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Labor Relations

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Agency and union shops¹ are congressionally and judicially sanctioned² components of labor relations. Union shops, which require union membership of every employee, are firmly established vehicles for collective bargaining and representation.³ Agency shop agreements, accepted as permissible variants of union shops,⁴ do not require union membership, but do compel employees to pay a service charge to help defray the union’s collective bargaining expenses.⁵ Absent conflicting federal regulation, individual states may enact legislation either requiring or barring

1. Agency shop agreements generally require nonunion employees to pay a service charge equivalent to the union initiation fee plus periodic installments equivalent to the union dues. Union membership, however, is not required. *See* Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959). Union shop agreements provide that no one will be employed who does not join the union within a short time after being hired.

2. *See* Labor Management Relations Act, § 8(a), 29 U.S.C. § 158(a)(3) (1970), which provides in pertinent part: "[N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . ." *See* NLRB v. General Motors Corp., 373 U.S. 734, (1963), in which the Court noted that "[a]s far as the federal law [is] concerned, all employees [can] be required to pay their way . . . ." 373 U.S. at 741.

3. The membership requirement is sufficiently satisfied by payment of dues. Active participation in union activities is not required. *See* 93 CONG. REC. 4887 (1947) (comments of Senator Taft); NLRB v. General Motors Corp., 373 U.S. 734, 741-43 (1963) (29 U.S.C. § 158(a)(3) is applicable to agency shop provisions); Radio Officers’ Union v. NLRB, 347 U.S. 17, 41 (1953). *Cf.* NLRB v. Milk Drivers, 531 F.2d 1162 (2d Cir. 1976) (inactive member entitled to earn livelihood); NLRB v. Aclang, 466 F.2d 558, 562 (5th Cir. 1972) (interpreting 29 U.S.C. § 158(a)(3) as requiring management not to encourage or discourage effective union membership). *See generally* Fraser & Johnston Co. v. NLRB, 469 F.2d 1259 (9th Cir. 1972).


agency or union shop membership as a condition of employment. With the growth of agency and union shops, however, nonunion employees have challenged the expenditure of their compulsory dues to finance political and ideological causes with which they disagree. Specifically, they have alleged that the compulsory financial support of unions infringes upon their first amendment rights.

To protect nonunion members’ constitutional freedoms, the Supreme Court has ruled that agency shop assessments required of nonunion members cannot be used for political purposes which those employees oppose. The Court has, nevertheless, maintained that collective bargaining agreements which condition employment on agency or union shop membership do not, on their face, impinge upon constitutionally protected rights of association. Recently, in *Abood v. Detroit Board of Education,* the Supreme Court extended the constitutionality of agency shop clauses to the public employment sector, holding that public employees may be compelled to pay union service charges for legitimate collective bargaining activities. The Court added, however, that it would be impermissible for the unions to use these funds for political causes to which nonunion employees objected.

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6. 29 U.S.C. § 164(b) provides in pertinent part, “Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State . . . in which such execution or application is prohibited by State . . . law.” See Retail Clerks v. Schermerhorn, 373 U.S. 746 (1963) (section 164(8) encompasses both agency shop and union shop agreements).


8. See, e.g., International Ass’n of Machinists, 367 U.S. at 749.


10. Id. at 234.

11. One commentator defines collective bargaining as a process of establishing terms and conditions of employment in a written agreement negotiated between the public employer and a union acting as exclusive representative of the employee in the bargaining unit. Summers, *Public Employee Bargaining: A Political Perspective,* 83 YALE L.J. 1156 n.1 (1974).

12. 431 U.S at 235. The growth of public sector unions and their consequential power
D. Louis Abood challenged the validity of an agency shop clause, which required that he pay a teachers' union a service charge equivalent to the regular dues of the union members, alleging that a substantial part of the charge would be expended for political and ideological programs which he opposed. Granting the defendants' motion for summary judgment, the trial court held such clauses constitutional, thus barring Abood's claim. The Michigan Court of Appeals upheld the trial court's determination of constitutionality, and the Supreme Court of


Abood also touches on the problem of establishing appropriate fund arrangements by limiting union expenditure of compulsory dues. Suggested solutions include either granting a rebate of that proportion of the protestant's dues spent on causes adverse to him or, alternatively, enjoining expenditure by the union of the proper percentage of the nonunion members dues which would be used for political causes. See Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 120-22 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740, 774-75 (1961). Discussion of the various remedies suggested by the Court is beyond the scope of this article. It is worth noting, however, that in Abood the Supreme Court mentioned the possible appropriateness of deferring further judicial proceedings on this issue since it seemed that an internal union remedy might prove adequate in this case. 431 U.S. at 242.

13. Defendants were the Detroit Federation of Teachers and the Detroit Board of Education. They had concluded a collective bargaining agreement effective from July 1, 1969 to July 1, 1971, containing provisions for an agency shop. Id. at 211-12.

14. The action was a consolidation of two similar suits, Warczak v. Detroit Bd. of Educ., 73 L.R.R.M. 2237 (Cir. Ct. Wayne County 1970) and Smigel v. Southgate Community School Dist., 388 Mich. 531, 202 N.W.2d 305 (1972). Warczak was a class action brought on the same grounds as Abood two months before the agency shop clause was to become effective. The Wayne County Circuit Court dismissed Warczak for failure to state a claim upon which relief could be granted, 73 L.R.R.M. 2237 (Cir. Ct. Wayne County 1970), and the plaintiffs appealed. While this appeal was pending, the Michigan Supreme Court ruled in Smigel that state law prohibited public sector agency shops. 338 Mich. 531, 202 N.W.2d 305 (1970). Accordingly, Warczak was vacated and remanded. On remand Warczak was consolidated with Abood. 431 U.S. at 213-14.

15. See 60 Mich. App. 92, 97, 230 N.W.2d 322, 327. The trial court noted that subsequent to the inception of Abood's action, Michigan had statutorily authorized agency shops in the public sector. In 1973, following Smigel, the state legislature enacted 1973 Mich. Pub. Acts, No. 25, Mich. Comp. Laws § 423.210(1)(c) as an amendment to its Public Employment Relations Act. The section provides in part, "Nothing 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 . . . a service fee . . . ." The court declared the statute to be retroactive. 60 Mich. App. at 96, 230 N.W.2d at 325.

16. The court reversed, however, on the issue of retroactive application. Id. at 102, 230 N.W.2d at 327. In addition, the appellate court noted that Michigan law permitted union expenditures for lobbying and political support. Consequently, the court recognized that had the teachers alerted the union to their objections, subsequent expenditure by the union of those employees' dues, notwithstanding their protest, could have been regarded as a violation of the teachers' first amendment rights. Because the union had not been notified of the teachers' objections, the court remanded, denying the requested injunction
Michigan denied review. Abood then turned to the United States Supreme Court which noted probable jurisdiction. 17

On this appeal 18 the Court upheld the validity of agency shop agreements for public employees 19 but ruled that a state cannot constitutionally compel public employees to contribute to union political activities which they consider objectionable. 20 Accordingly, the decision of the appellate court was vacated and the case remanded to determine whether specific union activities were outside the scope of collective bargaining and should thus be termed "political". 21 Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred but asserted that since public-sector collective bargaining was political in nature and state adopted union shop agreements could be likened to "coercive governmental regulation," the constitutional rights of the employees required a substantial protection which the Court had declined to afford them. 22 Justice Rehnquist supported Justice Powell's reasoning, arguing that he which would have barred the union from collecting any service charge from nonunion members. Id. The Supreme Court noted that since the appellate court's judgment on the retroactivity issue did not undermine the trial court's holding, the purpose of its remand was unclear. 431 U.S. at 216 n.8.

17. 425 U.S. 949 (1976). The Supreme Court accepted the appeal, although neither the 1971 agreement containing the challenged agency shop clause nor a subsequent 1973 agreement containing substantially the same provision was operative. The Court reasoned that the portion of the plaintiffs' claim challenging the constitutionality of compulsory service charges survived despite expiration of the agreements, since some of the plaintiffs in both Warczak and Abood either refused to pay the charge or paid under protest. 431 U.S. at 216-17 n.9.

18. The Supreme Court considered whether an agency shop arrangement in the public sector "violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees." Id. at 211. The Court distinguished between the agency shop provision at issue in Abood and a union shop agreement which required membership. It declined to address the validity of a union shop agreement in the public sector since no such agreement was under consideration. Id. at 217 n.10.

19. Id. at 234.

20. Id. at 235. The Court unanimously held that compulsory financial support for union political activities was unconstitutional, because such compelled support would violate the teacher's first and fourteenth amendment rights. The first amendment guarantees freedom from congressional interference with an individual's right to associate. Similarly, the fourteenth amendment guarantees protection from state infringement of association.

21. Since Abood reached the Supreme Court on the pleadings, the Court could not determine whether the teachers' rights had been impugned. The record contained only general allegations without evidentiary proof of specific political union activities. Id. at 236-37.

