The Future of Public Sector Union Security in the Seventh Circuit: Hudson v. Chicago Teachers Union Local 1

Joel Alam Martin
RECENT CASE

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INTRODUCTION

The doctrines of exclusive representation and union security are central to both the National Labor Relations Act (NLRA)\(^1\) and the Railway Labor Act (RLA).\(^2\) Exclusive representation\(^3\) extinguishes the individual employee’s power to conduct private negotiations with an employer and vests that power with the union.\(^4\) The union, as chosen representative, must fairly represent all employees in the bargaining unit, whether or not they are union members.\(^5\) Congress believed that exclusive representation by the union would promote labor stability.\(^6\)

The doctrine of union security requires both union and non-union members of the bargaining unit to share in the costs of representation.\(^7\) Despite

\(^{3}\) The doctrine of exclusive representation requires that an employer bargain solely with the union that represents a majority of the employees within the appropriate bargaining unit. The employer must also refrain from bargaining with rival unions or individual employees. The National Labor Relations (Wagner) Act [NLRA], 29 U.S.C. § 159(a), provides: “Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .” See infra note 6 and accompanying text. See also Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61-62 (1975) (reaffirming doctrine of exclusive representation in collective bargaining). For a criticism of the doctrine of exclusive representation, see Vieira, Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of “Exclusive Representation” in Public-Sector Employment, 12 Wake Forest L. Rev. 515 (1976).
\(^{7}\) “Union security” is generally defined as a doctrine that requires every employee in the bargaining unit to either join the union or pay the union a specified amount for its bargaining services. There are five basic forms of union security agreements. Closed shop agreements require that the employer hire only union members and condition employment on continued union membership. See, e.g., NLRA, 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1982) and the RLA, § 2 Eleventh, 45 U.S.C. § 152, Eleventh (1982) (closed shop agreements not authorized in the private sector). Union shop provisions allow the employer to hire non-union members but require all employees to join the union within a specified time period. The agency shop requires
congressional approval of union security, some courts have viewed the doctrine with considerable disfavor. These courts, as well as numerous commentators, have been troubled by the constitutional implications of compelling employees to join or contribute to private organizations. Opponents of union security contend that compulsory union affiliation and financial subsidization infringe upon objecting employees' freedom of speech and freedom of association under the first and fourteenth amendments. Proponents of union security maintain that, because the union has a legal duty of representing all employees, each employee should contribute their fair share of the costs involved in such representation. The debate over union security primarily concerns the public sector because there is no uniform federal legislation in this area. As such, the debate centers in those states that have enacted union security provisions governing the public sector.

Non-union members to pay union fees and dues but does not require membership. Fair share or service fee arrangements permit employees to choose not to join the union, but require non-members to pay the union a service fee equal to that portion of union dues devoted to collective bargaining activities. Maintenance-of-membership agreements do not require union membership, but do require all employees who voluntarily become union members to remain members for the term of the contract.

Dues checkoff plans often accompany union security plans. These plans allow the employer to deduct union fees from employees' earnings and transfer the funds directly to the union. For a complete discussion of union security, see R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 639-76 (1976), T. Hagbard, Compulsory Unionism, the NLRB, and the Courts (1977), Zwerdling, The Liberation of Public Employees: Union Security in the Public Sector, 17 B.C. INDUS. & COM. L. REV. 993 (1976), and Note, Public Sector Labor Relations: Union Security Agreements in the Public Sector Since Abood, 33 S.C.L. REV. 521, 522 (1982).


10. The terms "objecting employees" and "dissenting employees" will be used interchangeably throughout this Recent Case to represent employees who object to paying fair share fees.


12. See Blair, supra note 11, at 189, 190; Palombo, The Agency Shop in a Public Service Merit System, 26 LAB. L.J. 409, 411-12 (1975); Zwerdling, supra note 7, at 1010, 1011.


14. See, e.g., ALASKA STAT. § 23.40.110(b), (b)(2) (1983) (union shop and fair share provisions for all public employees); CAL. GOV'T CODE § 3502.5 (West Supp. 1985) (agency shop provision for local employees); id. § 3515.7(a) (maintenance-of-membership and fair share provisions for state civil servants); id. § 3540.1(i)(1)(2) (West 1980) (maintenance-of-membership and fair share provisions for public school employees); CONN. GEN. STAT. § 5-280(a) (Supp. 1984) (union shop provision for state employees); HAWAII REV. STAT. § 89-4(a) (Supp. 1983)
The United States Supreme Court has upheld the constitutionality of state statutes that authorize certain forms of public sector union security. Yet, many issues remain unresolved as is evidenced by the Seventh Circuit’s recent decision in *Hudson v. Chicago Teachers Union Local 1*. In *Hudson* the Seventh Circuit invalidated a statutorily authorized fair share provision in a collective bargaining agreement between the Chicago Teachers Union (CTU) and the Board of Education of the City of Chicago (the Board). The plaintiffs, who were non-union employees, challenged both the CTU’s procedure for reviewing objections to the union’s use of the fair share fee and the remedy provided to non-members who succeeded in their objections. The court concluded that the internal union procedure and the advance reduction and rebate remedy were constitutionally deficient.

Although the *Hudson* court properly criticized the internal union procedure, its decision to invalidate large parts of the CTU’s fair share system
disregarded prior Supreme Court decisions that approved efforts similar to those utilized by the CTU.\textsuperscript{19} Moreover, the court's decision places excessive burdens on the public employer and destroys the delicate balance of labor-management relations in the public sector.\textsuperscript{20} \textit{Hudson} has significant implications for the future of public sector unionization in the Seventh Circuit. This Recent Case reviews the legal evolution of union security in the public sector and analyzes the \textit{Hudson} decision against that background.

