain, if not to enhance, the organization’s ability to support partisan political campaigns.\textsuperscript{277}

The ultimate purpose of this activism is not merely to elect just any candidates, however, but rather to elect candidates friendly to the NEA’s objectives in sufficient numbers to guarantee indirect NEA
control over the direction of public policy at the local, state and national levels. Partisan politics, in short, is an adjunct of lobbying.

In the lobbying field, there is hardly any type or category of governmental action which does not come within the NEA's legislative interests. Therefore the NEA's lobbying activities at the state and national levels encompass a broad range of subjects, including: appropriations for public education, compulsory collective-bargaining privileges for public employees, a cabinet-level department of education, government-subsidized tuition in colleges and universities, school lunch programs, vocational education, teacher centers, child development, affirmative action, crime and violence in the public schools, copyright laws, aid to handicapped children, aid to refugees from Indochina, revenue shar-

278. As its legislative committee reported in 1975:

NEA is committed to the maintenance and expansion of civil and human rights for all Americans, and to the reasonable use of resources to meet critical human needs. Only when our national priority is justice and dignity for all citizens will America live up to its ideals and its potential. To this end, NEA will continue to support legislation which enforces civil, human, and political rights of all citizens, and to oppose any abridgement of these rights.

. . . NEA also believes that a significant part of the education process takes place outside the traditional school structure, and that NEA has a responsibility to see that the other influences experienced by students of all ages are conducive to the healthy development of the individual within a just and humane society.

Under the broad mantle of this general philosophy, NEA seeks progress on or achievement of . . . legislation to advance these aims.

Minutes of the NEA Board of Directors' Meeting of May 2-4, 1975, at 704.


288. Today at the NEA, July 9, 1975, at 1.


Such an ambitious program reflects the organization's supreme confidence in its ability to mobilize powerful resources, in the form of its officials, staff personnel and members, to exert influence on the legislative, executive and administrative branches of the local, state and national governments. It reflects as well the NEA's ability to commit considerable sums of money to lobbying efforts. But, most importantly, it reflects an intent on the part of NEA leaders to maximize their political influence. As NEA President George Fischer said in 1970,

This year, the NEA was identified during a congressional debate as the second most powerful lobby in Washington, D.C. While this is the highest ranking ever given to our effectiveness, I will not be satisfied until we are the most powerful lobby.

Whether the NEA is now the nation's most powerful lobby, I cannot say. But legislators and the public press, who should be knowledge-

300. NEA Rep., Nov., 1977, at 3; Minutes of the NEA Board of Directors Meeting of Nov. 15-16, 1974, at 490.
302. Minutes of the NEA Executive Committee Meeting of Feb. 10-12 & 24, 1975, at 346.
303. Minutes of the NEA Board of Directors Meeting of June 30 & July 2 & 5, 1975, at 746; Minutes of the NEA Executive Committee Meeting of Sept. 16-17, 1974, at 278.
306. E.g., NEA Advocate, Nov., 1977, at 3, reports as follows on an override of a presidential veto of an educational appropriations bill: "NEA Governmental Relations staff credited the victory to two factors: NEA's major effort to elect a pro-education Congress in the 1974 elections and NEA's ability to call upon a well-organized army of teacher lobbyists in the 50 states."
able in these matters, regularly credit it and its affiliates with a substantial, oft-times decisive, role in the passage or defeat of various pieces of legislation.309

Operationally, the NEA establishes and implements its lobbying goals through the following general procedure: the NEA Representative Assembly sets basic organizational policy. Staff personnel then prepare a legislative program designed to further this policy, and the organization conducts regional hearings nationwide to solicit comments from its membership on the program.310 Thereafter, the NEA Board of Directors adopts the finalized program, and NEA officials, staff personnel and members perform assorted lobbying tasks in support of the program. Typical activities include collecting, compiling, analyzing, summarizing and distributing information relating to the NEA’s legislative objectives or policies; drafting or aiding in the preparation of legislation; cooperating with legislative committees or staff personnel as they make bills ready for floor action; preparing and presenting testimony on pending or recommended legislation; maintaining continuous contact with legislative committees and individual legislators; and mobilizing NEA members to participate in demonstrations, rallies, marches and similar direct action, in campaigns of propaganda and agitation, and in grassroots lobbying.311 The NEA also attempts in sundry ways to influence decisions of executive officials.312 And, in 1976, establishment of its federal-agency-relations office “complete[d] full circle NEA’s involvement with the federal government.”313

In light of this massive lobbying effort, an observer might well concede that NEA President Fischer was correct in his prediction, seven years ago, that

[the world has never seen an organization of this magnitude. We will use our influence. . . . I believe the President of the United

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States will consult with the officers of the [NEA] on all issues of national importance.  

In any event, as a lobbying organization the NEA has few peers.  

Third, the NEA also is involved deeply in political propaganda and agitation. Of course, propaganda and agitation are not unusual adjuncts of the NEA's lobbying efforts. But they also may serve the independent goal of "good public relations." It was not for nothing, after all, that NEA Executive Director Terry Herndon justified the organization's 1975 increase in membership dues as necessary in part to finance "[a]n expanded communications program, one that will take [the NEA's] story to the general public." This program may gain recognition for an NEA affiliate "as a powerful force in its community," and "increase [its] visibility." It may enhance the image of NEA members and their organization "in the eyes of the public-at-large and in the eyes of the media which . . . are the shapers of public opinion to a great extent." Or the program may establish and maintain communications between the NEA and "the news media, service and civic organizations, . . . and other interested groups and citizens." Or it may counter "community animosity" arising as a result of NEA strikes and other anti-social activities with the rationalization that "teacher militance is simply an arm of our professionalism."  

Whatever their purposes, propaganda and agitation are central to the NEA's program. The organization encourages and assists its state and local affiliates to engage in campaigns of propaganda and agitation to promote its objectives and policies. And in cooperation with those affiliates, it mobilizes their officials, staff personnel and mem-

319. Supra note 317.  
320. Today At the NEA, Jan. 16, 1976, at 1; NEA Now, Nov. 17, 1975, at 1.  
bers to participate in these campaigns.  

Indeed, public relations perform such a vital role for the NEA that they constitute a separate "support system" within the organization—a "[c]ommunications plan" established "so that members, potential members, and the public will know, understand, and respect the voice of the teaching profession."  

Fourth, litigation is also a vital component of the NEA's program of political activism.  

The organization has supported lawsuits involving course content, dress codes for teachers, corporal punishment in public schools, reverse discrimination in institutions of higher learning, sex bias, denial of state financial aid to parochial schools, support for the NAACP, war resistance and the power of unions to deny nonunion employees access to the courts.  