22. Id. at 254-55. Justice Powell felt that Abood should be distinguished from prior decisions since the state, not private industry, had negotiated and adopted its own agency shop agreement. Consequently, he concluded that the agreement should be subjected "like any other enactment of state law . . . to the constraints that the Constitution imposes on coercive governmental regulation." Id. at 253 (footnote omitted). See also cases cited note 58 infra.
could find no distinction between compelling political party membership as a condition of employment and requiring public employee contribution to union collective bargaining costs.\textsuperscript{23} And finally, in a third concurrence, Justice Stevens noted that because the case had reached the Court on the pleadings, the majority opinion was not determinative of the appropriate remedy to ensure nonideological expenditures of union assessments from nonunion employees.\textsuperscript{24}

\section*{I. AGENCY SHOP CONSTITUTIONALITY AND FIRST AMENDMENT RIGHTS—TWO CONFLICTING PRINCIPLES}

The necessity for union service fee agreements was recognized by Congress in 1947 when it enacted the Labor Management Relations Act.\textsuperscript{25} Aware that serious abuses of compulsory unionism had aroused public support for elimination of the closed shop,\textsuperscript{26} Congress nevertheless determined that union bargaining activities involved substantial expense which nonunion members should justifiably help defray. Without union security provisions, many employees who shared the benefits of union negotiating efforts would refuse to share the costs.\textsuperscript{27} Congress concluded, therefore, that union shop agreements were an acceptable method of eliminating “free riders”\textsuperscript{28} and at the same time securing financial assistance for a union’s bargaining efforts. In addition, the lawmakers saw the agreements as promoting labor stability by eliminating conflicting and confusing employee demands.\textsuperscript{29} Since congressional-

\begin{itemize}
  \item \textsuperscript{23} \textit{431 U.S.} at \textsuperscript{243-44}.
  \item \textit{Id.} at \textsuperscript{244}.
  \item \textit{61 Stat. 136}. \textit{See note 2 supra}.
  \item \textit{S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947)}. Closed shop agreements provide that employers will hire only union members. \textit{29 U.S.C.} § \textsuperscript{158(a)(3)} provides in pertinent part, “[I]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage . . . membership in any labor organization.” \textit{See also H.R. REP. NO. 245, 80th Cong., 1st Sess. 33 (1947) which states that} “[t]he bill prohibits what is commonly known as the closed shop . . . .” \textit{and S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947) which states, “It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated.”}
  \item \textit{See S. REP. NO. 105, 80th Cong., 1st Sess. 607 (1947); H.R. CONF. REP. NO. 105, 80th Cong., 1st Sess. 41 (1947).}
  \item \textit{See S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947). “[T]hese amendments remedy the most serious abuses of compulsory union membership and yet . . . [promote] stability by eliminating [free riders]. Free riders are nonunion employees who pay none of the union’s collective bargaining expenses but still receive any benefits resulting from union negotiations. See also comment of Congressman Madden, 93 Cong. Rec. 3441 (1947).}
  \item \textit{See S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947). See generally 93 Cong. Rec. 4194 (1947). “[T]he pending bill retains . . . the power of collective bargaining . . . and if [the employees] can get a majority [to select their representative] all the other employees}
ly permissible union shop agreements would prohibit employee discharge from union membership for any reason other than failure to pay dues and assessments, the abuses associated with compulsory unionism would be eliminated. Consequently, the Act contains language permitting union shops under federal law.

Judicial opinion regarding the validity of union shop membership has reflected congressional reasoning. In one of the earliest such judicial expressions, *Railway Employees' Department v. Hanson,* the Supreme Court upheld the constitutionality of a union shop provision, notwithstanding a state right-to-work law which barred union affiliation as a condition of employment. In sustaining the agreement entered into have to keep quiet and permit the representatives of the majority to bargain for all of them." Id.

30. See, e.g., 93 CONG. REC. 4193-94 (1947) (remarks of Sen. Taft). Congress did not want unions to have indiscriminate power to have employees fired:

So, also, if a union fires a man for some reason other than nonpayment of dues, if the employee is willing to pay his dues to the union, then the union cannot compel the employer to fire him because he is no longer a member of the union, through some action of the union in expelling him. That seems to be only common sense and common justice.

The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.

... We intend to retain all the benefits of the labor legislation which has been enacted since the twenties, but in the bill we correct injustice after injustice which has developed in the administration of labor laws.

Id.

31. See note 2 supra.


33. *Id.* at 238. Article XV, § 13 of the Nebraska Constitution, as implemented by NEB. REV. STAT. § 48-217 (1947), prohibited both closed shops and denial of employment due to lack of union affiliation. Union shop agreements were authorized however by the Railway Labor Act, § 2, Eleventh, 45 U.S.C. § 152 (1951), which provides that any carrier may agree to a union shop which requires payment of dues or initiation fees as a condition of employment, notwithstanding state law to the contrary. The Railway Labor Act, unlike the Labor Management Relations Act does not have the equivalent of the latter's § 164(b). See note 6 supra. Rather, the Railway Labor Act is a preemptive federal statute which leaves no room for states to limit unions through right-to-work legislation.

The Court studied the history of union shop provisions and concluded that notwithstanding any state law, the Supremacy Clause of the United States Constitution and judicial determination had established that federal regulation of interstate industry took precedence over state law. 351 U.S. at 232. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
between an interstate railroad and its employees' union, the Court denied that first amendment rights were being violated. It asserted that since the evidence indicated only that compulsory assessments from nonunion members had been used for collective bargaining purposes on behalf of all employees, the provision therefore infringed no first amendment rights. The Court did state, however, that if assessments were used to force ideological conformity with union goals, rather than to promote collective bargaining, first amendment considerations would be involved, and it noted that Hanson would not prejudice any future decision regarding the constitutionality of union political expenditures.

International Association of Machinists v. Street provided the Court with an opportunity to address the precise issue suggested, but left unresolved, in Hanson. In Street, railroad machinists sought to enjoin enforcement of a union shop agreement requiring them to join a union and pay initiation fees and periodic dues to retain their jobs. The employees argued that the fees were being used to support political causes with which they disagreed, thus violating their first amendment right of free association. Unfortunately, the Supreme Court avoided confronting the first amendment question. Rather, the majority turned to the Railway

34. 351 U.S. at 235. Congressional rationale for authorization of union shop agreements under the Railway Labor Act closely parallels the rationale used for enactment of the Labor Management Relations Act. Union shop provisions were held valid under both acts to discourage free riders. See H.R. REP. NO. 2811, 81st Cong., 2d Sess. 4 (1950).

35. 351 U.S. at 233-38. Absent contrary evidence that the funds were either used as a cover to force ideological conformity or that the union attempted to enforce any other reprehensible condition of employment, the Court felt no need to address the first amendment issue. "We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work ... does not violate ... the First ... Amendment." Id. at 238.

36. Id. at 235, 238.

37. Id. at 238.


39. The evidence clearly indicated that a substantial part of the compelled funds were used to finance campaigns of federal and state officials the employees opposed and to promote the propagation of ideologies and concepts with which they disagreed. Id. at 744. The Georgia trial court, therefore, entered an injunction against enforcement of the union shop agreement holding that it violated the employees' first amendment rights. The Georgia Supreme Court affirmed, 215 Ga. 27, 108 S.E.2d 796 (1959), ruling that § 2, Eleventh of the Railway Labor Act was unconstitutional since it permitted an "unwarranted" invasion of freedom of association and political freedom. See International Ass'n of Machinists v. Street, 367 U.S. 740, 745 n.3.

The United States Supreme Court was asked to address the constitutionality of the union shop provision under which part of the exacted funds would be used to support political and economic programs nonunion employees opposed, but declined to do so. See note 43 & text accompanying notes 41-44 infra.

40. In Lathrop v. Donohue, 367 U.S. 820, 829 (1961) (plurality opinion), decided the same day as Street, the Supreme Court avoided deciding a similar question, ruling that
Labor Act for the source of its decision, reasoning that the Act was intended to alleviate the financial burdens suffered by unions in their collective bargaining and grievance adjustment efforts and that it prohibited political expenditures from compulsory union dues. The constitutional issue thus avoided, the Court reaffirmed its holding in Hanson validating union security arrangements for collective bargaining purposes.

Although the Hanson and Street Courts specifically upheld union shops, agency shops have similarly received judicial approval. In NLRB v. General Motors, the Court accepted agency shop arrangements because expenditures by the Wisconsin State Bar Association could not be classified as purely political, a clause requiring all practicing attorneys to pay annual $15.00 dues was valid. The Court affirmed the Wisconsin Supreme Court, see 10 Wis. 2d 230, 102 N.W.2d 404 (1960), without passing on its conclusion that an attorney could be constitutionally compelled to support political activities he opposed. 367 U.S. at 847-48. The Supreme Court specifically reserved that issue, since the record did not indicate the proportion of funds allegedly spent on political causes.

The Court acknowledged that in Street, unlike Hanson, there was a showing of political expenditure, 367 U.S. at 748, but after an examination of the legislative history of the Railway Labor Act, the Court concluded that Congress did not intend to provide "unions with a means for forcing employees, over their objection, to support political causes which they oppose" by enacting § 2, Eleventh. Id. at 764, 768. See also Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963). Rather, upon reviewing the Act's legislative history, the majority concluded that the constitutional issue could be avoided by construing the purpose of the statute. 367 U.S. at 749-50.

The Street majority opinion provoked a strong dissent from Justices Black, Frankfurter, and Harlan. Justice Black asserted that the Court had rewritten the Railway Labor Act instead of interpreting it and chided the Court for avoiding the obvious constitutional issue. Id. at 784-86 (Black, J., dissenting). He argued that the Act as correctly interpreted, abridged first amendment rights by compelling political support from unwilling employees, commenting "[W]hether there is such abridgment depends not only on how the law is written, but also on how it works." Id. at 789 (Black, J., dissenting). Justice Black cited the Act's legislative history to indicate that the legislation did not limit union expenditure to collective bargaining. Id. at 784-785 n.8 citing Hearings on S. 3295, 81st Cong., 2d Sess. 136-37 (1950); Hearings on H.R. 7789 Before the House Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 160 (1951); 104 CONG. REC. 11214-24, 11330-47 (1958); 96 CONG. REC. 1749-50 (1951).