**LEGAL EVOLUTION OF THE DOCTRINE OF UNION SECURITY IN THE PUBLIC SECTOR**

The constitutionality of union security was initially challenged in a 1956 case involving private sector unionization under the RLA. In \textit{Railway Employees Department v. Hanson},\textsuperscript{21} non-union employees challenged § 2 Eleventh of the RLA, which permitted a union and an employer to make union membership a condition of employment.\textsuperscript{22} The Supreme Court determined that the provision did not violate the dissenting employees' first and fifth amendment rights.\textsuperscript{23} The dissenting employees contended that § 2 Eleventh violated their first amendment right not to associate by forcing them to join an organization whose political beliefs they did not share.\textsuperscript{24} The plaintiffs also argued that § 2 Eleventh violated their fifth amendment rights by forcing them to pay for activities unrelated to collective bargaining.\textsuperscript{25} The Supreme Court nevertheless upheld § 2 Eleventh as a permissible use of Congress' power to regulate interstate commerce and preserve the peaceful operations of America's railroads.\textsuperscript{26} The Court also held that, to the extent that dues were used to support "the work of the union in the realm of collective bargaining,"\textsuperscript{27} the dissenters' first amendment rights were not unreasonably impaired.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{19} See infra notes 98, 119, 123-25, 134, and accompanying text.
\item \textsuperscript{20} See infra text accompanying notes 137-41.
\item \textsuperscript{21} 351 U.S. 225 (1956).
\item \textsuperscript{22} 45 U.S.C. § 152, Eleventh (1982) provides in pertinent part:
\begin{quote}
Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted — (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class . . . (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.
\end{quote}
\item \textsuperscript{23} 351 U.S. at 230.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. at 235-38.
\item \textsuperscript{27} Id. at 235.
\item \textsuperscript{28} Id. at 238.
The Court limited the Hanson holding in two subsequent decisions. In the 1961 decision of International Association of Machinists v. Street, the Supreme Court limited union authority to spend fair share fees on political activity under § 2 Eleventh. In Street, non-union employees claimed that portions of their dues were spent, over their protest, to finance political activities. The Court ruled in favor of the employees and held that § 2 Eleventh did not authorize a union to spend non-members' dues on "political causes." The Court, however, did not "delineate the precise limits" of the prohibited expenditures. Subsequently, in Brotherhood of Ry. and S.S. Clerks v. Allen, the Court held that § 2 Eleventh authorized unions to charge objecting employees only for those expenditures "germane to collective bargaining."

Relying heavily on the RLA cases, the Supreme Court first addressed the constitutionality of union security in the public sector in the 1977 decision of Abood v. Detroit Board of Education. In Abood, Detroit public school teachers challenged the validity of a Michigan statute that authorized unions and local school boards to negotiate "agency shop" agreements. Under the agreement, employees could elect not to join the union. Non-union employees, however, had to pay a service charge equal to full union dues. The teachers claimed that the agency shop clause violated their freedom of association under the first and fourteenth amendments. The Court, relying on Street and Hanson, held that charging non-union members fees to finance collective bargaining, contract administration, and grievance adjustment was constitutionally permissible. The Court rejected a public-private sector distinction in analyzing the constitutionality of labor legislation. Public employees, according to the Court, did not have a weightier first amendment

30. Id. at 744. The plaintiffs in Street complained that the union was using a substantial part of the compelled fees to finance the political campaigns of national, state, and local candidates favored by the union.
31. Id. at 750.
32. Id. at 768.
33. 373 U.S. 113 (1963).
34. Id. at 121. In Allen, a group of non-union employees sued to enjoin enforcement of a union shop agreement entered into between a railroad and several unions representing the railroad's employees. The Court held that the necessary predicate to an appropriate remedy is the division of the union's political expenditures from those expenditures germane to collective bargaining, "since only the former . . . are not authorized by § 2 Eleventh." Id.
36. Mich. Comp. Laws § 423.21(1)(c) (1973) provided, in pertinent part:
[N]othing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative . . . ."
37. Id.
38. Abood, 431 U.S. at 213.
39. Id. at 225-26.
interest in withholding fees from the union for the costs of exclusive union representation than their private sector counterparts.40

Although Abood represented a major step in the evolution of public sector labor law, it left important issues unresolved. For instance, the Court did not identify categories of permissible union expenditures,41 nor did the Court resolve the question of which remedies would be appropriate to protect dissenters' rights. The Court noted, however, that in devising a remedy it must balance objecting employees' rights to be free from compulsory subsidization of ideological activities with the union's duty of fair representation.42

After Abood, lower courts grappled inconsistently with the problems of developing remedies43 and delineating the precise limits of impermissible expenditures.44 In 1984, the Supreme Court attempted to provide guidance to the courts in Ellis v. Brotherhood of Ry., Airline and S.S. Clerks.45 In Ellis, non-union members challenged both numerous union expenditures under § 2 Eleventh of the RLA and the union's rebate remedy.46 The plaintiffs first argued that the union's use of non-members fees to finance various union activities, including national conventions, social activities, monthly

40. Id. at 229. The Court stated that "[t]he very real differences between exclusive agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees. A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint." Id. at 230.

41. Id. at 236. The Court noted that there would be "difficult problems in drawing lines between collective-bargaining activities and ideological activities unrelated to collective bargaining," and that in the public sector "the line may be somewhat hazier." Id.

42. Id. at 237. The Court suggested that a proper remedy would include: (1) a refund of that portion of the exacted fund representing impermissible expenditures; and (2) the reduction of future dues by the same proportion. Id. at 240. The Court also suggested that unions should develop "voluntary plan[s] by which dissenters would be afforded an internal union remedy." Id. (citing Allen, 373 U.S. at 122). The union in Abood required dissenting employees to object at the beginning of each school year to the use of their agency fees for political or ideological expenditures. The dissenting employees were then entitled to a pro rata refund of their agency fees in accordance with the union's calculation of expenses made on impermissible activities. Brief of Appellee at 19b, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).


46. Id. at 1892-95.

47. Id. at 1889-90.
publications, organizing activities, and litigation,48 violated their first amendment right not to associate.49 The Court substantially rejected the dissenters' claims stating that "the test must be whether the challenged expenditures [were] necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."50 After analyzing each expenditure in light of the new test, the Court concluded that all of the disputed expenditures, except those for organizing activities, were connected to exclusive representation.51

The plaintiffs also challenged the adequacy of the union's rebate procedures. Under the program, the union exacted full dues from non-members and months later rebated that portion that represented impermissible expenditures.52 The Court held the rebate scheme to be inadequate.53 The Court suggested "readily available" alternatives to retaining the dissenters' dues, such as "advance reduction of dues and/or interest bearing escrow accounts . . ."54 In light of the feasibility of the identified alternatives, the Court ruled that the union's pure rebate scheme violated the RLA.55

While the Supreme Court did not forthrightly assert the constitutionality of an advance reduction scheme or escrow account, several lower courts nevertheless interpreted Ellis as sanctioning the alternatives.56 In contrast to

48. Id. at 1887-88. The plaintiffs also challenged the union's charge for death benefits. Id. The Court did not reach the death benefits issue because the union had been decertified during the pendency of the litigation. Id. at 1895.


50. 104 S. Ct. at 1892.

51. The challenged expenditures included:

National Conventions. The Court had "very little trouble" in holding that non-members must help defray the costs of the union's national conventions. Id. at 1892-93. The Court held that convention activities "guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements." Id. at 1893 (citing Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 685 F.2d at 1073).