It is unnecessary to investigate the merits of these numerous cases in detail, however, to conclude that, for the NEA, litigation is merely another proficuous means to political ends. Much of this litigation has involved the DuShane Emergency Fund, which an NEA pamphlet has eloquently and inextricably connected to NEA political endeavors.  

Evidently, each of the "citizens activities" involved in

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323. 1976-77 NEA Handbook 47. NEA "support services exist to facilitate and support programs for the achievement of NEA goals and objectives." "Communications" is one of three such services. Id.

324. For an historical analysis of the NEA's socio-political activism in the courts, see generally M. DONLEY, JR., POWER TO THE TEACHER 178-90 (1976).


333. COMMON SENSE, Feb. 9, 1976, at 1.

334. The NEA, says this diminutive document, strongly advocates participation by educators in political and legislative activities as well as advocacy of social, economic, and political reform. DuShane-supported lawsuits are initiated to ensure broader constitutional protection for educators as they pursue the following kinds of citizen activities:

Organizing associations and political groups
Negotiating collective bargaining agreements
Petitioning officials for redress of grievances
DuShane litigation is political in nature, all of them being aspects of petition, partisan politics, lobbying or organizing.  

Finally, there are the NEA’s organizing activities. The NEA is deeply involved in establishing new state and local affiliates, and in increasing the membership of those that now exist. The practical political purpose of this, as NEA President James Harris said in 1973, is to “create a force which will be so effective politically and legislatively that no politician in his right mind would dare to put [the NEA] on his enemy list.”

For years, to the NEA “[t]he purpose of organizing” has been “not merely to exert an influence on a particular campus, but to exert an influence at the state and federal level as well.” “Organize for bargaining,” advised NEA President John Ryor in 1975. “Then, simultaneously use your collective power to jump into politics with both feet.” But even before Ryor’s election, NEA members had taken such advice to heart. Indeed, his predecessor concluded in the very same year that, because the NEA had a “unique network of 10,000 state and local affiliates that reach into every corner of the country”; because it has “an unequalled body of educated, sophisticated, articulate, and concerned personnel;” and because it is “increasingly becoming a well-oiled, smooth-functioning, integrated organization operating cooperatively at ... local, state, and national [levels]”—in short, because of its prowess in organizing, it already had “awesome potential power.” And, most recently, NEA Executive Director Terry Herndon echoed this confident view when he called on NEA

Campaigning for election to public office
Participating in campaigns
Assuming public office
Working in voter registration drives and other civil rights activities
Taking independent positions which may not agree with those of school boards or administrators on educational matters, including tax levies, fiscal policies, or the status of an educational institution
Writing and speaking on matters of public concern


335. Consider, e.g., NEA’s participation as amicus curiae in a case that involved no NEA members but that allegedly affected “the civil rights of all teachers,” NEA Rep., Feb., 1977, at 11.


338. NEA Advocate, Nov., 1975, at 5 (remarks of former chairman of NEA higher education council).


members to "organize, mobilize, and demand political responses by
the Congress and the legislatures" to NEA demands, "organize and
mobilize two million teachers to carry the fight into every community,
every political campaign, every party meeting, every legislative ses-
sion, and every school board meeting in the United States."341

The NEA's organizing activities extend as well to coalitions with
other groups. With the AFSCME, for example, the NEA has estab-
lished a policy of "[r]eciprocal support . . . in organizing and con-
certed collective activities such as strikes or political campaigns," which calls for "[c]oordinated legal activity," "[c]oordinated political
activity," and "cooperative public information programs."342 More
ambitiously, the NEA was a moving force behind formation of the
Coalition of American Public Employees (CAPE), an alliance of pub-
lic-sector unions whose purpose is "to provide a means of marshalling
and coordinating the legislative, legal, financial, and public relations
resources of the member organizations in matters of common con-
cern."343 "We have seen firsthand," explained the CAPE's Executive
Director,

the intensified clout, at both the national and state levels, that
comes from pooling our legal, legislative, economic, and public re-
lations resources behind a common cause through an organized,
formalized arrangement.344

And NEA Executive Director Herndon concurred, boasting that
"each new Coalition partner boosts our strength manyfold."345 Not
surprisingly, CAPE faithfully reflects, as well as magnifies, the politi-
cal activism of its member-organizations.346 And, to advance par-
ticular political goals on an ad hoc basis, the NEA regularly instigates
the formation of or joins existing groups, such as Common Cause, the
Citizens Committee for a Cabinet Department of Education, the
Council on National Priorities, and the Project on Budget Priorities
for the United States.347

342. Minutes of the NEA Executive Committee Meeting of Apr. 28-29 & May 2, 1975, at
346. Id., Nov., 1976, at 12 (CAPE endorsement of Carter-Mondale ticket); id., Dec., 1974,
at 7 (CAPE testimony before Congress on behalf of federal collective-bargaining law).
347. Minutes of the NEA Executive Committee Meeting of Sept. 16-18, 1974, at 281; NEA
Rep., Oct., 1977, at 8; id., Apr., 1975, at 2; Minutes of the NEA Executive Committee Meet-
In sum, the NEA engages extensively in *each and every* activity which characterizes a political-action organization even when pursued in isolation. If the NEA is a political-action organization, then, it is one of the most virulent forms yet examined in any literature I have seen. The ultimate conclusion depends, of course, on the substantiality or essentiality of its political activism. But these matters require little further discussion. It would not be appropriate here to undertake a detailed analysis of the NEA’s budget to determine how much of its nearly fifty million dollar income it expends for political activities. My purpose is not to prove according to the rules of evidence that the NEA is a political-action organization, but only to suggest according to the rules of inference that it may be one.

However, nothing precludes me from suggesting that the reader peruse the NEA Resolutions\(^{348}\) or New Business\(^{349}\) for the last several years, or study the NEA Program Structure\(^{350}\) over the same period of time. I have done so at some length, and have convinced myself that fully three-quarters of the NEA’s activity, as the NEA describes it there, is political in nature. Most of the rest is inadequately described, thus preventing accurate characterization. This amount, I need not emphasize, is significantly more than what courts have held to be substantial in other contexts.\(^{351}\)

Furthermore, nothing precludes me from citing the NEA’s own admission that it expended approximately three percent of its 1976-1977 budget for the administration of the NEA-PAC, the endorsement of partisan political candidates for election to public office, and lobbying not germane (in its view) to collective bargaining (as it defines the term).\(^{352}\) Since its program budget for that fiscal year totalled approximately forty-nine million dollars, the NEA thus has conceded political expenditures of almost one and one-half million dollars, or nearly half again as much as the income tax regulations


\(^{351}\) Supra notes 206-07 & accompanying text.