In a second dissent, Justice Frankfurter, joined by Justice Harlan, stated that the legislative history of the Act demonstrated that Congress, fully cognizant of union political activities, was not concerned with limiting such activity. 367 U.S. at 800-02 citing 96 CONG. REC. 17049-50, Hearings on S. 3295 Before the Subcomm. of the Senate Comm. on Labor and Public Welfare, 81st Cong., 2d Sess. 173-74 (1951). Justice Frankfurter said, "[f]or us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life..." 367 U.S. at 812-14 (Frankfurter, J., dissenting).

See note 1 supra (union shops).

Id. (agency shops).

rangements as viable alternatives to the union security provisions it had sustained in the railroad union cases. General Motors had refused to negotiate for an agency shop provision, alleging that Indiana law prohibited conditioning employment on union membership. The Supreme Court, however, reasoned that since the single membership requirement of the provision was payment of union initiation fees and dues and that since active union membership, available on a nondiscriminatory basis, was optional with each employee, the proposed agreement conformed to the membership standard defined by Congress. The Court concluded that the membership requirement of the proposed agency shop substantially differed from union membership barred by Indiana law and upheld its validity.

Although it had upheld union security agreements in private industry, the Court was aware that employees' associational rights could be infringed if unions were to use compulsory dues for political purposes which nonmembers find objectionable. Notwithstanding the Court's hesitation in Hanson and Street to acknowledge union political involvement in areas unrelated to collective bargaining, those decisions evidence the Court's desire to safeguard first amendment political rights for private employees. Consequently, permissible compulsory union membership in private enterprise has been "whittled down to its financial core" to the extent necessary to promote improved labor relations. The Court determined that this minimal membership requirement sufficiently protected constitutional rights of privately employed individuals.

The Court has been equally protective of public employees' constitutional guarantees. Established legal principle holds that absent a com-

48. See also Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746 (1963).
49. In Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959), the Indiana intermediate appellate court had ruled that an agency shop arrangement which compelled payment of union dues and initiation fees did not violate Indiana's right-to-work law. The proposed agreement in General Motors, 373 U.S. at 736, was similar to that sustained in Meade, 159 N.E.2d at 409-10.
50. See 373 U.S. at 743; note 3 supra.
51. 373 U.S. at 745.
53. See text accompanying notes 36-37 supra. See also International Ass'n of Machinists v. Street, 367 U.S. 740, 764 (1961).
55. See, e.g., City of Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). The Court upheld the right of a nonunion teacher to oppose a proposed "fair share" clause at an open Board of Education meeting, although the clause which required payment of union dues by union and nonunion teachers was considered a proper subject for collective bargaining. Id. at 177. The Court reasoned that the teacher was not only an employee, but also a concerned citizen whose opinion could not be strictly construed as "bargaining." Id. at 175-77.
Compelling state interest, public employment cannot be conditioned on the surrender of first amendment rights. 56 Most recently, in Elrod v. Burns, 57 the Court ratified prior decisions which determined that public employment cannot be conditioned upon an employee's political beliefs. 58 The Elrod plaintiffs, who had lost their jobs because they were neither affiliated with nor sponsored by the incumbent political party, 59


Political belief and association have also been well protected by the first amendment. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977) (state may not compel exhibition of an ideological message on automobile license plate); Kusper v. Pontikes, 414 U.S. 51 (1973) (voter cannot be locked into political party by restrictive state primary election law); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (flag salute not required in public schools). See also Buckley v. Valeo, 424 U.S. 1 (1976) (limiting campaign contributions violates freedom of speech and association); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (premature charge of first amendment violation if disclosure of association's membership not sought); Bates v. Little Rock, 361 U.S. 516 (1960) (municipal ordinances requiring disclosure of NAACP membership lists encroach on freedom of association); NAACP v. Alabama, 357 U.S. 449 (1958) (compelled disclosure of membership in dissident organization violates freedom of association); United States v. Rumely, 345 U.S. 41 (1953) (Congress has limited power under the first amendment to grant committee power to investigate lobbying).

59. Cook County tradition dictated that when a newly elected sheriff assumed office he would replace noncivil service employees on his staff with loyal party members. A recently elected Democratic sheriff replaced three of the petitioners who were Republican noncivil service employees because of their political preference. A fourth employee was threatened with imminent discharge.
sought to enjoin local patronage practices. Affirming the Seventh Circuit's order for injunctive relief, the Supreme Court ruled it unconstitutional to discharge employees for their political preferences alone. The Court suggested that such patronage practices threatened to eliminate political opposition essential to the democratic process by allowing certain employees to be discharged solely because their political belief might cause them to express opposition to their superior's actions. Thus under a patronage system, public employees could be removed from their jobs to prevent them from exercising their constitutionally protected rights of belief and association. Because public employees had neither the time nor the finances to advance both individual political causes and those required for employment, the Court determined that forced financial party support and forced party allegiance restrain freedom of belief and association.

Therefore, the Court concluded that "political belief and association [which] constitute the core of those activities protected by the First Amendment" were not proper conditions of public employment.

The Court has consistently held that the Constitution guarantees association with the political party of one's choice and bars any government official from attempting to influence that choice. \(66\) Elrod reflects judicial insistence on political associational freedom. The Hanson and Street decisions, which upheld private enterprise compulsory agency shop association for bargaining purposes, suggest a similar judicial desire to protect employees' political rights.\(^67\) Although the Elrod Court specific-

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60. 427 U.S. 347, 350 (1976). The trial court had denied the injunction, ruling that failure of the employees to show irreparable injury necessitated a finding that they had failed to state a claim upon which relief could be granted. The Seventh Circuit reversed and remanded, instructing the district court to enter injunctive relief. 509 F.2d 1133 (7th Cir. 1975). Certiorari was granted by the Supreme Court, 423 U.S. 821 (1976), which then affirmed the appellate court.


62. Id. at 359 n.13, 369-70. Pertinent to its analysis was the determination that "a democratic system . . . [indispensably depends] on the unfettered judgment of each citizen on matters of political concern." Id. at 372. The Court required "only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue. . . ." Id.

63. Id. at 355-56.

64. Id. at 356 (footnote omitted).

65. See id. at 357. The court suggested, however, that patronage dismissals for those in policy making positions might be permissible in order to guarantee unobstructed implementation of new administration policies. Id. at 367.

66. See, e.g., Elrod v. Burns, 427 U.S. 347, 356 (1976) citing West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . ." See also cases cited note 58 supra.

67. See text accompanying notes 36-37 supra. See also International Ass'n of Machinists v. Street, 367 U.S. 740, 764 (1961).
ally addressed the issue of state patronage practices, the Court recognized that as government employment becomes increasingly pervasive, its power to "starve political opposition" increases.\textsuperscript{68} The Court's reasoning compelled its determination that forcing financial partisan support threatens our democratic system of government.\textsuperscript{69} Its unbridled endorsement of agency shops which compel financial membership does not ostensibly conflict with its acknowledgment that requiring political financial support can strangle freedom of political association. Such conflict should result only from a finding that agency shop negotiating activities were political. But collective bargaining in the public sector, unlike that in private industry, is political.\textsuperscript{70} Therefore, in order to justify agency shop provisions in the public sector, the Court would have to reconcile the conflict between its sanction of union security agreements for collective bargaining purposes and its insistence upon free political association. \textit{Abood} presented the Court with the opportunity to weigh its stance concerning government employees' constitutional rights against its contention that permitting agency shop agreements for collective bargaining purposes does not curtail nonunion members' first amendment protections.\textsuperscript{71} Its validation of public sector agency shops, however, represents a denial of mutually exclusive principles.

\textbf{II. ABOOD—A POLITICALLY EVASIVE DECISION}

The Court's decision in \textit{Abood} rested on two premises—that judicial precedent urged validation of the public sector agency shop\textsuperscript{72} and that government employees do not significantly differ from their private counterparts.\textsuperscript{73} The majority reasoned that government interests advanced by the Michigan provision were similar to those promoted by federal labor law and affirmed in \textit{Hanson} and \textit{Street}. In those cases, promotion of labor stability by eliminating discordant bargaining demands and free riders had been held to justify imposition of union shop membership under the Railway Labor Act.\textsuperscript{74} Similarly, the \textit{Abood} Court, anticipating

\begin{itemize}
\item \textsuperscript{68} Elrod v. Burns, 427 U.S. 347, 356 (1976).
\item \textsuperscript{69} Id. See id. at 368-69.
\item \textsuperscript{70} See, e.g., Project, supra note 12; text accompanying notes 93-102 infra.
\item \textsuperscript{71} The constitutional issue avoided in \textit{Hanson} and \textit{Street} was made pertinent in \textit{Abood} by the ruling of the Michigan Court of Appeals that state law sanctioned "the use of nonunion members' fees for purposes other than collective bargaining." 60 Mich. App. at 99, 230 N.W.2d at 326. See note 16 supra.
\item \textsuperscript{72} "[I]nsofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, [the \textit{Hanson} and \textit{Street}] decisions of this Court appear to require validation of the agency-shop agreement before us." 431 U.S. at 225-26. See text accompanying notes 74-75 infra.
\item \textsuperscript{73} 431 U.S. at 229-30. See text accompanying note 76 infra.
\item \textsuperscript{74} See text accompanying notes 33 & 42 supra. See also Oil, Chemical & Atomic
probable conflict and confusion at the bargaining table in the absence of cohesiveness, recognized the need for agency shops in the public sector, concluding that "[t]he desirability of labor peace is no less important [there] nor . . . the risk of 'free riders' any smaller."75