Social Activities. The Court held that expenses for refreshments at union functions were "sufficiently related to [collective bargaining] to be charged to all employees." Id.

Monthly Publications. Since non-members were not charged for the portion of the monthly magazine devoted to "political causes," the Court held that the union could validly charge non-members for the publication. Id.

Organizing Activities. The Court however found that organizing expenditures "only in the most distant way" worked to the benefit of those already paying dues. Id. at 1984.

Litigation. Insofar as litigation expenses were related to negotiating and administering the contract, settling grievance disputes, or representing employees in disputes with other unions, the Court held that litigation expenses were clearly chargeable to non-members. Id. at 1895.

52. Id. at 1889-90. For a complete discussion of the "pure rebate" remedy struck down by the Supreme Court in Ellis, see Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 685 F.2d 1065, 1068 (9th Cir. 1982), aff'd in part, rev'd in part, 104 S. Ct. 1883 (1984).

53. 104 S. Ct. at 1890.

54. Id.

55. Id.

56. In Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), cert. denied, 105 S. Ct. 128 (1985), the Court of Appeals for the Third Circuit relied on Abood and Ellis in upholding the
those courts, the Seventh Circuit Court of Appeals in *Hudson* rejected a rebate remedy of the type recommended in *Ellis*.

**THE Hudson Decision: FACTS & PROCEDURAL HISTORY**

The CTU serves as the exclusive representative of approximately 27,500 employees in bargaining with the Board. Membership in the CTU is voluntary and for several years the CTU had unsuccessfully attempted to negotiate a fair share provision into its labor contracts with the Board. The CTU's efforts were frustrated because the Board was unauthorized under Illinois law to agree to a fair share provision. In 1981, the Illinois legislature passed a statute that expressly authorized the Board and the union to include a fair share clause in its collective bargaining agreements.

constitutionality of a fair share provision in a New Jersey public employee statute. The statute provides in pertinent part:

(a) Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative.

(b) The representative fee in lieu of dues shall be in an amount equivalent to the regular membership dues ... less the cost of benefits ... available to or benefiting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.


The *Robinson* decision was a consolidation of three separate appeals, all of which challenged the constitutionality of the remedy provided by the New Jersey statute's fair share provision under the first and fourteenth amendments. 741 F.2d at 601. In rejecting appellant's claims and recognizing the competing governmental interest in maintaining labor peace, the Third Circuit concluded that due process required only a balanced remedy that would prevent involuntary subsidization of political expenditures without burdening legitimate union functions. *Id.* at 612. According to the court, the New Jersey statute incorporated such a balance. The statute provided for a minimum 15% differential between full union dues and dues charged non-members. The unions in the suit had also voluntarily created an escrow system for the challenged portion of the representation fee. The court held that this procedure incorporated both of the protective mechanisms suggested by *Ellis*. *Id.*

In Tierney v. City of Toledo, 116 L.R.R.M. 3475 (N.D. Ohio 1984), the court denied a preliminary injunction against the implementation of an agency shop rebate remedy and an internal union procedure authorized by the City of Toledo Municipal Code. *Id.* at 3476. Under the rebate procedure, dissenters had to register their objections to expenditures by January 31 of each year. At that time, a preliminary refund would be calculated and deposited in an interest-bearing escrow account. At the end of each year, an arbitrator would determine the final refund plus any interest owed to the dissenters. *Id.* After 1983, dissenters were granted an advanced reduction based upon the percentage used in the previous year to calculate the dissenting fee payors' final refund. *Id.* Comparing this procedure with the alternatives suggested in *Ellis*, the court held that this procedure fell within "the constitutionally viable alternatives outlined therein." *Id.* at 3477.


58. *Id.*

59. *See supra* note 16.
Pursuant to the newly enacted statute, the CTU and the Board agreed to include a fair share provision in their 1982 collective bargaining agreement. Shortly after signing the agreement, the CTU amended its constitution and bylaws to grant itself authority to charge and calculate a fair share fee and to review complaints by dissenting employees about the use of the fee. The CTU assessed the non-members' fair share fee at ninety-five percent of full union dues, and the Board deducted the fee from the non-members' earnings and paid it directly to the union. Under the CTU's Implementation Plan, objecting non-members could complain to the CTU president by registered mail within thirty days of their first payroll deduction. The objection would then be considered by the CTU’s Executive Committee. The Committee would decide within thirty days whether it would grant an additional reduction to the complaining employee. Objectors could then appeal the decision and receive a personal hearing before the Committee. From there, objectors could arbitrate their claim with the union. The arbitrator would be selected by the CTU president from a list of accredited arbitrators maintained by the Illinois State Board of Education. The CTU would bear the costs of the arbitration.

The plaintiffs filed suit in federal district court to challenge the constitutionality of the Illinois statute authorizing the fair share policy. The court

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60. Article 1, § 8.2 of the one year collective bargaining agreement between the CTU and the Board read in pertinent part:

All full-time employees covered by this Agreement who are not members of the UNION shall, commencing sixty (60) days after their employment or the effective date of the Agreement, whichever is later, and continuing during the term of this Agreement, and so long as they remain non-members of the UNION, pay to the UNION each month their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members of the UNION. Such proportionate share payments shall be deducted by the BOARD from the earnings of the non-member full-time employees and paid to the UNION. The UNION shall submit to the BOARD an affidavit which specifies the amount which constitutes said proportionate share which shall not exceed the dues uniformly required of members of the UNION.

61. The Board's deduction of the agency fee was crucial in the court's finding that the plaintiffs were entitled to sue under 42 U.S.C. § 1983 (1982). Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Since a public employer assisted the union in "coercing public employees to finance political activities," there was state action. Hudson, 743 F.2d at 1191. Moreover, the court held that when a private entity such as a union acts in concert with a public agency to "deprive people of their federal constitutional rights," the private entity was liable under § 1983 along with the public agency. Id.


found that the statute was facially constitutional under *Abood*. The court also determined that the pre-deduction adjustment scheme, coupled with the rebate system, minimized the risk of unauthorized expenditures of non-members' funds. Finally, the court held that the CTU Implementation Plan, adopted under color of the Illinois statute, did not violate the dissenters' procedural due process rights under the fourteenth amendment.

On appeal, the dissenters limited their challenge to the constitutionality of the rebate system and procedural aspects of the CTU Implementation Plan. In reversing the lower court, the Seventh Circuit held that the internal union procedure violated the fourteenth amendment because it was "entirely controlled by the union." The court was particularly troubled by the CTU's use of arbitration to review the dissenters' objections.