\(^{352}\) NEA REP., Sept., 1976, at 14 ("preliminary determination" of 2.9% of budget expended on "political activity" subject to "rebate" to dissenters).
hold to be substantial.\textsuperscript{353} Actually, its political spending was significantly higher than this, judging from its further admission that more than two and one-half million dollars constituted its expenditures for all forms of lobbying and partisan-political activism, including those not germane (in its view) to collective bargaining (as it defines the term).\textsuperscript{354} And these amounts, even if they do not minimize woefully what the NEA spent, fail to include any political costs which its state and local affiliates incurred during the fiscal year in question.

Moreover, nothing precludes me from referring the reader to some illuminating statements of NEA leaders which bear on this issue. For example, NEA President George Fischer spoke of "power and influence attained through politics" as long ago as 1970:

\begin{quote}
Since every decision which we live by, teach by, is a political decision determined by elected politicians, we must begin to influence the forces which control our functions, our finances and our futures.

Therefore, we in the [NEA] must first determine that we are no longer just Republicans or Democrats, but that we have only one real overriding party—education.\textsuperscript{355}
\end{quote}

I encourage the reader to consider the statement "we are no longer just Republicans or Democrats, . . . we have only one real overriding party—education." By "education," Fischer could have meant only education as the NEA sees it. Therefore, I submit, in this speech Fischer announced the formation of a new political entity in American life: a political party dedicated to the special interests of a single economic group or profession, a "special interest political party" for education. Now, for a special interest political party, political activism is essential, by hypothesis. But we need not leave such conclusions to mere inference. In 1975, NEA Executive Secretary Terry Herndon justified a proposed increase in NEA membership dues by arguing that

\begin{quote}
[i]f no dues increase is forthcoming, NEA will have no choice but to reduce its program of membership service. . . .

Efforts in other areas—political action, legal defence, communications, legislation, negotiations, human and civil rights—have taken our Association from a relatively somnolent organization in the 1950's to the powerful, activist voice for teachers and students
\end{quote}

\textsuperscript{353} Id. at 2 (program budget of $48.7 million for fiscal year 1976-77, of which $1.4 million represents "non-collective-bargaining" lobbying and partisan political costs). On the income tax standard of $1 million, see note 208, supra.

\textsuperscript{354} Id., Sept., 1976, at 2 (all lobbying and partisan political expenditures total $2.6 million).

\textsuperscript{355} Report of the President to the 108th Annual NEA Convention (July 3, 1970).
it is today. To slice away these programs, the lifeblood of the Association, would be to take a giant step backward.\textsuperscript{356}

I encourage the reader to consider these words with care. What sort of organization has no choice but to put political activism ahead of nonpolitical membership services, except a political-action organization? What is the essence of an organization the lifeblood of which is political activism, except political activism? But these questions answer themselves.

And the answers permit us to proceed on the premise that the NEA is a political-action organization in fact and law. Moreover, as we shall now discover, the logic of public-sector unionism establishes an even stronger case for this premise than does the law of political-action organizations.

\section*{C. The Logical Necessity for Public-Sector Unions to Function as Political-Action Organizations}

As I noted earlier, the contemporary law of political-action organizations is in many respects incomplete. A complementary, and perhaps in the long run more satisfactory, approach is to consider the logic of the situation, in terms of the philosophy and goals of contemporary public-sector unionism, and the inherently political nature of public-sector employment.

\subsection*{1. The desire of public-sector unions to attain control over public employers}

The goal of contemporary public-sector unionism is to control the actions of public employers for the benefit of unions, their members and their adherents. The movement aims “to exercise restraining or directing influence over; to dominate; regulate; . . . overpower” in fact, and perhaps, with the aid of the state, to acquire the legal “right to exercise a . . . governing influence over” employers.\textsuperscript{357} That control in this sense is the objective of contemporary public-sector unions, the unions themselves brashly proclaim. An NEA handbook on collective bargaining, for instance, disdains the “language of compromise” in an agreement between a teachers’ union and a public


\textsuperscript{357} Webster’s, supra note 100, at 580; Black’s, supra note 102, at 399.
employer. "Such language," it warns, "allows the [employer] a large measure of unilateral discretion... and, therefore, is nearly always inappropriate..."\textsuperscript{358} Indeed, employer discretion of any kind contravenes the emphatic NEA dogma that "[t]eachers should have the right to share the authority for decision making which affects them."\textsuperscript{359}

This "right to share the authority for decision making," however, is not a claim to exercise merely some relatively minor and inconsequential "restraining or directing influence" over public employers. Rather, it is an arrant demand to participate fully in "bilateral decision making."\textsuperscript{360} In the words of AFSCME President Jerry Wurf, unionized "teachers are fighting for the dignity of collectively dealing with [their employers] as peers, rather than as supplicants." For him, public-sector collective bargaining is "a power relationship where public officials and policy makers respect [unions] as equals."\textsuperscript{361} With a remarkable degree of candor, one NEA staff person admitted that organized teachers have [the same goal] all over the country—they want control of their profession. They feel that they are the experts—that they have a right to be the determining agent in curriculum and textbook selection and in other programs.

We are looking forward to the time when we will have teams of teachers in each school building—where it is not the principal who looks upon himself as the master of the teachers and who tells teachers what to do. Teachers want to share in decision-making...

\textsuperscript{362} We are moving in this direction and getting stronger all the time.

Indeed, this is the openly avowed strategy of NEA teacher power: first undermine the unilateral authority of public employers; then demand to share their authority as equals; and, at length, assume unchallengeable dominance over public education through a form of fascist-syndicalist "industrial self-government."\textsuperscript{363}


\textsuperscript{359.} Id. at 6 (emphasis retained).

\textsuperscript{360.} Id. at ibid.


\textsuperscript{362.} NEA REP., Jan., 1976, at 11.

\textsuperscript{363.} The NEA's scheme of "teacher power" rests on the contention "that classroom teachers can be accountable only to the degree that they share responsibility in educational decision-making." NEA Resolution 76-44, "Accountability and Assessment," 1976-77 NEA Handbook 223. This means first, that "[t]eachers must select instructional materials without censorship"—as, for instance, from the parents whose children the teachers will expose to these materials; and second, that the "primary authority to make educational changes should lie with
Moreover, this desire to attain control over public employers is no wistful fantasy of public-sector-union leaders; nor is their ambitious strategy merely an impotent dream. To the contrary, the desire finds a practical means of fulfillment in militant political activism, and the strategy, an at least partial embodiment in compulsory public-sector collective bargaining. I emphasize the adjective "compulsory," because it is this aspect of contemporary public-sector labor relations which should enlist our especial attention and concern. No common law principle prevents willing parties on both sides, in either the private or the public sector, from engaging in voluntary collective bargaining. But voluntary bargaining, no less than full freedom of association, is antithetical to the collectivistic imperatives of the modern trade-union movement. Coercion, not freedom, is congenial—indeed, imperative—to the fascist-syndicalist mind. And therefore the contemporary institution of statutory collective bargaining, based as it is upon the philosophy of fascist-syndicalism, relies upon compulsive measures at every turn.364

With respect to public-sector employees, the preeminent coercive device is exclusive representation, the means by which unions and their accomplices in government abridge the freedom of dissenters not to associate with the organizations' programs of political activism.365 Once a majority of employees in an appropriate bargaining

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364. On fascist-syndicalism as the basis of contemporary labor law, and especially of the exclusive representation device, see Syndicalism, supra note 2, at 572-610.