After determining the need for public sector agency agreements, the majority found that public and private employees possessed common needs and skills, as well as a desire for the advantages of collective bargaining. Consequently, they found no distinction between public and private employees, other than the nature of their employer,76 and concluded that this difference alone did not give public employees "weightier First Amendment interest[s]" than their private counterparts.77 Thus, the majority considered appropriate the Hanson-Street rationale that union shop contribution to labor relations outweighed the possibility of first amendment impingement78 and justified extension of union security arrangements to the public employment sector. The provision of the Michigan statute found constitutional in Abood specifically established an agency shop the validity of which had been determined in NLRB v. General Motors Corp.79

Admittedly, labor-related considerations in Abood might merit the majority's desire to promote exclusive representation for issues germane to collective bargaining. As the majority indicated, opposing individual demands for improved conditions could result in conflict rather than stability. In addition, without compulsory dues requirements, nonunion employees would receive benefits without paying the costs of obtaining them. Certain aspects of Abood, however, make it properly distinguishable from Hanson and Street. Justice Powell clearly indicated these differences in his concurrence, faulting the majority's reliance on Hanson and Street to legalize agency shops for government employees.80 In

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75. 431 U.S. at 224.
76. Id. at 229-30, quoting Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 CIN. L. REV. 669, 670 (1976). "The uniqueness of public employment is not in the employees nor in the work performed . . . ."
77. 431 U.S. at 229.
78. See id. at 224-25.
79. 373 U.S. 734 (1963). Hanson and Street involved union shop provisions. See note 18 supra. But, as the Court indicated in Abood, the earlier cases were concerned simply with financial support requirements rather than compulsory membership. Therefore, the Court found it unnecessary to distinguish between the two types of provisions. 431 U.S. at 217 n.10.
80. Id. at 244-55. (Powell, J. concurring).
Powell's opinion, the Hanson Court had sanctioned union shop agreements pursuant to the Railway Labor Act because it concluded that government participation in enacting the legislation resulted in no first amendment violation. His argument appears valid. A reading of Hanson implies that the Act merely authorized private establishment of union shops for collective bargaining purposes. Justice Powell further suggested that the Street Court had reiterated the permissive nature of the Railway Labor Act and had, in addition, emphasized that Congress never intended to provide unions with a means for forcing employees to support political causes they oppose. Thus, in both instances the unions were free to impose or reject union shop provisions. In contrast to the purely private agreements of Hanson and Street, the provision in Abood had been negotiated and adopted by the Detroit Board of Education, a state agency. Consequently, membership in the teachers' union was state-compelled and the Hanson-Street analysis negating government action which compelled association under the Railway Labor Act is clearly inapplicable. As Justice Powell indicated, the permissive nature of the Railway Labor Act, which enabled execution of private union security provisions, was absent in the Michigan statute, which compelled the execution of public union security provisions. Consequently, first amendment concerns in Abood were distinguishable from those in the cases on which the majority relied.

In Hanson and Street, the employer was not the government and consequently a government was not conditioning employment on a prohibitive loss of associational

81. Id. at 245-46.
82. 351 U.S. at 231. "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter union shop agreements." Id. (emphasis added). See also International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961).
83. 431 U.S. at 247-48. See International Ass'n of Machinists v. Street, 367 U.S. at 768: "§ 2. Eleventh [does not vest] the unions with unlimited power to spend exacted money. . . . Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes."
84. Justice Powell asserted that the Hanson Court did not lose sight of the fact that the union shop provision of the Railway Labor Act was not government compelled, but rather had emphasized its permissive nature. See 431 U.S. at 245-46 (Powell, J., concurring).
In response to Justice Powell's argument, the majority asserted that nothing in Hanson suggested that a union shop agreement involving indirect government action would be less offensive to the first amendment than the provision in Abood, stating, "[T]he First Amendment . . . forbids any abridgement by government whether directly or indirectly." Id. at 227 n.23 citing International Ass'n of Machinists v. Street, 367 U.S. at 777 (Douglas, J., concurring).
85. Id. at 252-53.
86. See text accompanying notes 76-83 supra.
In *Abood*, the government, acting as an employer, required adherence to an agency shop provision.

The majority's failure to distinguish between government authorization of private union security provisions and government-compelled financial support for public sector unions resulted in its denial of a first amendment infraction. The fallacy of the majority's analysis becomes more evident upon studying the Court's conclusion that the compulsory service charge imposed on the teachers could not be used for political activities unrelated to collective bargaining. The Court reasoned that compelling nonunion employees to support objectionable political causes would infringe upon their constitutional rights.

The Court thus reaffirmed settled policy, recently reiterated in *Elrod*, that government employment cannot be conditioned on the loss of the first amendment right of political association. The Court had accepted, however, the principle that public employee unions might aptly be termed political and that "decisionmaking by a public employer is above all a political process."

The public employer provides public sector unions with their unique political strength, for it is responsible to the electorate. Labor policy decisions directly affect the electorate, which ultimately finances the...
employer's expenditures through taxes and supports or rejects the employer's policies at the polls. Frequently, government policies, such as budget decisions, are legislative determinations made in response to anticipated or existing community needs.\textsuperscript{94} Ideological determinations, such as educational policies, are made by official government representatives and are shaped by community desires.\textsuperscript{95} Should the electorate disagree with policies established for them by the government employer, they can replace the officials responsible for the employer's policy decisions.\textsuperscript{96} But the strength of the electorate is derived from the solidarity of the various public interest groups of which it is comprised.\textsuperscript{97}

Unionized government employees enjoy a special position in the electorate because they can exercise their political influence as a cohesive public interest group to obtain advantageous policies or to "place persons in positions of power" who are receptive to their outlook.\textsuperscript{98} Public officials, frequently indebted to public unions for their political position, are the same officials who sit across the bargaining table from the union representative\textsuperscript{99} or are members of the legislative body which ratifies the bargaining agreement.\textsuperscript{100} Respect for the source of their political promi-

\textsuperscript{94} See Summers, supra note 11, at 1159.
\textsuperscript{95} Id. at 1156, 1177-1183.
\textsuperscript{96} See Comment, supra note 90, at 274.
\textsuperscript{97} See Project, supra note 12, at 949. "[T]here is never a debt to the general public per se; the debts are only owed to various organized interest groups." See also Summers supra note 76, at 674. Public employee unions are not necessarily a more powerful public interest group than any other, but they usually have sufficient funds and personnel to funnel to their political efforts to assure them substantial success. Project, supra note 12, at 946. The Project study comprehensively discusses union lobbying activities and efforts to get sympathetic voters to the polls, and provides examples of politician-union courtships during elections. A significant distinction between the union as an interest group and other public interest groups, however, is that after elections "the unions and the elected officials must still bargain together and work together to keep the government running." Id. at 947.
\textsuperscript{98} 431 U.S. at 257 (Powell, J., concurring). Justice Powell compared public sector unions to traditional political parties in their objectives. He suggested that both were interested in influencing government decision making and obtaining the election of persons favorable to their policies. See Project, supra note 12, at 948, which proposes that "unions are now deeply involved in... [politics to further] their own... self interest by electing officials who will be responsive to their needs." See also Shaw & Clark, The Practical Differences Between Public and Private Sector Collective Bargaining, 19 U.C.L.A. L. Rev. 867, 872 (1972) in which it is suggested that "end runs"—direct appeals to a legislative body which circumvent the bargaining table—are an effective and often employed method by which public sector unions obtain favorable legislation and conditions. The method is effective because legislators frequently come from organized labor or have political ties to union groups.
\textsuperscript{99} See note 97 supra. See also Summers, supra note 76, at 684.
\textsuperscript{100} City charters or state constitutions frequently establish proper negotiation procedure. Distinct from private collective bargaining, the public negotiator's agreement could necessitate legislative ratification. See Summers, supra note 76, at 670-71. "[E]ven in
nence must influence their policies toward union demands. The subjects of public sector bargaining negotiations are, by their nature, political since they either reflect voter sentiment or affect the entire community. While determinations as to wages, hours, class size, student discipline and public services are working conditions appropriate for bargaining, they can result in either increased taxes or altered availability of services. These issues which affect community life, and thus might reasonably evoke community reaction, are political. The public union employee, as a member of the community, may not agree with union goals on these issues. Reason would seem to dictate, therefore, that to require payment of a service charge to support public union collective bargaining not only compels political association as a prerequisite for public employment, but also demands compulsory political association abhorrent to the first amendment.

The *Abood* majority in fact acknowledged the probable difficulty courts would face distinguishing public union collective bargaining “for which contributions [might] be compelled” from “ideological activities unrelated to collective bargaining” for which compulsory financial support would be unconstitutional. It is difficult, therefore, to justify the Court’s failure to recognize the political strength of public sector unions and its belief that compulsory contributions by public employees to the cost of exclusive union representation works no greater infringement on their constitutional freedoms than permitting union shops in the

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101. “[T]here is doubt that an elected official who has received considerable support from an employee union could subsequently be objective in dealing with matters of concern to that union.” *Project*, *supra* note 12, at 923 (footnote omitted).

102. See notes 94-96 & accompanying text *supra*. See also *Project*, *supra* note 12, at 1018, which suggests that there is a constant tension between citizen and union demands which causes “[t]he ultimate decision on wages and employment . . . [to depend] . . . on an assessment by elected officials of the relative political strengths of union, taxpayer and other interest groups.” *Cf.* *Summers*, *supra* note 76, at 673. In the *Summers* article, the author concludes that “one of the principal justifications for public employment bargaining is to counteract the overriding political strength of other voters who constantly press for lower taxes and increased services.” *Id.* at 675.

103. See cases cited in note 58 *supra*. See also the concurring opinion of Justice Rehnquist, in which he finds the *Abood* majority’s reasoning contrary to that of the *Elrod* plurality, which required that each citizen be able to act and believe according to his own wishes. 431 U.S. at 242-43 (Rehnquist, J., concurring).