The Seventh Circuit noted three problems with the CTU's use of arbitrators to adjudicate dissenters' rights. First, the Court objected to the CTU's power to appoint arbitrators. The court stated that the union's potential hostility towards dissenting non-members raised serious doubts about the propriety of allowing the union a unilateral choice of arbitrators.

Second, the court disapproved of the CTU's control of the arbitrator's salary. Since the CTU

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64. *Id.* at 1513. The district court reasoned that the statute empowered the Board "to agree to no more than that which the Supreme Court expressly approved in *Abood.*" *Id.* Because the statute limited the fee to a proportionate share of the costs of collective bargaining, non-members would not be required to pay 100% of full union dues. Since non-members were not charged for that portion of the union dues earmarked for political causes, there was no first amendment violation, and the district court therefore found the statute to be constitutional. *Id.*

65. Specifically, the district court applied the "least restrictive means" test developed in *Kusper v. Pontikes*, 414 U.S. 51 (1973). *Hudson*, 573 F. Supp. at 1515-20. Applying this test, the court held that the CTU Implementation Plan posed only a "negligible" risk of violating the dissenters' first amendment rights, while it guaranteed the CTU the "immediate, steady flow of funds it needs to represent all employees, including non-members." *Id.* (emphasis in original). The district court therefore concluded that the plan was the least restrictive means of effectuating the government's interest in maintaining labor harmony. *Id.*

66. *Id.* at 1520-21. In handling the plaintiffs' due process claim, the court balanced the conflicting claims of the employees and the union by weighing three factors: (1) the plaintiffs' liberty and property interests; (2) the government's administrative interests; and (3) the risk of erroneous deprivation through the challenged procedures. *Id.* at 1521 (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976)). The district court stated that the compelling interest in sustaining regular fees, coupled with the low risk of abridgment of dissenters' rights, did not justify the high cost of imposing a pre-deduction hearing. 573 F. Supp. at 1521.

67. 743 F.2d at 1191. The plaintiffs' primary claim was that the CTU's internal union procedure was fundamentally flawed under the principle that "no man should be a judge in his own case." Brief for Plaintiff at 30, *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)) [hereinafter cited as Brief for Plaintiff]. The plaintiffs claimed that a review of their objections by the opposing party's representatives presumptively foreclosed an impartial hearing. Brief for Plaintiff, *supra*, at 30.

68. 743 F.2d at 1194-95.

69. *Id.* at 1195.

70. *Id.* The court noted that "the union's interest and those of the individual employee are not always identical or even compatible." *Id.* (quoting McDonald v. City of West Branch, 104 S. Ct. 1799, 1804 (1984)).
paid the salary, the court believed that an arbitrator might have a financial interest in deciding in favor of the union.71 Finally, the court noted that in reviewing fair share objections, arbitrators would be called upon to make first amendment determinations.72 Because many arbitrators are not attorneys, the Seventh Circuit questioned the competency of arbitrators to decide constitutional questions.73

The court decided that the public employer should administer the review process.74 According to the court, a fair review procedure should assure that non-members' fair share fees would be spent only on those union activities germane to collective bargaining.75 The Seventh Circuit suggested in dicta that an adequate procedure would include at minimum: 1) fair notice; 2) a prompt evidentiary hearing before the Board of Education or some other state or local agency;76 and 3) a right of judicial review of the agency's decision.77 The court concluded that the CTU's internal union remedy and arbitration procedure did not satisfy due process, given the possible bias of union procedures toward union interests.78

The Seventh Circuit also invalidated the CTU rebate remedy. The court held that a union could not "just choose" some level for the fair share fee and deduct that amount from non-members' earnings. If the union chose too high a fee, it would have the use of non-members fees interest-free during the period between the deduction and the rebate.79 The court stated that this remedy effectively created an involuntary loan to the union which could be used for impermissible purposes.80

ANALYSIS & CRITICISM

The Internal Union Procedure

The Supreme Court has never ruled directly on the constitutionality of particular internal union procedures, although it tentatively sanctioned certain procedures in Abood.81 The Court generally approves of internal union procedures as a means of settling disputes over alleged impermissible expenditures.82 Many lower courts have recognized and approved of the use

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71. 743 F.2d at 1195.
72. Id. at 1195-96.
73. Id.
74. Id. at 1192, 1194.
75. Id. at 1194.
76. Evidentiary safeguards in administrative hearings often include the right to call witnesses, the right to face accusors, and the right to a decision based solely on the evidence of record. Friendly, Some Kind of Hearing, 123 U. PA. L. REV. 1267, 1279-1304 (1975). For a complete discussion of evidentiary safeguards in administrative hearings see 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12 (2d ed. 1979).
77. 743 F.2d at 1196.
78. Id.
79. Id.
80. Id.
81. See supra notes 35-42 and accompanying text.
82. Allen, 373 U.S. at 122-24; Abood, 431 U.S. at 239-42.
of internal procedures as a more practical alternative to judicially administered relief.\textsuperscript{83}

The Seventh Circuit, however, declined to follow those courts which sanctioned internal union procedures. The court reasoned that, because the union might not represent non-members fairly, the use of union-sponsored arbitration to protect dissenters' constitutional rights was inadequate.\textsuperscript{84} The court properly criticized certain aspects of the internal procedure. The likelihood of union bias in union-sponsored arbitration lessened the fairness of the procedure, especially since individual constitutional rights were involved.\textsuperscript{85} Other courts also share the Seventh Circuit's concern about the competence of arbitrators to decide constitutional questions.\textsuperscript{86}

Although the CTU procedures may not have been ideal, the Seventh Circuit's remedial suggestions are flawed in even more serious ways. For instance, the court did not say whether the evidentiary hearing should take place before or after the employer deducts the fees. The plaintiffs in \textit{Hudson} had argued that a pre-deduction hearing was necessary to protect their constitutional rights since fair share deductions presented a risk of erroneous deprivation of their liberty.\textsuperscript{87} A pre-deduction hearing would prohibit the union from collecting any portion of a non-members fee until an impartial adjudicator reviewed the union's fair share calculations.


\textsuperscript{84} \textit{Hudson}, 743 F.2d at 1195.