365. In private-sector employment the primary coercive tool of contemporary unions is still, I imagine, direct action—for example, violent and intimidating strike-threat tactics. Of course, this is not to say that much union activity in the public sector is not unadulterated gangsterism. See, e.g., Mulcahy & Schweppe, Strikes, Picketing and Job Actions by Public Employees, 59 MARQ. L. REV. 113, 130 (1976).
unit designates it as such, a union assumes the status of the exclusive, or compulsory, representative for all employees in the unit, whether they voted for it, against it or not at all. Thus, the union represents all employees with respect to negotiation and of the terms and conditions of their employment, prosecution of their grievances, and (if we read the Abood plurality opinion broadly) promotion of their interests, as the union perceives them, through partisan politics, lobbying and other political activities.\(^{366}\) That this status confers singular power on the union to control the destinies of employees, even the apologists of compulsory unionism readily concede. In collective bargaining, says Professor Summers, a union is "the employee's economic government. The union's power is the power to govern."\(^{367}\)

The ultimate purpose of this governing power is not merely to tyrannize dissenting employees, but also and especially to ensconce majority unions in a position from which they can usurp, to some degree, the authority of employers.\(^{368}\) For, as against employers, the unions' status as exclusive representatives carries with it a legally enforceable duty to bargain in good faith with respect to every matter subject to collective bargaining. The collective agreement which determines terms and conditions of employment, then, arises from a concurrent exercise of authority shared by unions and employers as a consequence of coercion directed (through employees) against the latter for the benefit of the former. Or, their special privilege to act as the employees' "economic government," to exercise as to them the quasi-legislative power to negotiate in good faith through the exclusive representation device, enables public-sector unions derivatively to exercise a directing or governing influence over employers as well—in short, to control those employers to some degree.

2. The necessity for political activism if public-sector unions are to attain control over public employers

Unfortunately for themselves, public-sector unions can exercise only limited direct control over the nominal employers of their members through good-faith collective bargaining alone. To that extent, the public and private sectors are similar. Now, in the private sector, unions can employ several different mechanisms to attempt to control

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366. See 431 U.S. at 233-36.
368. On the use of the words "tyranny" and "usurpation" as legal terms of art in this context, see Syndicalism, supra note 2, at 829.
the ultimate employer, the consuming public, including persuasion, direct action (such as strikes or boycotts) or state intervention of one kind or another to curtail the operation of the market mechanism itself. In the last-mentioned case, they must of course engage in political activism in order to enlist the aid of government officials or fonctionnaires in their struggle against society. Historically, however, reliance by private-sector unions in the United States upon direct state economic planning has been rare. One can imagine private-sector unions, therefore, which eschew politics altogether, or at least have minimal contacts with the political process. The situation is categorically different in public employment, however.

Public employment is unique because the relationship between public employers and their employees is essentially political in nature. Indeed, observers characteristically define the relationship in such terms as a “political connection between the state and a group of citizens.” Even the Abood plurality, in other respects so insensitive to the real issues surrounding compulsory public-sector unionism, explicitly recognized that decision-making by a public employer is above all a political process. But because of the inherently political nature of public employment, contemporary public-sector unions must organize for and engage in wide-ranging political activism to the very limit of their resources, if they are to achieve any meaningful measure of control over public employers.

The source of the uniquely political nature of public employment is the identity and character of the employer. In the words of Professor Summers, “[t]he employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom these officials are answerable are citizens and voters.” The most important corollary of this is that all public employment questions are simultaneously and necessarily political questions in three senses: first, they involve choices, and with increasing frequency critical choices, which someone must make among competing public policies and conceptions of the general welfare. “Directly at issue,” says Summers, are “the size and allocation of the budget, the tax rates, the level of

371. Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 CINN. L. REV. 669, 670 (1975). In his usual style of petitio principi, however, Summers then concludes that “[c]ollective bargaining ... must fit within the governmental structure and must function consistently with our governmental process”—never bothering to make any serious effort to determine whether, as a matter of principle, it can so “fit” and “function.”
public services, and the long term obligations of the government.” 372
Second, elected officials and their appointees must make these
choices in the first instance. “Indeed,” adds Summers, “these deci-
sions generally are considered uniquely legislative and not subject to
delegation.” 373 And third, the voters to whom those officials are
politically accountable must assume ultimate existential responsibility
for the consequences of their (the officials’) choices. However, be-
cause in the final analysis all public employment questions are politi-
cal questions in these three senses, the ultimate public employer with
which any public-sector union must deal is not an administrative body
such as a school board, or a legislature, but rather the public itself.
Public-sector unions, we learn from no less reliable a source than
NEA Executive Director Terry Herndon, “seek partnership with the
public in determining these matters.” 374 Neither can public-sector
unions rely exclusively upon compulsory collective bargaining with
administrators, or even lobbying the legislative or executive branches
of government, to achieve their objectives. They must instead de-
velop techniques with which to control or influence the entire politi-
cal process of representative government. Again, NEA spokesman
Herndon informs us that his union “perceive[s] the absolute need and
responsibility to exert maximum influence on the political sys-
tem, . . . a need for a supportive political environment for an impor-
tant and difficult work.” 375
 “[P]artnership with the public,” “the absolute need and responsi-
bility to exert maximum influence on the political system,” “a need
for a supportive political environment”—each of these phrases tells
the same story. As a necessary consequence of the logic of their
position, public-sector unions such as the NEA must strive to gain
political control of every level of the governmental decision-making
process. As exclusive representatives, of course, they must appeal to
the nominal employer of their members through compulsory collect-
ive bargaining where that special political privilege exists. 376 But
they also must engage in lobbying and like activities to influence
legislative, executive, administrative and other governmental action

372. Id. at 672.
373. Id.
375. Id.
376. Note that “collective-bargaining ‘rights’” are generally the result of lobbying, prop-
aganda and agitation, partisan politics, and in some cases direct action—but never of litigation.
See, e.g., Winston-Salem/Forsyth County Unit of N.C. Ass’n of Educators v. Phillips, 381 F.
which, in the parlance of the *Abood* plurality, is germane to the operations of their members’ nominal employer. This is not simply because public-sector bargaining “provides a formal process for lobbying,” although that is obvious enough. It is also because of the nature of the chain of political authority which most compulsory bargaining laws reflect. Legislative action often remains independent of, but controlling upon, the results of bargaining. In such a case, apologists of compulsory public-sector unionism are quick to argue (correctly, I submit) that public-employee unions “must necessarily become involved in the ‘political process’ in order to achieve legislative ratification of negotiated benefits.” Moreover, to maximize the effectiveness of bargaining, the unions must engage in propaganda and agitation designed to drive a political wedge between the public and those among their representatives who oppose union demands or refuse to make sufficient concessions. And, when bargaining and lobbying fail, as they often do, public-sector unions must be prepared and willing to engage in partisan political campaigns and other forms of activism, not only to influence the ultimate decision-makers in the legislative and executive branches of government, but also to pervert the normally adversary process of bargaining itself by “invad[ing] the management decision-making structure.”