104. *Id.* at 236.

105. Although the Court declined to acknowledge the relevancy of its decision upholding the Hatch Act, ch. 410, 53 Stat. 1147 (1939) (currently codified at 18 U.S.C. §§ 591-613 (1970)), it is noteworthy that recognition of the political power of government employees was responsible for Hatch Act legislation.
private sector. The majority erroneously presumes that freedom of association will be preserved because dissenters may publicly make known their objections to union ideologies. Given the unique political potential of public employee unions both to secure programs favorable to them as well as to promote the election of sympathetic legislators, public agency shop provisions may stifle protesters. By assuring public union support for those in power who favor union policies, such provisions effectively curtail political opposition. Causing the voice of the dissenter to be inconsequential could effectively eliminate the dissent. It would seem to follow, therefore, that notwithstanding the availability of a public forum to nonunion dissenters, compelling agency shop membership of public employees can be likened to governmentally compelled political association. By curtailing political opposition, union security agreements thus have the precise effect of the patronage practices deplored by the Elrod holding.

In his concurrence Justice Rehnquist maintained that the Abood opinion failed to preserve the requisite Elrod principle that a citizen must constitutionally be permitted "unfettered judgment . . . on matters of political concern." The public employee may dissent, but, as the Court reasoned in Elrod, the average government employee generally lacks finances to support his personal political position. Thus, the service charge imposed to further collective bargaining efforts detracts from the employee's own political and ideological beliefs, should they differ from

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106. See note 77 & accompanying text supra. Several commentators have suggested, contrary to the Abood Court's reasoning, that failure to accord recognition to the political strength of public sector unions is equivalent to failure to recognize the dangers of government authorization of agency shops. See Clark, supra note 91, at 680-681:

[T]oo little attention has been paid to political aspects of public sector collective bargaining and the potential problems and distortions of the political process that will result if remedies are not instituted . . . the extension of broad collective bargaining rights to public employee unions who participate actively in the election of officials with whom they negotiate at the bargaining table gives public sector unions a disproportionate amount of power which will distort the political process.

But see Summers, supra note 76, at 675. It is noteworthy that in Michigan the rule is that when a municipal collective bargaining agreement conflicts with an otherwise valid municipal ordinance, the ordinance yields to the agreement. 431 U.S. at 253 (Powell, J., concurring). This would seem to partially substantiate Justice Powell's conclusion that "[t]he collective bargaining agreement to which a public agency is a party . . . has all of the attributes of legislation for the subjects with which it deals." Id. at 252-53 (Powell, J., concurring).


108. See note 106 supra.


110. Id.
the union’s, and is "tantamount to coerced belief" and association.\textsuperscript{111} It would seem that Justice Rehnquist properly concluded that there is no constitutional distinction between a governmentally imposed requirement that a public employee belong to a particular political party to maintain his position and a similar requirement that public employees contribute to collective bargaining expenses of labor unions.\textsuperscript{112}

In sustaining the validity of public sector agency shop provisions, the \textit{Abood} Court granted public sector unions extensive control over government decisionmaking policies\textsuperscript{113} and imposed seemingly unprecedented restrictions on the exercise of the public employee’s individual political rights. The state’s interest in labor stability, cited by the majority as a justification for public sector agency shops, does not seem sufficiently compelling to warrant such a sacrifice of individual first amendment guarantees. The majority in \textit{Abood} apparently disregarded its own statement that "in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State."\textsuperscript{114}

\section*{III. Conclusion}

\textit{Abood} represents an unsuccessful attempt to reconcile two counter-vailing policies—freedom of public employee political association and the constitutionality of agency shop agreements. Relying on traditional reasoning that stability of labor relations provided by exclusive representation outweighs possible first amendment infraction the Court determined that agency shop provisions for the public sector are constitutional. The logic which supported private agency shop validity is, however, unconvincing when applied to public union labor relations. Freedom of political association is a significantly greater concern for nonunion public employees, who often must finance union political activity in the guise of collective bargaining.\textsuperscript{115} Although the \textit{Abood} Court specifically declared that service fees exacted from nonunion members could not be applied to union political activities,\textsuperscript{116} careful examination of the nature and prac-

\footnotesize{
\begin{itemize}
\item \textsuperscript{111} Elrod v. Burns, 427 U.S. 347, 356.
\item \textsuperscript{112} 431 U.S. at 243-44 (Rehnquist, J., concurring).
\item \textsuperscript{113} See note 196 \textit{supra}. It has been asserted that the traditionally low rate of voter participation in local elections could work to the advantage of public unions which are effective at the polls. \textit{Project, supra} note 12, at 1039.
\item \textsuperscript{114} 431 U.S. at 235.
\item \textsuperscript{115} This article does not purport to discuss the necessity for collective bargaining for public employees. It should be noted, nevertheless, that commentators generally agree that it is essential to counteract the taxpayers’ battle against increasing expenditures. See, \textit{e.g.}, Summers, \textit{supra} note 11, at 1167; Summers, \textit{supra} note 76, at 674-75.
\item \textsuperscript{116} Left open was the question of a proper standard for determining collective bargaining as opposed to political activity. Since the case reached the Court on the
\end{itemize}}
tices of unions reveals that collective bargaining activities are largely political, a fact which the majority deemphasized. The Court appears to impose association as a prerequisite for state employment because the majority declined to recognize that sanctioning public agency shops could be fairly equated with curtailing the constitutional right of political association previously guaranteed public employees.

An ancillary implication of the majority's attitude toward public sector unions is possible public employee union domination of state legislation. The potential for such union power presently exists in the symbiotic relationship enjoyed by elected policy-making officials and the unions. Officials responsible for government labor policy are naturally responsive to demands made by those who have assured or are most apt to assure their political success. This commonplace practice has a unique significance for public sector unions which, unlike other public interest groups, have additional access to governmental policy-makers through collective bargaining. These officials and union representatives must face each other to negotiate. The agreements they reach are political determinations which affect the entire community. Thus, absent an opposing interest group equally equipped to exert political influence on these officials, public union collective bargaining agreements may tend to become established state labor policy.

The Court's holding that agency shop assessments could not be used for political purposes which nonunion employees oppose, eliminated one of the uncertainties left by Hanson and Street. In extending agency shop constitutionality to public sector unions, however, the majority seems to have concluded that collective bargaining, which is essentially political, is not political when it is collective bargaining. The net result of Abood then is not a clarification of judicial policy regarding union security provisions, but rather increased confusion regarding public employees' constitutional rights.

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pleadings and lacked an evidentiary record, the Court declined to address the question, leaving the final determination to the Michigan court on remand. 431 U.S. at 236-37; see note 21 supra.

117. See note 106 supra.

118. See notes 97, 98, & 101 supra.
COMMUNICATIONS—The FCC, as an Alternative to Divestment of Western Electric, Ordered Greater Autonomy for the Bell Operating Companies in Purchasing Decisions. In re AT&T, 64 F.C.C.2d 1 (1977).

One of the inevitable side effects of large scale industrialization is the development of the vertically integrated industry, that is, an industry in which plants producing goods in the various stages between the raw material and the finished product are centrally owned and controlled by a holding company. The steady growth of these companies has occurred in response to the significant economic benefits accruing from integration. Primarily, the vertically integrated firm is freed from dependence on others for raw materials and sales outlets. In addition, it is able to coordinate anticipated demand for its product with the production of raw materials needed to meet the demand. These factors promote manufacturing efficiency which results in reduced waste of raw materials, labor, and managerial expertise in the production and distribution processes. The cost of production is thus reduced and the product can be offered to consumers at a price lower than can be provided by independent firms. Vertical integration, however, may also result in a loss of competitive benefits to the consumer. Competition theoretically assures that products will be manufactured at the least possible cost. But vertically integrated industries reduce competition by restricting the access of independent manufacturers and purchasers to the firms within the vertically integrated industry and by restricting the ability of integrated firms to purchase and sell outside the vertically integrated structure.

To curb the loss of these competitive benefits, the government has attempted to control private and public vertically integrated industries through antitrust laws and regulation respectively. The traditional remedy in antitrust cases has been elimination of the integrated structure by divestment of the firm which was reducing competition. Regulatory agencies, however, have allowed retention of the firm so long as it is part

1. A holding company is any company which is in a position to control or materially influence the management of one or more other companies by virtue, in part at least, of its ownership of securities in the other company or companies. BLACK'S LAW DICTIONARY 865 (rev. 4th ed. 1968).
3. Some integrative benefits are also unique to the type of industry involved. For a listing of integrative benefits accruing to the Bell System, see note 20 infra.

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of a vertically integrated public utility\(^5\) structure. Neither approach is satisfactory since divestment results in the loss of integrative benefits while retention of the plant continues the loss of competitive benefits. Recently, in *In re AT&T*,\(^6\) the Federal Communications Commission (FCC) employed a novel approach to retain both integrative and competitive benefits by ordering maximum separation short of divestment of the Bell System telecommunications equipment manufacturer from the Bell operating telephone companies which purchase the equipment.

The Bell System is a wide-ranging conglomerate consisting of the American Telephone & Telegraph Company (AT&T), AT&T’s telephone subsidiaries, which are Bell’s operating telephone companies,\(^7\) the Western Electric Company, and Western Electric subsidiaries.\(^8\) In addition, Western Electric is wholly owned by AT&T and is the Bell System’s manufacturing and supply affiliate.\(^9\) Overall direction and control of the Bell System is provided by AT&T, the holding company, through its General Department.\(^10\) The relationships among the various enterprises are further strengthened through a series of contracts between Western and the operating telephone companies under which the latter are not required to purchase from Western Electric although Western assumes the obligation of providing them with equipment and supplies.\(^11\) Because of peculiarities in the process of deciding to make or purchase a product, the great bulk of Western Electric’s sales, however, are made directly to the operating companies.\(^12\) The FCC found that this interrela-

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5. A public utility is a business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service. *See* BLACK, *supra* note 1, at 1395. This distinguishes a public utility from a private firm and overshadows the fact that both may be privately owned. In addition, economies of scale which result in increases in efficiency comparable to increases in firm size are particularly pronounced in public utilities. As a result, these firms are generally given exclusive franchises by the government. But, in return, the government reserves the right to regulate the operations of such monopolies to prevent abuses of the monopoly power it has granted.