\textsuperscript{85} See, e.g., \textit{Southeastern Promotions, Ltd. v. Conrad}, 420 U.S. 546, 552-62 (1975). \textit{But see} Reid v. UAW, Dist. 1093, 479 F.2d 517 (10th Cir. 1973), cert. denied, 421 U.S. 1076 (1976). In \textit{Reid}, dissenting employees sought an injunction against union expenditures on political activities. The union agreed that its internal procedures, which allowed employees to obtain a rebate of their dues, provided the plaintiffs with all the relief to which they were entitled under \textit{Allen}. 479 F.2d at 518-19. Since employees had not exhausted the union remedies or proved that the procedures were "unfair, unreasonable, and unworkable," the Tenth Circuit affirmed the summary judgment against the employees. \textit{Id.} at 520-21. The court held that "speculative, conclusionary, and argumentative statements" condemning the union procedure as unfair did not suffice to create issues of fact. \textit{Id.} at 520. The court concluded that such statements were at most "conjectures as to how the union remedy might work in imagined circumstances." \textit{Id.}

\textsuperscript{86} \textit{But see generally} McDonald v. City of West Branch, 104 S. Ct. 1799, 1803 n.9 (1984) (non-lawyer arbitrators may not have the expertise to resolve complex legal questions arising in constitutional actions); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 742 (1981) (an arbitrator may not adequately protect employees' statutory rights since the arbitrator's specialized competence is in the law of the shop, not the law of the land); \textit{see also} Speech presented by Professor Elliot Goldstein to the Fourth Annual Chicago Arbitration Day Convention (October 31, 1984) (noting the Supreme Court's shift away from private dispute settlement through arbitration as a final remedy for statutory or constitutional employee rights). \textit{But see} Parrett v. City of Connnersville, 737 F.2d 690, 696-97 (7th Cir. 1984), cert. dismissed, 105 S. Ct. 828 (1985) (procedures established under collective bargaining contracts, including arbitration, can satisfy constitutional requirements).

\textsuperscript{87} Brief for Plaintiff, \textit{supra} note 67, at 36-39.
It is doubtful that the court intended to impose a pre-deduction requirement on the CTU. First, such a requirement would be inconsistent with language in the Supreme Court's Ellis decision that encouraged the use of procedures that did not unduly burden legitimate union functioning. Second, the Hudson decision does not exhibit the careful weighing of state and private interests which ordinarily accompanies such due process determinations. The procedural protections to which private parties are entitled depend on a balancing of the parties' interests in each case. Therefore, when determining whether a pre-deduction hearing is necessary, courts must examine the effect of the deprivation on the party and the nature of the governmental function involved. The deprivation of liberty suffered by non-members in Hudson was de minimus under the CTU's advance reduction scheme. In addition, the Supreme Court has recognized the substantial governmental interest in labor harmony advanced by a union's use of compelled fees. The financial and administrative burdens of pre-deduction hearings on unions could bring an abrupt end to the use of union security in the Seventh Circuit. A weighing of the competing interests involved would therefore indicate that procedural due process requirements would be satisfied by a post-deduction hearing.

Independent of the timing of the hearing, it is doubtful that a public employer is an appropriate agent to champion the constitutional rights of

88. See infra text accompanying notes 131-33. See also Developments in the Law, Public Employment, 97 Harv. L. Rev. 1611, 1733-34 (1984) (Ellis Court rejected pre-deduction hearings as overly burdensome).
93. The monetary loss, if any, suffered by the non-members in Hudson would only amount to the difference between the fair share fee ($16.48 per month) and the amount later calculated after objections and adjustments. 573 F. Supp. at 1519. Even if the CTU had grossly miscalculated the fair share fee by as much as 50%, the error over the six week rebate period would be only $24.72 per school teacher. Id.
94. See, e.g., Ellis, 104 S. Ct. at 1896 (union interference with first amendment rights is justified by government's interest in maintaining industrial peace); Abood, 431 U.S. at 222, 223 (union security is applicable in public sector because desirability of labor peace is no less important in public sector than in private sector); Street, 367 U.S. at 761-71 (collective bargaining, exclusive representation, and union security give unions the power to effectuate congressional policy of stabilizing labor relations); Hanson, 351 U.S. at 233-34 (Congress recognized union security as a stabilizing force in labor-management relations).
95. See supra note 66.
dissenting employees in their disputes with a union. Fair share provisions are strictly an internal union issue. The employer’s only involvement with the fair share issue is to accept a fair share provision in the collective bargaining agreement. After Hudson, however, public employers in the Seventh Circuit will have the burden of adjudicating union disputes. Also, as the district court noted, when the employer becomes the insurer of its employees’ constitutional rights, the employer can veto a union’s expenditures under the guise of protecting employee rights. Both employers and unions will therefore become more reluctant to include fair share provisions in collective bargaining agreements. This result is plainly inconsistent with Supreme Court precedent encouraging the use of union security.

The Seventh Circuit had better alternative procedures available to protect the interests of the union, the non-members, and the public employer. One such plan would, like the CTU plan, require the union to determine the fair share fee in advance. To invoke the review procedures, dissenters would notify the union of their objections and have their cases heard by neutral panels. Throughout the review, the union would bear the burden of proving that the fair share fee was reasonably calculated. If the objecting non-members successfully presented their case, the union would rebate the amount of impermissible expenditures already deducted and would reduce future deductions proportionately. Such a plan would properly balance the public policy interest in preserving union security with the dissenters’ first amendment interests. It would protect objecting employees from financing political causes they oppose without burdening the union’s statutory duty of fairly representing all employees in the bargaining unit. The procedure could be beneficially implemented without employer interference.

97. 573 F. Supp. at 1520 n.19; see also Metropolitan Edison Co. v. NLRB, 103 S. Ct. 1467, 1475 (1983) (if an employer could unilaterally define or proscribe union actions, it would give the employer considerable leverage over the manner in which the union performed its duties).
98. See supra text accompanying notes 21-55.
99. The Supreme Court has held that since unions possess the facts and records from which the fair share fee is calculated, the unions should bear the burden of proving that the calculation is fair. Allen, 373 U.S. at 122.
100. Another possible alternative exists in Illinois under the new Illinois Educational Labor Relations Act. ILL. REV. STAT. ch. 48, §§ 1701-1721 (1983). Section 11 of the new Act authorizes the employer and the union to negotiate fair share provisions in collective bargaining agreements. Section 5 creates an Illinois Educational Labor Relations Board (IELRB) consisting of three members appointed by the governor with the advice and consent of the Senate. The IELRB has the power to hear charges of unfair labor practices filed pursuant to Section 14. Presumably, under this new act, objecting non-members could file an unfair labor practice charge against both the employer and the union, charging that the union’s alleged impermissible expenditures violated their section 14 rights. The IELRB would then have the power to investigate the complaints and, if necessary, hold a complete administrative hearing. Section 16 then allows for judicial review of the IELRB’s findings. This process would seem to comply with the minimum constitutional standards required by Hudson, without creating the innumerable practical problems associated with imposing the burden on the public employer.
The Categorization of Expenses

With the Hudson decision, the Seventh Circuit became the first circuit subsequent to Ellis to hold that a union's fair share dues may not be used to finance "intermediate" expenses, which are defined as those expenses incurred in exclusive representation that are not germane to collective bargaining. The most troubling aspect of the Hudson decision is that public sector unions in the Seventh Circuit cannot charge non-members for expenses genuinely related to the costs of exclusive representation.