378. In Minnesota, for example, the statute provides that

[n]othing in this act shall be construed to impair, modify or otherwise alter, or indicate a policy contrary to the authority of the legislature . . . to establish by law schedules of rates of pay for its employees or the retirement or other fringe benefits related to the compensation of such employees.

MINN. STAT. ANN. § 179.66, subd. 6 (Supp. 1977).


380. Typically,

When the union believes that it will shortly obtain the maximum concessions possible at the bargaining table, it begins a campaign involving newspaper releases and personal contact of the appropriate elected officials and legislators . . . designed to create the impression that the government is abusing the employees. . . . The ultimate aim . . . is to bring pressure in the form of threatened reprisals at the polls, loss of political patronage, and outright harassment so that those officials will, in turn, pressure the governmental bargaining team into modifying its position—thus yielding further concessions to the union.

381. “Particularly in public school and junior college districts, organized teacher groups have succeeded in electing their members . . . or sympathizers to school and governing boards. [D]emocratic government does allow almost anyone to run for office, but this tactic may make
There is, however, more. If bargaining, lobbying, propaganda and agitation, and partisan politics fail, as they often do, public-sector unions then must rely upon an appeal either to the law of the land or to the law of the streets; that is, they must engage in litigation or in strikes and other forms of direct action, legal or illegal. In sum, collective bargaining a farce.” Rehmus, Constraints on Local Governments in Public Employee Bargaining, 67 Mich. L. Rev. 919, 926 (1969). Examples of NEA activity in this area may be found in NEA Rep. May-June, 1977; id., Jan., 1976, at 13; NEA Now, Apr. 12, 1976, at 2; id., Jan. 12, 1976, at 3; id., Nov. 24, 1975, at 2; Today at the NEA, Nov. 18, 1975, at 1.

382. This article is not the place to deal in depth with the problem of public-sector strikes. That issue, of course, deserves and requires detailed study. In the final analysis, the trade-union theory and practice of direct action, especially in the public sector, is the theory and practice of revolution. See Syndicalism, supra note 2, at 712-18.

To be sure, union leaders such as NEA’s Terry Herndon may argue that:
most of [the teacher strikes] are [not] contrary to the best interests of the public.

The public has been misserved in many places for many years by the operation of inefficient, ineffective, and inadequate educational programs. If it is impossible to create the situations for optimal professional practice without the strike then the strike must occur.

NEA Advocate, Nov., 1975, at 8. That is to say, if NEA leaders and members disagree with what the public has decided best serves the general welfare as far as education is concerned, they will not hesitate to employ direct action to (as it were) force the public to be free. Moreover, the NEA’s spokesmen and publications make evident the attitude that its members’ duty to their union and its policies is “the most important thing, stronger than a legal obligation to a new [collective-bargaining] law that was relatively weak and needs improvement.” NEA Rep., Mar., 1976, at 6 (interview with Florida “teacher of the year”).

These attitudes explain NEA’s massive involvement in strikes over the past several years, as one integral component part of its overall political program to attain teacher power at the public’s expense.

First, NEA supports its affiliates in strikes, and specifically “denounce[s] . . . the practice of keeping the schools open during a strike.” Minutes of the NEA Board of Directors Meeting of June 30 & July 2 & 5, 1975, at 725-26. Top NEA officials extend their personal encouragement to striking teachers. The NEA organization, its component parts and its members provide maximum legal, financial and other assistance to the strikers. And NEA governance organs discipline strike-breakers. E.g., NEA Rep., Jan., 1977, at 2 (appearance by NEA president at strike in Louisville, Ky.); id., Oct., 1974, at 3 (appearance by NEA president at strike in Tacoma, Wash.); Minutes of the NEA Executive Committee Meeting of Nov. 17-18, 1975, at 364 (NEA president expresses commitment to visit local affiliates “facing critical problems”); Minutes of the NEA Executive Committee Meeting of Dec. 8-9 & 13, 1975, at 401 (legal assistance “for teachers incarcerated because of their commitment to bargaining rights”); NEA Rep., Jan., 1976, at 14 (soliciting NEA members to make financial contributions to striking teachers); id., Dec., 1973, at 6-7 (over $2 million in loans made to strikers by NEA-controlled “assistance fund”); Minutes of the NEA Board of Directors Meeting of Sept. 20-21, 1974, at 457 (pledging strike assistance to local affiliate); Minutes of the NEA Board of Directors Meeting of Feb. 14-15, 1975, at 543-44 (NEA policy regarding strike-breakers).

Second, NEA officials, staff, and members cooperate at all levels of the organization in planning and implementing strike strategies and tactics. E.g., NEA Rep., Dec., 1976, at 5 (Seattle, Wash., strike described as “a tremendous team effort”); id., Oct., 1975, at 6-8 (NEA “staff . . . had been working behind the scenes . . . in preparation for the impending crisis”).

Third, the NEA cooperates with other public-sector unions in direct action against the public. E.g., Minutes of the NEA Board of Directors Meeting of May 2-4, 1975, at 668-69 (NEA policy on cooperation with the AFSCME); NEA Now, Oct. 20, 1975, at 1 (joint NEA-AFSCME strike in Atlanta, Ga.).
public-employee unions do, in Herndon's words, have "an absolute need... to exert maximum influence on the political system," through collective bargaining, lobbying, propaganda and agitation, partisan politics, litigation and direct action. To some union administrators, this need is inherent in the process of public-sector collective bargaining—a proposition, I suppose, with which there can be little reason for disagreement. But union leaders, and I believe cor-


Admittedly, union leaders play down the significance of public-sector strikes by dismissing them as an "emotional issue." Strikes, they say, are merely the predictable response of public employees to the absence of "legislation that fully provides [them] with the right to engage in collective bargaining." Wurf, Union Leaders and Public Sector Unions, in Public Employee Unions: A Study of the Crisis in Public Sector Labor Relations 165, 180 (A. Chicker-ing ed. 1976). "If the public wants to avoid injurious confrontations with those who perform critical services," warns NEA's Terry Herndon, "it must provide the statutory base that gives public employees some means other than confrontation to get reasonableness and equity." NEA Rep., Oct., 1974, at 4. Indeed, "[i]f a federal law is not enacted to guarantee... public employees collective bargaining rights, there is a risk of labor unrest unparalleled since the 1930's." Id., May, 1975, at 17. See M. Donley, Jr., Power to the Teacher 209 (1976) (80% of teacher strikes in 1974 concerned "collective-bargaining 'rights'"). And union apologists concur that "the real key to preventing disruptive strikes" is "the community's capacity for creating both fundamental relationships and auxiliary peace mechanisms adequate to make unionists and their leaders feel there is no need for striking—and good reason not to." Raskin, Conclusion: The Current Political Contest, in Public Employee Unions, supra, at 203, 220.