6. 64 F.C.C.2d 1 (1977) (Final Decision).

7. AT&T holds most of the stock in 21 telephone operating companies and a substantial portion of the stock of two others in the United States. *In re AT&T*, 64 F.C.C.2d 131, 143 (1976) (Initial Decision) (Kraushaar, J., presiding).

8. *Id.* at 143.

9. *Id.* at 144. The telecommunications equipment market is composed of two segments: 70% for Western Electric and 30% for independent equipment manufacturers. *Id.* at 159-60.

10. The General Department funds Bell Laboratory’s research and provides centralized advice and assistance to the Bell operating telephone companies through license service contracts on financing, patent services, and regulatory matters. *Id* at 17.

11. *Id.* at 163.

12. *Id.* at 144.
tionship inherently biased equipment procurement by the operating companies. Thus, the FCC concluded that independent equipment manufacturers were placed at a competitive disadvantage to Western Electric in supplying the operating companies, and, therefore, that the prices the operating companies paid for equipment were kept artificially high.

Although the internal relationships of the Bell entities and the prices they charge each other for their various goods and services are not subject to review by the FCC, rates charged to consumers must be approved by that body. As a result of declining profits, AT&T filed for interstate rate increases on November 20, 1970. Accordingly, an investigation was undertaken by the FCC into the legality of the rate charges of AT&T and associated Bell System companies. Among the number of inquiries made, particular emphasis was given to the relationship of Western Electric to the operating telephone companies because of concern that the relationship did not contribute to the efficiency of the Bell operation.

The FCC assigned the case to Administrative Law Judge Kraushaar who found, in the Initial Decision, that the integrated Bell structure provided certain benefits that weighed against divestment, despite a

13. See notes 82-85 & accompanying text infra.
14. Thirty days prior to the effective date of rate changes, every common carrier is required to notify the FCC of the changes and to publish the new rate schedule. Upon complaint, or under its own initiative, the FCC may then conduct a hearing on the lawfulness of the rate change. If the FCC finds the change unlawful, it may suspend the rate change and prescribe just and reasonable charges. Communications Act of 1934, 47 U.S.C. §§ 203-05, 403 (1970).
15. In addition to pre-hearing discovery conducted by the Commission’s trial staff (see note 22 & accompanying text infra), the Commission awarded outside contracts for the study of various aspects of the Bell System. See note 78 infra.
16. 64 F.C.C.2d at 134-35. The investigation was initiated by a Commission Order of Jan. 20, 1971 (27 F.C.C.2d 149), and by Memorandum Opinion and Order of Jan. 21, 1971 (27 F.C.C.2d 151).
17. The investigation was divided into two phases. Phase One was limited primarily to the determination of a fair rate of return on Bell’s interstate markets. 64 F.C.C.2d at 135. This casenote discusses Phase Two, which was designated as an investigation into all other aspects of Bell’s interstate revenue requirements, the rate structure for Bell’s Message Telecommunications Service, and the integrated corporate structure of the Bell System. Id.
18. The Commission may delegate its hearing functions to an administrative law judge when necessary to the proper functioning of the FCC and to the prompt and orderly conduct of its business. In every case of adjudication which has been so delegated, the judge is required to prepare an initial decision. 47 U.S.C. §§ 155(d)(1), 409(a) (1970).
20. The judge found that ratepayers had generally benefited from Western Electric’s manufacturing activities being subordinate to the needs of the Bell operating companies. Specifically, he found that new configurations and systems were introduced whenever it appeared that these would benefit the operating companies, without regard to Western
less than fully competitive market in the telecommunications equipment field. In an effort to balance the integrative benefits of the Bell System with the need for improving competition in the equipment market, the judge ordered greater autonomy from Western Electric for the Bell operating telephone companies when procuring equipment and supplies.21

Simultaneous with the delegation of the matter to Judge Kraushaar, the Commission appointed a trial staff22 to conduct part of the investigation and to make recommendations.23 The trial staff recommended to Judge Kraushaar, prior to his order, that because of certain inefficiencies in Western and the Bell System24 and because of the potential for anticompetitive abuse as well as equipment market foreclosure by Bell,25 Western Electric be divested. After the judge issued his order, the trial staff recommended its implementation only as an interim step until divestment of Western Electric could be effectuated.26 The FCC, however, found the investigation inadequate to support any decision on divestment and upheld Judge Kraushaar’s order.27 In so doing, the FCC found that the judge’s analysis of integrative and competitive benefits supported his decision to order greater autonomy in lieu of divestment.

Electric’s interest as a manufacturer in regular production with a minimum of design changes. Judge Kraushaar also found that Western maintained additions and replacement parts for up to 40 years, thereby providing a stable source for the operating companies, and that Western Electric was obligated to gear up in advance of actual equipment and material orders in order to supply estimated future requirements of the operating companies. Id. at 151.

21. Judge Kraushaar’s orders provided, among other things, that:
   (a) Bell shall submit . . . measures for the implementation of its policy, which shall include greater autonomy (centrally enforced) of the operating telephone companies of the Bell System in the acquisition of telecommunications equipment from all available sources;
   (b) Bell shall likewise adopt . . . formal procedures for the objective evaluation of general trade products on a continuing basis and institute specific procedures to insure a free-flow of requirements and product compatibility information and data between and among its components and the general trade.

Id. at 501-02.

22. The trial staff was independent of both the Commission and Judge Kraushaar. Its members were drawn from the Common Carrier Bureau of the Commission and from outside consultants. Id. at 4.

23. The trial staff was employed to separate the investigating and prosecuting functions of the hearing from the review function of the administrative law judge as the Communications Act requires. 47 U.S.C. § 155(d)(8) (1970).

24. See notes 81-83 & accompanying text infra.

25. 64 F.C.C.2d at 8.

26. Id.

27. Id. at 10, 44-45.
I. CONTROLLING VERTICALLY INTEGRATED INDUSTRIES IN THE PUBLIC AND PRIVATE SECTORS

The primary goal of antitrust litigation against private holding companies has been to increase competitive benefits to the public. Initially, the antitrust laws were invoked only against corporate mergers that resulted in horizontal monopolies and not against mergers that resulted in vertical monopolies. Finally, in 1957, the antitrust laws were invoked against vertical corporate mergers in United States v. E.I. du Pont de Nemours & Co. Du Pont was a supplier of automotive finishes and fabrics to General Motors Corporation. Between 1917 and 1919, du Pont purchased a twenty-three percent stock interest in the automotive giant. This acquisition enabled it to become entrenched as General Motors' primary supplier, resulting in a substantial lessening of competition in the automotive finishes and fabrics market. To alleviate this situation, the government sued, charging that the stock accumulation violated sections one and two of the Sherman Antitrust Act and section seven of the Clayton Act. Reversing the district court's dismissal of the complaint,

28. A horizontal monopoly consists of several plants, under one management, engaged in the same kind of business which would, if they were under independent management, compete with each other. See MURAD, supra note 2, at 51.

29. To deal with monopolies based on sheer size, Congress enacted a series of antitrust laws, primarily the Sherman and the Clayton Antitrust Acts. The Sherman Act, passed in 1890, prohibits combinations in restraint of interstate and foreign commerce and forbids monopolies and attempts to monopolize. 15 U.S.C. §§ 1-7 (1970). The Clayton Act, passed in 1914, supplements the Sherman Act and prohibits local price discrimination, tying contracts which forbid a buyer to use goods which compete with those of the seller, and interlocking directorates. 15 U.S.C. §§ 12-27 (1970). The antitrust laws were not invoked against vertical mergers until 1957 when vertical monopolies began to restrain competition. Problems with vertical monopolies have mirrored the growth of corporations to mammoth proportions in the last several decades.


31. The primary issue was whether du Pont's commanding position as General Motors' (GM) supplier of fabrics and finishes had been achieved through competitive effort or through acquisition of GM's stock. Id. at 588-89. Even though du Pont had obtained the commanding position as GM's supplier, the Court noted that neither company had overlooked considerations of price, quality, and service, and that the executives had acted in the best interests of their own companies. The Court found these factors irrelevant, however, because intent to monopolize is not necessary to violate the Clayton Act. Id. at 606-07.

32. 15 U.S.C. §§ 1, 2 (1970). "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970). Section 2 makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . ." 15 U.S.C. § 2 (1970).