There are two views on the constitutionally permissible use of non-members' fair share fees. The first approach presumes that only political activities may not be financed by fair share fees. Under this view, a union can charge non-members for all activities except those purely political in nature. The question of the appropriateness of challenged expenditures under the first view is limited to the extent to which the union activities implicate serious first amendment concerns. The second view presumes that only those expenses directly related to the union's cost of contract negotiation and collective bargaining may be financed through the fair share fee.

101. 743 F.2d at 1199 (Flaum, J., concurring).

102. Intermediate expenses include expenditures incurred for social activities, union conventions and legal matters not directly related to contract negotiation and administration. R. Clark, Fair Share Agreements Following Ellis v. Brotherhood of Railroad & Airline Clerks: A Management Perspective (unpublished manuscript). Professor Clark also determined that the proportion of union expenditures on political and ideological activities amounts to less than 15% of a union's total expenditures.

103. See T. Haggard, supra note 7, at 139-40.

104. This suggests a division of expenditures into two categories: expenditures directly related to political activities and all other expenses. For examples of courts accepting this approach, see Robinson v. New Jersey, 741 F.2d 598, 609-10 (3d Cir. 1984), cert. denied, 105 S. Ct. 1228 (1985); Champion v. California, 738 F.2d 1082, 1085-86 (9th Cir. 1984), cert. denied sub nom, Champion v. Deukmejian, 105 S. Ct. 1230 (1985), and Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 761-62 n.17 (C.D. Cal. 1973), rev'd and remanded on other grounds, 533 F.2d 1126 (9th Cir. 1976). The district court in Seay suggested:

Dissenting employees in an agency fee situation should not be required to support financially union expenditures as follows:

One, for payments to . . . any candidate for public office . . . or

Two, for payments to . . . any political party or organization, or

Three, for the holding of any meeting or the printing or distribution of any literature or documents in support of any such candidate or political party or organization . . . .

As to expenditures for other purposes, regardless of their political nature, . . . I feel that they are sufficiently germane to collective bargaining to require dissenting employees who are subject to [union security] agreements to bear their share of that burden.


105. The second view identifies two categories of expenditures: (1) those expenditures directly related to the union's duty as collective bargaining agent; and (2) all others, including but not limited to those expenditures that are political or ideological in nature. For examples of courts accepting this approach, see Hudson, 743 F.2d at 1192-93; Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 91 L.R.R.M. 2339, 2342-43 (S.D. Cal. 1976), aff'd in part, rev'd in part, 685 F.2d 1065 (9th Cir. 1982), aff'd in part, rev'd in part, 104 S. Ct. 1883 (1984). The district court in Ellis listed the activities which dissenting employees could not be compelled to subsidize:

(1) Recreational, social and entertainment expenses for activities not attended by
surprisingly, the range of permissible expenditures varies widely under the two approaches. The Supreme Court has definitively rejected the latter approach and focused only on political union expenditures that impinge directly on first amendment rights. By implication, the Supreme Court has sanctioned a union's authority to charge for "intermediate" expenses.

Beginning with Hanson, the Supreme Court recognized that union security presented a wide range of first amendment problems. Accordingly, the Court held that fair share fees that covered expenses "within the realm of collective bargaining" did not violate dissenting employees' first amendment rights. Similarly, the Street Court was concerned solely with the union's use of exacted funds to support "political causes." Subsequently, in Allen and Abood, the Court held that there was no first amendment violation as long as unions used compelled fees only "in support of activities germane to collective bargaining." While lower courts initially split on the permissible scope of expenditures, the Supreme Court in Ellis rejected a narrow interpretation. In Ellis, the Court recognized that non-union employees were

management personnel of Western Airlines.

(2) Operation of a death benefit program.
(3) Organizing and recruiting new members for BRAC (Brotherhood of Railway, Airline and Steamship Clerks) among Western Airlines bargaining unit employees.
(4) Organizing and recruiting new members for BRAC and/or seeking collective bargaining authority or recognition for:
   (a) employees not employed by Western Airlines;
   (b) employees not employed in the air transportation industry;
   (c) employees no. employed in other transportation industries.
(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.
(6) Contributions to charities and individuals.
(7) Programs to provide insurance, medical and legal services to the BRAC membership or portions thereof, other than such programs secured for its salaried officers and employees.
(8) Conducting and attending conventions of BRAC.
(9) Conducting and attending conventions of other organizations and/or labor unions.
(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.
(11) Support for or opposition to proposed, pending or existing legislative measures.
(12) Support for or opposition to proposed, pending or existing governmental executive orders or decisions.

91 L.R.R.M. at 2342-43.
106. See infra text accompanying notes 115-18.
107. See supra note 102.
108. 351 U.S. at 236.
109. Id. at 238.
110. 367 U.S. at 750.
111. Allen, 373 U.S. at 121; Abood, 431 U.S. at 235.
112. See supra notes 43-44.
"free rider[s]" in union contracts. The Court also acknowledged the government's interest in requiring that non-union employees contribute to the costs of exclusive representation and that unions need "flexibility in [their] use of compelled funds." Noting that union security was itself an infringement on the first amendment, the Court perceived little additional infringement in allowing the union to charge for national conventions, social activities, and monthly publications. The Court held that union expenditures were constitutional if they were necessarily or reasonably incurred for the purpose of exclusive representation. The Court stated that, under this test, non-members could be charged not only for the direct costs of collective bargaining but also for activities or undertakings "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." Consequently, the Ellis test allows unions to charge non-members for a wide range of operating expenditures.

The Hudson panel, however, disregarded the Ellis test and took a narrow view of permissible union expenditures under a fourteenth amendment "liberty" analysis. Since the fundamental concept of liberty embodied by the fourteenth amendment due process clause incorporates the liberties guaranteed by the first amendment, the Seventh Circuit recognized that due process protections must accompany any deprivation of constitutionally protected liberties. Yet, the Hudson court inexplicably determined that the scope of procedural protections was different under the first and fourteenth amendments.