Of course, union leaders are never embarrassed to qualify their "labor-peace" theory with the caveat that "strikes... are a normal and natural and necessary part of the collective bargaining process. They are the last resort. But it is necessary to preserve the right to that last resort." Meany, Union Leaders and Public Sector Unions, in Public Employee Unions, supra, at 165, 171. But they claim their resort to strikes would be unnecessary if public officials would stop "resisting... peaceful alternative[s]," such as binding arbitration. If public officials would only cooperate, they say,"[i]t would eliminate the danger that communities could suffer from the disruption of vital services;" and "once unions such as [the AFSCME] need not be preoccupied with mere survival, we will be able to work with public officials to improve public services." Wurf, Union Leaders and Public Sector Unions, in Public Employee Unions, supra, at 165, 180, 181.

Why the public does not recognize and condemn arguments such as these for what they are—namely, extortion—remains a mystery. See Syndicalism, supra note 2, at 712-23. Even more difficult to fathom is why the Abood plurality upheld the agency shop when it is common knowledge that the "critical aspect of union security provisions—more precisely, of union dues—is that payments made in connection with them are the principal means of financing strikes." Lewin, Collective Bargaining and the Right to Strike, in Public Employee Unions, supra, at 145, 160. The litigants raised the point. Brief for Appellants 176-86. But there is no mention of the issue in any of the opinions.

383. "[Partisan] political activity may well be an integral part of the bargaining process. It is so where it is directed toward the election of officials and legislators who are thought to more (or less) be favorable to union demands in pending labor negotiations." City of Stamford, Case No. MPP-3381, Decision No. 1421 (Conn. State Bd. of Lab. Rel., 1976).
rectly so, go further. Indeed, such spokesmen as AFSCME General Counsel A.L. Zwerdling readily advance the more expansive proposition that “[t]he recent legislative and legal activities of the AFSCME provide an example of the inherently political nature of public employee unionism.” 384

A perfect case-study supports these general statements. In 1975, after arbitration, the collective-bargaining agreement between the Minnesota State Board for Community Colleges and the Minnesota Community College Faculty Association (MCCFA), an affiliate of the Minnesota Education Association (MEA) and the NEA, contained a cost-of-living-allowance (COLA) clause covering teachers’ salaries. In the face of joint lobbying by the MCCFA and MEA, the Minnesota Legislature deleted the COLA clause from the collective agreement. The MCCFA immediately launched a lobbying campaign “aimed at restoring the cost-of-living clause,” and warned its members that “our only recourse is through legislative action.” 385 During the summer of 1975, MCCFA and MEA officials conferred among themselves and with friendly legislators to plan strategies; the COLA issue “was given much attention” at a “MEA legislative workshop;” and MCCFA representatives “met with the Community College Board to elicit their active support in the legislature.” 386 In early September, the MCCFA President admonished the organization’s members that

we must have lobbying by all MCCFA members and major efforts from other MEA members . . .—and hopefully AFSCME as well—if we are to have a chance of being successful. We will have the necessary information and strategies ready for presentation at our convention. . . . We will then carry on massive grass-roots lobbying across the state. . . . Every legislator must be contacted several times. . . . 387

At the MCCFA convention, a friendly state senator spoke advising MCCFA members

on how to get into the political system. He stated that ‘many educators would like to rise above the political process’ and declared this attitude ‘destructive.’ It is necessary to educate the public through press releases and letters to the editor. In addition

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384. Union Security in the Public Sector, in ABA Sect. of Lab. Rel. Law, National Institute Program: Labor Relations Law in the Public Sector 156, 167 (A. Knapp ed. 1977) (emphasis added). All of Zwerdling’s remarks on this subject are worthy of study. Id. at 166-68 & nn.38-49.
386. Id. at 1-2.
387. Id. at 2.
[the senator] recommended that teachers be active in a political party and come to the legislature seeking desired changes. He advised that those persons directly involved are more effective with the legislature than any lobbyist. 388

Thereafter, the union began its grass-roots lobbying campaign. Across the state, small groups of MCCFA members contacted their legislators, reporting back to MCCFA offices on the results of their meetings. "It is extremely important," the MCCFA President emphasized, "that all of the first contacts be made immediately. . . . Every [legislator] must be included in either the first group visit, or in follow-up contacts." 389

Unfortunately for the union, the legislature rejected the cost-of-living clause. But this defeat inspired the MCCFA President to reflect on the "lessons" the COLA campaign taught:

1. Members must be involved politically. Our lobbyists are only as effective as the organization they represent, and the organizational strength is observed by legislators in their own districts.

3. The legislators who will support us the most strongly are those who received campaign help from our members.

[MCCFA] members and others must now support those legislators who supported us; oppose those who did not. All representatives and senators are up for election this November; COLA must be an issue they have to face. . . . [S]ome work is now expected of you. You are not expected to give up your whole summer to campaigning; if you would work only eight-to-ten hours between now and the election for a legislative candidate, we will have achieved enormous influence. 390

During the ensuing election, the MEA's political-action arm used the COLA vote "as a major criterion" in granting or withholding campaign contributions "in every legislative race [in Minnesota] where an incumbent was involved." Although few anti-COLA legislators suffered defeat, the MCCFA President could nevertheless report his belief that these actions have greatly strengthened both MCCFA and MEA. MCCFA is now clearly identified to the legislature as an important and integral part of MEA. Our ties to [the MEA's political arm] are clear. Also, it has been strongly demonstrated that legislators will be held accountable for their votes on key MEA bills.

388. Id., Nov. 5, 1975, at 1-2.
389. Id. at 1.
This new organizational identity coupled with our increased political involvement speaks well for the future.  

Later, in September of 1977, after the Minnesota legislature had rejected another arbitrated increase negotiated by the MCCFA, the latter and its affiliate the MEA filed a “precedent setting... unfair labor practice suit against the State of Minnesota... seek[ing] an injunction prohibiting the State from refusing to comply with the arbitrator's [COLA] award.” “We have sought legislative redress and that was not successful,” said the MCCFA President. “Now we must turn to the courts.”