That no corporation engaged in commerce shall acquire, directly or indirectly,
the Supreme Court found that du Pont's acquisition of the stock had resulted in the creation of a monopoly in a vertical supplier-customer relationship. However, the Court did not discuss or recognize the benefits of the vertical integration. Rather, the Court simply ruled that section seven of the Clayton Act, prior to its amendment in 1950, applied to vertical as well as horizontal mergers. This ruling was based on the Court's review of the legislative history of the Act which indicated that Congress intended section seven to cover the corporate acquisition of the stock of any corporation, competitor or not, which restrained commerce in any community or tended to create a monopoly of any line of commerce. On remand, the district court selected a "pass through" of voting rights as a more effective remedy than divestment. Once again, the government appealed and the Supreme Court reversed, ordering du Pont to give up its General Motors stock. The Court noted that divestment was the traditional and most effective remedy for antitrust violations. Moreover, divestment was believed to be substantially easier to oversee than the proposed "pass through" method. Signifi-

35. 353 U.S. at 598-606.
36. Section 7 was amended to clarify its applicability to vertical as well as horizontal mergers. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949).
37. 353 U.S. at 591-92.
38. 177 F. Supp. 1 (N.D. Ill. 1959). The district court invited the government and amici curiae to submit plans to remedy the violations. The principal feature of the government's proposed plan was a requirement that within 10 years du Pont divest itself of its GM stock. See United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 319 (1961). Du Pont objected to the harsh income tax consequences of divestment and proposed its own plan for relief, the salient feature of which was a "pass through" of voting rights. Thus, du Pont would retain all attributes of ownership of the GM stock except the right to vote which would be "passed through" to du Pont stockholders. Id. at 320. The district court had chosen the "pass through" remedy because it would have less serious tax and market consequences for du Pont and GM stockholders. Id. at 320-21.
39. The "pass through" remedy was intended to restrict contact between du Pont and GM officers thereby preventing any preferential relations between the two. The remedy was based on the assumption that the du Pont shareholders who voted the GM stock would not vote as a block. 177 F. Supp. at 39-42.
41. Id. at 328-33.
42. A "pass through" of voting rights would require policing which would probably involve the courts and the government more deeply in the regulation of private affairs than a simple order of divestment. In addition, the Court found it likely that in the "pass through" plan, du Pont stockholders would vote their shares in such a way as to induce GM to favor du Pont, thus rendering the remedy ineffective. Id. at 331, 334.
cantly, the Court ignored the effect of divestment in eliminating the benefits of vertical integration.\footnote{43}

In contrast, the benefits of vertical integration have long been recognized and taken into account by regulatory agencies and the judiciary in regulating public utilities such as the Bell System. As with private holding companies, public utilities have been limited in the extent of their holdings, but the limitations have been ordered specifically with the benefits of vertical integration in mind. \textit{North American Co. v. SEC}\footnote{44} and \textit{SEC v. New England Electric System}\footnote{45} both limited permissible holdings to one vertically integrated public utility system. North American was a holding company which controlled competing electric and gas utilities in a horizontal monopoly. Pursuant to the Public Utility Holding Company Act of 1935,\footnote{46} the Securities and Exchange Commission (SEC) ordered North American to divest its gas utilities and to retain only those securities connected with the primary integrated electric system.\footnote{47} North American appealed and the court of appeals affirmed the SEC's orders.\footnote{48} The Supreme Court also rejected North American's challenge and upheld the constitutionality of section eleven of the Holding Company Act.\footnote{49} The Court reasoned that under the commerce clause, Congress has the legislative power to allay its concern that the extension of public utility holding companies might not reflect the advantages of integration.\footnote{50} The Court found that this power was expressed in section eleven of the Act and in an exception to this section which permits retention of additional integrated systems by the holding company only if they are relatively small, located close to the primary

\footnote{43} Justice Frankfurter, in dissent, noted that the district court's overriding concern had to be the protection of the public interest, which would include capturing integrative benefits. \textit{Id.} at 359. He also argued that the public interest could be protected by ordering divestment only when remedies less harsh and as effective as divestment were not available. \textit{Id.} at 364.
\footnote{44} 327 U.S. 686 (1946).
\footnote{45} 384 U.S. 176 (1966).
\footnote{47} \textit{See} 327 U.S. at 690.
\footnote{48} 133 F.2d 148 (2d Cir. 1943).
\footnote{49} 327 U.S. at 703-05.
\footnote{50} \textit{Id.} In § 1(b)(4) of the Holding Company Act, Congress specifically found that the national public interest, the interest of utility investors and of utility consumers might be adversely affected "when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties." \textit{Id.} at 703.

Congress concluded from extensive studies made prior to passage of the Act that the economic advantages of a holding company at the top of a sprawling unintegrated system are not commensurate with the resulting economic disadvantages. \textit{Id} at 708. For example,
system, and unable to operate economically\(^5\) after the loss of substantial integrative benefits.\(^5\)

Interpreting this exception was the central issue in \emph{New England Electric System}, in which the Supreme Court upheld the SEC's construction of section eleven.\(^5\) New England Electric was a holding company, similar to North American, controlling both gas and electric utilities.\(^5\) The SEC had ruled that section eleven required a showing that the independent operation of an additional system would cause serious impairment of that system through the loss of integrative benefits enjoyed through the retention of control by the holding company. New England Electric was unable to show that the gas companies could not be economically operated independently of it. Consequently, the SEC ordered divestment of the gas utilities, reasoning that any loss of economies would be offset by the competitive benefits to be gained from divestment.\(^5\) New England Electric appealed and the court of appeals vacated the Commission's order\(^\text{a}\) on the ground that it had misinterpreted what constituted loss of economies. The Supreme Court, however, upheld the Commission's interpretations, finding that Congress could reasonably have intended to create only a limited exception to the general rule confining holding companies to a single integrated utility system.\(^\text{a}\) The Court added that the SEC had considered the integrative benefits as well as the loss of competitive benefits caused by the retention of competing utilities.\(^\text{a}\)

As is demonstrated by \emph{North American} and \emph{New England Electric System}, the regulatory agencies, Congress, and the courts favor the vertical integration of public utilities and limit the pursuit of competitive benefits to control of horizontal monopolies. These bodies, however, have ignored the potential benefits to be gained from increasing competition within the integrated structure of public utilities. Such benefits were recognized by the courts in the initial approach to control of the inte-

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\(5\) Operating economically refers to maintaining the prices of the additional integrated system at a level competitive with the prices of the primary system.

\(5\) Id. at 696-97.

\(5\) 384 U.S. at 179.

\(5\) Id. at 177.

\(5\) Id. at 177-79.

\(5\) 346 F.2d 399 (1st Cir. 1965).

\(5\) 384 U.S. at 179-81.

\(5\) The Court noted that potential competitive advantages of divestment are difficult to forecast. Whether the gains to competition offset the estimated losses in economies of operation resulting from divestment of the gas properties is a matter for Commission expertise in dealing with the total competitive situation. \emph{Id.} at 184-85.
grated structure of the Bell System. The vertical relationship of AT&T and Western Electric first came under judicial scrutiny in 1949 when the Justice Department initiated an antitrust action attacking the legality of this relationship.\textsuperscript{59} The complaint sought divestment of Western by AT&T in order to restore competition in the telecommunications equipment market. The suit was ended in 1956 with a final judgment against Bell with the consent of the parties.\textsuperscript{60} Aware of the integrative benefits inherent in the Bell structure, the Justice Department had refused to allow expansion of Western Electric into additional markets, but permitted the vertical arrangement to continue.\textsuperscript{61}

Finally, in \textit{In re Use of the Carterfone Device in Message Toll Telephone Service},\textsuperscript{62} the FCC addressed the vertically integrated structure of the Bell System and the problem of increasing competition in the telecommunications equipment market.\textsuperscript{63} In that decision, the FCC attempted to restrict the scope of Western Electric’s equipment monopoly and to enlarge the competitive impact of independent equipment manufacturers by invalidating tariffs which had prohibited the interconnection of customer-owned devices with public telephone networks.\textsuperscript{64} The tariffs had ensured a Western Electric monopoly by requiring customers to obtain all devices for the telephone network from Bell. Telephone companies, however, restricted the effectiveness of \textit{Carterfone} by filing new tariffs

\begin{itemize}
\item \textsuperscript{59} United States v. Western Elec. Co., Civil Action 17-49 (D.N.J. 1949).
\item \textsuperscript{60} United States v. Western Elec. Co., 1956 Trade Cases \textsuperscript{71,134} (D.N.J. 1956).
\item \textsuperscript{61} In its pertinent parts the Consent Decree:
\begin{enumerate}
\item Enjoined AT&T and Western Electric from manufacturing any telephone operating equipment of a type not sold to Bell companies.
\item Required AT&T and Western to grant a non-exclusive royalty-free license under Western’s then United States patents to any company wishing to manufacture the same, and to grant similar licenses at reasonable non-discriminatory royalties under all its future patents, as well as to furnish all necessary technical information, to patent licensees.
\end{enumerate}
\end{itemize}

\textsuperscript{1956 Trade Cases at \textsuperscript{71,137, 71,139}}.

Otherwise, the fundamental relationships between AT&T, Western Electric and the operating companies were not altered. Western continued as the manufacturing and supply affiliate of the Bell System, but was severed from the remaining telephone operating and manufacturing companies in the United States.

\textsuperscript{62} 13 F.C.C.2d 420 (1968). The Carterfone is a device which allows the interconnection of a two-way radio caller and a caller on a telephone through a base station. 13 F.C.C.2d at 420-21.

\textsuperscript{63} The case was initially filed by Carterfone against Bell in Texas. The district court held that the special competence and expertise of the FCC gave it the right to determine the validity of Bell’s tariff preventing connection of the Carterfone to Bell System telephones. Carter v. AT&T Co., 250 F. Supp. 188 (N.D. Tex. 1966), \textit{aff’d}, 365 F.2d 486 (5th Cir. 1966), \textit{cert. denied}, 385 U.S. 1008 (1967).