113. "Free riders" are employees who gain the benefits of the union's duty of fair representation without paying their proportionate share of the costs. See, e.g., Transcript of Proceedings, Presidential Emergency Board No. 98, appointed pursuant to Exec. Order No. 10306, Nov. 15, 1951, p. 150 (statements of George M. Harrison, spokesman for the Railway Labor Executives' Association) (a "free rider" is a "guy who drags his feet, a term which is applied by unions to non-members who obtain, without cost to themselves, the benefits of collective bargaining procured through the efforts of the dues-paying members"); see also S. GOMPERS, 12 AMERICAN FEDERATIONIST 221 (1905) ("Nonunionist[s] who reap the rewards of union efforts without contributing a dollar or risking the loss of a day, are parasites. They are reaping the benefit from the union spirit, while they themselves are debasing genuine manhood.").

114. 104 S. Ct. at 1896.
115. Id. The Court acknowledged that union security provisions represented a significant infringement on dissenting employees' first amendment rights by forcing them to financially support a group with which they may disagree. The Court, however, believed that this first amendment infringement was justified by the government's interest in industrial peace. Id. (citing Abood, 431 U.S. at 222; Street, 367 U.S. at 776 (Douglas, J., concurring); Hanson, 351 U.S. at 238).
116. 104 S. Ct. at 1892.
117. Id.
118. See also Abood, 431 U.S. at 221 (union's duty as exclusive bargaining representative encompasses difficult tasks requiring the expenditure of time and money).
119. 743 F.2d at 1194.
120. Id. at 1193.
121. The Seventh Circuit stated that "the two grounds we have suggested for regarding the plaintiff's procedural challenge as properly brought under section 1983—free speech and due
The court first found that the non-members' "free speech" interests required protection by reasonable review procedures in order to prevent fair share fees from being used for political purposes.122 To this extent, *Hudson* is consistent with prior Supreme Court decisions. The court further held, however, that due process considerations required that the review procedures make reasonably certain that the fair share fee was used solely for activities directly related to collective bargaining, regardless of whether they were political or ideological in nature.123 The court believed that this would ensure that dissenters were not deprived of their fourteenth amendment "liberty of association" without due process of law. The Seventh Circuit admitted, however, that the fourteenth amendment interest advanced in *Hudson* was the same substantive right guaranteed by the first amendment: specifically, the freedom not to associate.124 The Supreme Court recognized in *Ellis* that dissenters' first amendment freedom not to associate is adequately protected by prohibiting unions from spending compelled funds on political or ideological activities.125 The *Ellis* analysis, therefore, should apply equally to the right not to associate under the fourteenth amendment.

The Hudson court did not explain why the scope of impermissible expenditures should differ according to the constitutional amendment upon which the analysis is based. The Seventh Circuit's decision is therefore problematic. Non-members have an undisputed constitutional right under both the first and fourteenth amendments to be free from charges that finance union political activities. The Seventh Circuit's extension of this prohibition into the realm of potentially legitimate union functioning, however, ignores the Supreme Court's acceptance of union security and compulsory financing of a broad range of union activities.

**The CTU Advance Reduction Remedy**

The final issue addressed in *Hudson* was the validity of the CTU remedy. The Seventh Circuit in *Hudson* held that a union may not set a fair share fee which may later prove to be too high and use the excess payment interest-

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122. The court stated that: "[F]ree speech . . . implies that the public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." *Id.* at 1194.

123. *Id.* "[D]ue process . . . implies that the procedure must make reasonably sure that those employees' wages will not be used to support any union activities that are not germane to collective bargaining, whether or not the activities are political or ideological." *Id.* (emphasis in original).

124. *Id.* at 1193. The court noted: "The liberty in question is freedom of association." *Id.* The court then said that the freedom of association had "a negative as well as a positive dimension. 'Freedom of association . . . plainly presupposes a freedom not to associate,'" *Id.* (quoting *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3252 (1984)).

125. 104 S. Ct. at 1896. See also supra text accompanying notes 113-18.
free until it is later refunded. In so holding, Hudson clearly departs from Supreme Court precedent. Although the CTU plan did not include interest bearing escrow accounts, it provided an advance reduction scheme and rebate procedure. The disjunctive language in Ellis permits a union to choose an advance reduction scheme "and/or" an interest bearing escrow account. It is not necessary, under Ellis, for a union to employ both suggested alternatives. Had the Seventh Circuit adhered to a literal reading of Ellis, the absence of an escrow system would not have been enough to render the whole CTU program unconstitutional.

The Seventh Circuit's invalidation of the CTU remedy is also inconsistent with the policies articulated in past Supreme Court decisions that addressed the remedy issue. In Street, Allen, Abood, and Ellis the Supreme Court recognized that any remedy for excess fair share fees would need to balance individual rights against legitimate union functioning.

126. Hudson, 743 F.2d at 1196.
127. Beginning in Street and Allen, the Supreme Court suggested that a practical remedy for employee objections to the union's use of agency fees would be to refund that portion of the deducted fee representing political expenditures, and to reduce future deductions proportionately. Street, 367 U.S. at 774-75; Allen, 373 U.S. at 122. In Street the Court suggested two possible remedies: an injunction against the union's expenditure of non-members' dues on political causes, and a refund of the portion of the dues earmarked for impermissible expenditures. Street, 367 U.S at 774-75.

Similarly, the Court in Allen indicated the appropriateness of the Street remedies and stated that a reduction of future dues would further protect non-members' rights. 373 U.S. at 122. The Court noted that this type of remedy could be enforced with a minimum of administrative difficulty and without the danger of unduly burdening legitimate union functioning. Id.

The Abood Court found that a satisfactory remedy must both prevent dissenters from having to subsidize political activities and preserve the union's ability to require all employees to contribute to the cost of collective bargaining activities. 431 U.S. at 237.

Finally, in Ellis the Court took a definitive stance and struck down what it termed a "pure rebate" remedy. 104 S. Ct. at 1890. The pure rebate remedy struck down in Ellis allowed the union to charge non-members full union dues, months later refunding that portion of the dues expended for impermissible purposes. Id. In invalidating the pure rebate scheme, the Court emphasized that it had not lost sight of the necessity of balancing individual rights and legitimate union functioning. Id. at 1890, 1896. The Ellis court suggested that as alternatives to the pure rebate remedy, an advance reduction of dues "and/or" interest-bearing escrow accounts would place only the "slightest additional burden on the union." Id. at 1890.

128. Although the CTU plan provided for advance reduction, there was no escrow provision for disputed funds. After the plaintiffs in Hudson commenced their suit, the CTU began to voluntarily place dissenters' agency fees in escrow. Hudson, 743 F.2d at 1197. Although the Seventh Circuit approved of this step, it stated that it would be better if the CTU turned management of the escrow account over to a bank or trust company. Id.