Here, then, is a seemingly minor but typical incident which freezes and preserves for posterity, in the words and deeds of union officials and members, the essence of public-sector unionism—the full and inextricable integration of collective bargaining, lobbying, propaganda and agitation, partisan politics and litigation. This, in short, is the logic of public-sector unionism embodied, as it must and will always be embodied, in militant political activism of every major variety.

Of course, I have yet to speak, or to adduce an example, of organizing as an element of political activism. Neither shall I do so at any great length. For it is obvious that to engage effectively in political activities, every public-sector union must organize and mobilize its members and form working coalitions with other politically active groups. The logic of the situation suggests that union organization will focus, in the first instance, on employees' economic concerns in order to take advantage of real economic grievances or to play on the ever-present passions of greed and vulgar envy. However, this merely creates the necessary platform for more ambitious political endeavors—endeavors which constitute the truly important objectives of most public-employee unions. “Organize for bargaining so you can get into a position in which administrators must deal with you,” NEA President John Ryor encouraged NEA members. “Then, simultaneously use your collective power to jump into politics with both feet.” Compulsory collective bargaining, Ryor thus indicates, is not and cannot be enough. It is merely a nucleus around which to crystallize a structure of collective power intended by union leaders

for many purposes other than negotiating terms and conditions of employment.395

Indeed, once public-employee unions have organized and mobilized their members and arranged coalitions with other militant groups, they can employ their collective power to promote whatever causes serve their members’ political, economic or social interests—or, perhaps more realistically, the interests of union leaders in seizing and exercising political power over either union members or citizens generally. After all, its capabilities do not confine to the narrow ambit of compulsory collective bargaining the machine of political activism, influence, and power which the logic of their situation compels public-sector unions to create and operate. Only the intentions or perceptions of the men who direct it could do that. But their intentions and perceptions, I suspect, and the design of the machine, faithfully reflect a design capable of affecting, in some significant way or other, the whole political process of representative government.

Public-sector unions such as the NEA, AFT, and AFSCME are—because they must be—militant political-action organizations to the limit of their institutional resources and their members’ endurance.

D. Public-Sector Unions as Special-Interest Political Parties

In addition to being political-action organizations, public-sector unions are—because they must be—political parties of a peculiar sort: namely, special interest political parties, both without and (especially) with regard to their participation as exclusive representatives in the inherently political process of compulsory public-sector collective bargaining.

1. Without respect to their status as exclusive representatives

The facts amply demonstrate that public-sector unions are political-action organizations, at least in the case of the NEA. Logic and facts also teach that these unions are partisan political-action organizations and, in the broad sense of the term, political parties.

All unions are partisan organizations, of course, in that with respect to their members they perform the role of “zealous advocate[s]” who “take the part of another.”396 Even private-sector unions admit that

395. Not accidentally, then, repeal of the Hatch Act has been one of the highest-priority goals of federal public-employee unions. E.g., Gov’t Emp. Rel. Rep. (BNA), at 5 (Jan. 24, 1977).
396. Webster’s, supra note 100, at 1783.
they are “first and foremost special interest organizations.” 397 And leaders of public-sector unions such as AFT President Albert Shanker are no less adamant that “[t]he [union-member] teacher has a right to an advocate. [The AFT is] that advocate.” 398 No one, however, approaches the NEA and its officials in their unabashed self-adulation as an “advocate organization,” 399 as “spokespersons for education,” 400 as “the national voice for education,” 401 or even as “[w]e the teachers of the United States of America.” 402

The partisanship of public-sector unions such as the NEA, however, is of a special kind, because, as Justice Powell noted in Abood, the “ultimate objective of a union in the public sector, like that of a political party, is to influence public decision-making in accordance with the views and perceived interests of its membership.” 403 Public-sector unions are, in a meaningful sense, “political parties.” For their members constitute a “body of persons forming one side in a contest . . .; a number of persons united in opinion and action, as distinguished from, or opposed to, the rest of the community . . . on questions of public policy.” 404 And, as we have seen, they must and do function as political-action organizations, or, perhaps more precisely, political-action movements. Public-sector unions are not, to be sure, political parties of the traditional type, such as the Republican or Democratic Parties, which historically have attempted to appeal to a wide spectrum of economic, social, and political interests. Rather, they are special interest political parties: partisan organizations dedicated to advancing, through broad-ranging and militant political activism, the parochial concerns of a particular economic or social group, class or profession such as (in the case of the NEA and AFT) organized public school teachers.

This conclusion is not an eccentric idea of my own, but one to which the NEA itself subscribes with evident pride. As early as 1970, NEA President George Fischer advised the organization that “we in the [NEA] must first determine that we are no longer just Republicans or Democrats, but that we have only one real overriding party—education.” 405 Four years later, NEA Executive Director

398. Transcript, supra note 393, at 11.
400. TODAY AT THE NEA, July 9, 1975, at 1.
403. 431 U.S. at 256 (Powell, J., concurring).
404. WEBSTER’S, supra note 100, at 1784.
Terry Herndon added that the NEA does "have congressional friends from both parties . . . , but unfortunately there is no sign of a great stampede toward progress in either caucus. Therefore, we must continue to be partisan on behalf of education." 406

And in its current training materials, the NEA reminds its members: "your party is the 'education party.'" 407 Moreover, its political allies also counsel that "[a]s an organization, the NEA must . . . use its power in the political process, not under the banner of party but under the banner of education." 408 In short, by its own admission, the NEA is a special interest political party.

2. With respect to their status as exclusive representatives

But if public-sector unions such as the NEA are special interest political parties in their own right, how much more so are they worthy of that designation in their capacities as exclusive representatives in the process of compulsory collective bargaining? Indeed, I submit that, simply by their participation as exclusive representatives in that inherently political process, public-sector unions become special interest political parties even if they are not political-action organizations on some independent ground.

The logic of the situation dictates this conclusion. First, as every observer has recognized, public-sector collective bargaining is a political activity. On the one hand, the bargaining process itself is political in that it "pertain[s] to . . . the conduct of government" or "the exercise of the functions vested in those charged with the conduct of government." 409 Collective bargaining has no more obvious or important purpose than to establish what the conduct of government will be, through negotiations aimed at controlling or influencing the exercise of the functions vested in those persons charged with that conduct. On the other hand, the status of an exclusive representative is equally political in that it "pertain[s] to the exercise of the rights and privileges or the influence" by which certain individuals "seek to determine or control public policy," and to "the organization

408. NEA Rep., Aug., 1973, at 4 (remarks of Senator Edward M. Kennedy, D-Mass., at 1973 NEA "Critical Issues in Education" Conference). See also id. at 6 (remarks of Representative James O'Hara, D-Mich.): "If you don't get into politics with both feet, someone else is going to make that decision for you. I don't think you ought, as a profession, to attach yourselves to either party. Keep us both nervous about where you are going to vote."
409. WEBSTER'S, supra note 100, at 1909.
or action of individuals, parties, or interests that seek to control the . . . action of those who manage the affairs of a state.” Exclusive representation is nothing less than a system of extraordinary legal rights, powers and privileges through which certain interests exercise a unique form of influence to determine or control the direction of public policy and the action of public officials. Collective bargaining through exclusive representation, then, is a political activity in and of itself.