129. For example, the New Jersey statute in Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), cert. denied, 105 S. Ct. 1228 (1985) incorporated only one of the suggested alternatives outlined in Ellis. 741 F.2d at 602. The dissent in Robinson argued that for the statute to be constitutional, it must incorporate both of Ellis' protective mechanisms. Id. at 618. The majority, however, disagreed and correctly interpreted Ellis to allow for "two" acceptable alternatives. Id. at 612 n.12. Since the statute in question satisfied one of the two alternatives, the Third Circuit held that "[t]his protection is all that Ellis mandates." Id.

130. See generally Street, 367 U.S. at 771-72 (striking down injunction restraining enforcement of union shop agreement because the injunction unduly interfered with union's ability to spend compelled funds necessary to effectuate congressional plan of having all employees who benefit share in costs of collective bargaining); Allen, 373 U.S. at 123-24 (recognizing that no remedy
was concerned that a pure rebate system would compel non-members to lend money to the union for objectionable purposes. According to the Supreme Court, an advance reduction "and/or" an interest bearing escrow account sufficiently protected dissenters' first amendment rights without unduly burdening legitimate union functioning. The CTU advance reduction remedy was consistent with Ellis and effectuated the proper balance. The advance reduction was carefully calculated and even erred in favor of non-members. As an additional safeguard, the union provided a rebate remedy. Those dissenters who proved that an error in the union's calculation had occurred were entitled to a rebate of the amount already impermissibly deducted plus a proportionate reduction in future payments.

Acknowledging that the CTU remedy, unlike the one disapproved in Ellis, provided for advance reduction, the Hudson court inexplicably found such a difference "immaterial." The court's unwillingness to distinguish between the remedies was apparently based on its displeasure with the CTU's pre-deduction percentage. Observing that the discount in Hudson was "only 5%," the court implied that this amount was not a sufficient cushion to protect non-members' rights. The court's conclusion ignores the district court's finding that the union's careful calculation militated against an unreasonably high fair share determination. Also, it is not clear from the court's opinion whether even the addition of an escrow system would have saved the CTU remedy. By invalidating the CTU remedy, the Seventh Circuit ignored the Ellis decision and failed to properly balance the competing interests necessary to effectuate the policies underlying the doctrine of union security.

would be appropriate if it infringed on the union's right to expend compelled fees); Abood, 431 U.S. at 237 (an appropriate remedy must prevent compulsory subsidization of ideological activities without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities); Ellis, 104 S. Ct. at 1890 (advance reduction of dues and/or interest bearing escrow accounts place only the slightest additional burden on unions).

131. 104 S. Ct. at 1890.
132. Id.
133. The district court found that the CTU calculated the proportion of rebatable expenditures to the lowest possible denominator. Even though the CTU's impermissible expenditures amounted to 4.5946 percent of full union dues, the CTU rounded the figure off to 5 percent, thus giving up approximately $16,000 in favor of non-members. This, the CTU reasoned, would provide an extra cushion to cover inadvertent errors in calculation. 573 F. Supp. at 1509 n.4. See also Allen, 373 U.S. at 122 (in view of the difficult accounting problems in calculating the fair share fee, Court did not require absolute precision in such calculation).
134. 743 F.2d at 1196. The court stated:

It is true that in Ellis the union had made no effort to determine in advance what fraction of its dues was not pertinent to collective bargaining and therefore should not be charged to objecting non-members. But that is an immaterial difference, at least on the facts of this case.

Id.

135. Id. at 1196-97. The court noted that in Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), cert. denied, 105 S. Ct. 1228 (1985), the Third Circuit found that a 15% advance reduction in non-members' dues provided a sufficient cushion. Yet the court stated, "[t]he advance reduction was only 5 percent." Id.

136. See supra note 133.
Impact

The *Hudson* decision is particularly troubling because it represents a decided defeat for public sector unionism in the Seventh Circuit. The court's decision cripples the effectiveness of union security as a method of preventing the "free rider" problem. The future application of public sector union security is therefore in doubt, at least in the Seventh Circuit.

The court's decision frustrates the process of effective public sector labor relations in several ways. The public employer now has the duty of ensuring that a union does not violate employees' constitutional rights. This duty gives the employer leverage to veto specific union allocations and expenditures, thereby creating a serious imbalance in bargaining power. This imbalance will complicate the public sector bargaining process and jeopardize the delicate equilibrium in labor-management relations. After *Hudson*, the employer has the affirmative duty of establishing procedures which protect dissenters' constitutional rights. This duty exposes employers to potential legal liability, and many public employers in the Seventh Circuit may therefore find these duties too onerous. As a result, they may accordingly decline to accept fair share provisions in collective bargaining agreements.

Even unions that successfully negotiate fair share provisions into labor contracts can no longer charge non-members for intermediate expenses. As a result, non-members' dues will differ significantly from full union dues. As the amount of non-members' dues decreases, the financial incentive for individuals to refrain from official union membership increases. Thus, there will be more non-members and proportionately less money for the union to effectively carry out its statutory duty of exclusive representation. Such financial instability jeopardizes meaningful collective bargaining by encouraging the employer to be obstinate in hopes of forcing a favorable agreement from a weak union.

The *Hudson* decision also exacerbates the free rider problem. Since the union must continue to function as the exclusive representative of all employees, the court's decision allows non-union employees to enjoy the benefits of the bargaining process while union members are forced to assume most of the financial burden of administration. The result again is financial instability for the union, since the union members may not be able to adequately finance the negotiation and administration of the collective bargaining agreement.

Conclusion

Although the Supreme Court has accepted union security in the public sector, several issues remain unresolved as evidenced by the Seventh Circuit's

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137. *Hudson*, 743 F.2d at 1192, 1194.
138. See supra note 97 and accompanying text.
139. *Hudson*, 743 F.2d at 1191, 1194.
140. See supra note 102 and accompanying text.
141. See Blair, supra note 11, at 189.
recent decision in *Hudson v. Chicago Teachers Union Local 1*. In *Hudson*, the court fashioned procedures that place excessive burdens on the public employer. The employer must now be the insurer of its employees’ constitutional rights in disputes with the union. This duty gives the public employer excessive power in the bargaining process. Also, to ensure against potential *Hudson* liability, employers must now scrutinize union allocations and expenditures. This gives the public employer a veto power over the union’s use of non-members fees on activities which the employer believes are impermissible. These results, coupled with the *Hudson* court’s new limitations on the scope of permissible expenditures, frustrate the collective bargaining process. Finally, due to the increased burden of reviewing dissenters’ claims, public employers may potentially refuse to incorporate fair share provisions in collective bargaining agreements. Not only would this further exacerbate the bargaining process, it is inconsistent with prior Supreme Court decisions which expressly encourage the use of union security.

*Joel Martin Alam*