Second, the scheme of compulsory collective bargaining logically requires that public-sector unions function as partisan political organizations. As exclusive representatives, these unions are necessarily political entities, because they are “organization[s] composed of persons holding similar beliefs on certain public questions who strive to gain control of the government in order to put their beliefs into effect.” That they are also partisan political entities, in the sense of being zealous advocates for their members, we have already seen. Moreover, the whole concept of collective bargaining through the exclusive representation device irrebuttably presumes such partisanship in the notion that employees and employers have opposing interests.

Now, public-employee unions are “representative only of one segment of the population,” not of the people as a whole, whereas public employers presumptively represent the entire community. Therefore, if the interests of these unions and employers are opposed, and if the unions are necessarily political entities in the bargaining process, then it follows that, simply as a consequence of the logic of exclusive representation itself, they constitute a species of political party. In short, the very nature of compulsory public-sector collective bargaining compels public-sector unions, whatever their other political attributes or activities, to operate as special interest political parties.

I recognize, of course, that my use of the term “political party” in reference to such organizations as the NEA is somewhat novel—although it is one in which both Justice Powell and the NEA itself

410. Id.
412. See, e.g., the interesting private-sector decision of Queen Mary Restaurants Corp. v. NLRB, 96 L.R.R.M. 2456, 2560 (9th Cir. 1977) (employer may not refuse to compromise with exclusive representative in regard to compulsory unionism arrangements on theory that employer “represented those employees who had voted against the [union] and any compromise would betray them;” this argument, says the court, “contradicts the basic tenet of collective bargaining”).
concur without reservation. Yet, though unusual, it is not without support in the traditional literature. Political scientists generally distinguish parties from pressure groups on the bases of the manner in which they participate in the political process and their sources of membership support. For example, one authority holds that parties seek "as their primary goal the conquest of power or a share in its exercise" by electing representatives, selecting administrators, and "taking control of the government," whereas pressure groups "do not seek to win power themselves, or to participate in the exercise of power," instead being satisfied merely to influence those who do wield it.\footnote{414} As we have seen, however, compulsory collective bargaining through the exclusive representation device is not merely a means by which unions can somehow influence the exercise of governmental power. But, at least as the NEA, AFT, and AFSCME conceive of it, compulsory collective bargaining is a means for them to share, and even to share equally, in that exercise. Moreover, in practice, organizations such as the NEA do attempt to elect representatives, albeit not at this time in history on an open "union label," whom they perceive as favorable to their collective-bargaining goals.\footnote{415} And, in at least one decision, a state labor board has held such partisan political activism to be "an integral part of the bargaining process."\footnote{416} Finally, a major NEA goal for several years has been the creation of a cabinet-level department of education, high-level appointments to which, presumably, the NEA intends to control on that auspicious day when "the President of the United States ... consult[s] with the officers of the [NEA] on all issues of national importance."\footnote{417} The manner in which public-sector unions participate in the political process through compulsory bargaining,


\footnote{415. See note 381 & accompanying text supra. It seems to me that, as a practical matter, NEA or other union-endorsed candidates do run on a "union label," and that it is that intangible "label"—the prestige which presumably attaches to the organization's endorsement—which union leaders expect will tend to favorably influence voters. Supra note 252 & accompanying text.}

\footnote{416. City of Stamford, Case No. MPP-3381, Decision No. 1421 (Conn. State Bd. of Lab. Rel., 1976).}

then, does not differ appreciably in principle from the manner in which traditional political parties participate therein.

Again, a noted author maintains that parties "draw their support from a broad base, whereas pressure groups represent a limited number with a particular or private interest." This, perhaps, is an irrelevant distinction here, since my primary point is that public-sector unions are special interest political parties, by definition. But let us put the terminological consideration to one side. Admittedly, most private-sector pressure groups, including unions, do represent parochial interests—not only in fact, but also in the eyes of the public-at-large, which infrequently deceives itself with arguments that concessions to one or another interest group will promote the general welfare. Public-sector unions, conversely, are engaged in the provision of public services, with a prima facie connection to the public interest. Therefore, they often can convincingly claim, although perhaps not prove when challenged, that their particular interests somehow represent or coincide with the interests of the recipients of those services. The position of every public-employee union, moreover, compels it to present its own objectives, no matter how anti-social they may really be, in the guise of public interests. Thus, the NEA continually attempts to advance its own ends by propagandistic appeals to the public couched in terms of society's supposed interest in some NEA scheme or other. Unlike private-sector groups, however, public-sector unions can often succeed in this deception precisely because their position allows them, at least initially, to take advantage of such good will as exists between the people and their government. Public-employee unions attempt to draw their support, then, from essentially the same broad base as do traditional political parties.

In sum, I conclude that their participation in the inherently political process of compulsory collective bargaining through the exclusive representation device renders public-sector unions special interest political parties. *A fortiori*, if (as is the NEA) they are also militant political-action membership organizations, the same conclusion holds true, only more emphatically. In the latter case, as others have observed, "[i]t is no exaggeration . . . to say that the public union is the successor in many ways to the old political machine."
III. Conclusion

It is not my purpose, nor is it possible in a single article, to deal exhaustively with the constitutional issues which flow from the finding that public-sector unions such as the NEA, AFT and AFSCME are special interest political parties. Yet such exhaustive analysis is necessary if our society is to resolve the legal and political problems which compulsory public-sector unionism poses. In anticipation of that analysis, therefore, I suggest two further areas of inquiry which legal scholars should enter:

First, as special interest political parties, are the NEA, AFT and AFSCME the very political “factions” which Madison premonished us in The Federalist No. 10, constitute the gravest possible threat to the integrity of our republican form of government?

Second, does compulsory public-sector collective bargaining, through the agency of factious special interest political parties exercising the extraordinary rights, powers and privileges of exclusive representatives, embody a danger to representative government against which the Constitution provides any protection through judicial process?

These questions, admittedly, are complex and controversial. But if we are to avoid becoming the victims of Melancton Smith's prophesy, we must address and answer them unequivocally while there remains sufficient time to act upon our conclusions.