\textsuperscript{64} The hearing examiner concluded that the continued prohibition against Carterfone would be inequitable and discriminatory in favor of the telephone company-owned interconnecting devices. 13 F.C.C.2d 430, 440 (1968).
which required their personnel to install the equipment of the independents\textsuperscript{65} and were thus able to maintain their monopoly positions with respect to interconnecting devices and their operating telephone companies.\textsuperscript{66}

II. PURSUING COMPETITIVE BENEFITS IN VERTICALLY INTEGRATED INDUSTRIES IN THE PUBLIC SECTOR

Faced with this history of relatively ineffective attempts at increasing competition in the telecommunications equipment market and of contrasting approaches to the control of vertically integrated industries, the FCC took a fresh approach in \textit{In re AT&T} by developing a middle ground between divestment of Western Electric and maintenance of the status quo.\textsuperscript{67} Through this process the Commission hoped to capture and retain all of the benefits of Bell’s integrated structure while still increasing competition. In so doing, however, the FCC failed to analyze significantly either the effectiveness or the ease of administration of their decision.

At the outset, the FCC rejected both the trial staff’s recommendation that Western Electric be divested and Judge Kraushaar’s decision that divestment was not warranted,\textsuperscript{68} finding that the investigation upon which the trial staff and Judge Kraushaar relied was insufficient to support any decision on divestment.\textsuperscript{69} The Commission noted that the investigation was not designed to explore fully the overall competitive impact of divestment of Western Electric on the telecommunications equipment market, since it was only intended to consider the impact of Western’s divestment on telephone service adequacy and rates.\textsuperscript{70} The

\textsuperscript{65}. After \textit{Carterfone}, all telephone companies filed tariffs with the Commission providing for the interconnection of devices of a Carterfone nature so long as the telephone company furnished, installed, and maintained the interconnect. This put a high premium on getting a device from someone other than the connecting telephone company. See I.T.T. \textit{v. General Tel. & Elec. Corp.}, 351 F. Supp. 1153, 1179 (D. Hawaii 1972).

\textsuperscript{66}. \textit{Id.} at 1179.

\textsuperscript{67}. 64 F.C.C.2d at 10, 42-45. Judge Kraushaar, the administrative law judge, had based his decision against divestment on the manner in which the present Bell structure has served the public interest. For example, the judge found that the integration of Western Electric and Bell Labs in the Bell System has provided useful public benefits in the form of system-wide expertise and innovations which have led, in turn, to monumental technological advances such as the transistor. \textit{Id.} at 486.

\textsuperscript{68}. \textit{Id.} at 10.

\textsuperscript{69}. \textit{Id.}

\textsuperscript{70}. Greater autonomy for Western would have some competitive impact on the telecommunications equipment market, as would divestment. The difference in impact between greater autonomy and divestment is in the ability of equipment manufacturers to compete when a divested Western begins selling directly to independent telephone companies. In discussing unrestricted sales to independents, the Commission concluded that a
Commission also indicated that no divestment plan was ever presented or explored on the record. As a result, no cost-benefit comparisons could be made between the present Bell structure and a divested organization.

Adhering to the intended purpose and design of the investigation, the FCC emphasized the duty owed to ratepayers to see that they realize all of the benefits to which they are entitled. This was a departure from the traditional approach taken in previous antitrust actions against private holding companies in which competitive benefits are emphasized, and from the traditional approach in regulatory actions in which integrative benefits are emphasized. Nevertheless, the Commission examined both forms of benefits and found that the overall performance of the Bell System was excellent, generally providing high quality telephone service at reasonable rates. They also found, however, that considerable improvement in certain areas could make it more responsive to consumer needs as well as to the technological innovations found in other sectors of the telecommunications industry. The FCC noted that Western Electric's relationship with the Bell operating companies, especially its efficiency and performance in supplying the operating companies, was a primary area in which improvement could be made.

Western's efficiency and performance were crucial factors in the divestment issue since the Commission believed that divestment of Western would be appropriate only if its efficiency and performance were unacceptable because of a lack of competition. Fortunately for the corporation, several witnesses testified to the efficiency of Western Electric's operation, and studies commissioned both by Bell and the competitive marketplace for serving Bell operating company needs should exist prior to Western Electric entering the market. Id. at 25.

71. Id. at 10.

72. In this context, the Commission is referring to the cost or the charge to the ratepayer of providing identical telecommunications services under a different Bell structure.

73. In contrast, in neither du Pont, North American Co. nor New England Electric System did a decisionmaker discuss the relative cost-benefit efficiency of chosen remedial structures over existing structures.

74. See, e.g., 64 F.C.C.2d at 12-13, 15-16. Numerous sections of the Communications Act require the FCC to ensure that adequate service and reasonable rates and regulations result from the vertically integrated Bell structure. 47 U.S.C. §§ 151, 154(i), 154(j), 303, 403 (1970).

75. 64 F.C.C.2d at 14-15. The administrative law judge had concluded that the United States has the finest telephone system in the world in terms of quality and cost to the ratepayer primarily because of the Bell System. Id. at 145-47.

76. Id. at 14-15.

77. Id. at 20-21.
trial staff supported this testimony.78 The Commission, however, acknowledged criticisms of these studies79 and agreed with Judge Kraushaar that the evidence was entitled to some weight, but was not conclusive as to Western's efficiency.80 Instead, the Commission stated that Western Electric's construction program,81 its method of costing and pricing equipment sold to the operating telephone companies,82 and its involvement in the Bell System decision process to make or buy equipment were all areas in which it could become more efficient.83

78. The Commission had awarded contracts to Touche Ross & Co., and to McKinsey & Co., to conduct studies of Western's operations and performance looking primarily at cost minimization, quality, and service. Both studies found Western to be an efficient, well-managed company which had had a favorable impact on rates. Id. at 20-21.
79. The McKinsey study lacked specific evaluations of a number of subjects while the Touche Ross study lacked scope and depth. Id. at 23.
80. Id.
81. Id. at 21-22.
82. Id. at 19-20, 22.
83. Id. at 32-33. Of these, the area to which the FCC gave the greatest attention was the "make/buy" decision process, in which decisions to purchase a desired product from the general equipment market or to have Western Electric provide the product are made. Id. at 32-33. The primary participants in this process are AT&T marketing and legal departments. These departments, in turn, involve other AT&T groups and management staffs, including the Bell System Purchased Products Division (BSPPD). BSPPD arranges for product evaluation and makes price comparison studies of general trade and Western's products. BSPPD also provides a centralized interface with general trade suppliers, assembles product information, and conducts negotiations on behalf of the operating telephone companies for the purchase of products. Id. at 31.

The Commission focused on two aspects of the "make/buy" decision process in concluding that the process inherently favors Western Electric. The first was the importance of the price comparison studies undertaken by BSPPD. These studies, which compare Western's prices for telecommunications equipment with general trade prices, provide data to the operating companies as an aid in their procurement decisions. The studies were introduced by Bell in an attempt to demonstrate that Western offered lower prices in all categories. Id. at 35. Judge Kraushaar concluded, however, and the Commission agreed, that their impact was marginal and that Western Electric probably created the price differentials between Western and general trade products by abstaining from active competition with the general trade in the independent telephone company market. Id. Thus the differentials were found to be an invalid basis for a decision to purchase Western products. In addition, the Commission found that the operating companies are given virtually no managerial control and little influence in BSPPD and tend to rely on BSPPD recommendations. Id. at 32 n.52, 43 n.65.

The second aspect on which the Commission focused was the role that Western Electric plays in the "make/buy" decision process. The Commission found that Western had an input into virtually every critical phase of the process including the determination whether a new product is desirable, and whether the product should be made or bought. The Commission concluded that this gave Western a substantial competitive advantage over general trade suppliers seeking to serve the Bell operating companies' equipment needs. Id. at 38-39. For example, Judge Kraushaar had found that Western Electric, unlike the general trade, is the regular recipient of price comparison data, which has enabled Western to make its prices competitive on products initially priced lower by the general trade. Id. at 35.
After establishing that Western's performance could be improved, the FCC noted that increased competition in the equipment market, caused largely by the *Carterfone* decision and technological advances, had already resulted in numerous substantial advantages to the Bell System.\(^8\) Therefore, the Commission concluded that increased competition in the operating companies' equipment procurement was necessary to solve the problems of the "make/buy" decision process. Agreeing with Judge Kraushaar, however, the Commission concluded that the vertically integrated manner in which Western Electric and the operating companies function and interact had resulted in many positive contributions to the efficiency and performance of both Western and the Bell System. These improvements were reflected in the quality and cost of telephone service.\(^8\) The Commission concluded that divestment would deprive consumers of these benefits and, therefore, was not warranted.

Accordingly, it ordered the Bell System to submit a proposal to achieve optimal separation of its equipment procurement and manufacturing functions short of divestment.\(^8\) In taking this approach, the Commission clearly attempted to capture the benefits of increased competition in the equipment market while retaining the integrative benefits of the Bell System. Correspondingly, it departed from the traditional antitrust and regulatory solutions. As novel as this remedy was, however, the Commission may have erred in employing it by failing to consider the effectiveness of its method for increasing competition in the telecommunications equipment market. A controlling factor in the Court's decision in the remedy phase of *du Pont* was the effectiveness and ease of administration of the proposed remedies.\(^8\) As evidenced by the *Carterfone* solution and the proposed "pass through" of voting rights in *du Pont*, it is quite possible that this seemingly appropriate remedy can be rendered ineffective. As a result of corporate loyalty, the Bell operating companies could retain a bias for Western products even when the overt source of that bias is eliminated. Moreover, as in *Carterfone*,\(^8\) Bell might readily be able to introduce economic incentives not directly related to equipment purchase that would encourage the operating companies to continue purchasing from Western. If so, the FCC's novel

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\(^{84}\) *Id.* at 26-27.

\(^{85}\) See note 20 *supra*.

\(^{86}\) 64 F.C.C.2d at 44-45. The Commission gave these guidelines: The operating companies "should have centralized capabilities for performing the functions which include: (a) make/buy and procurement decisions; (b) issuing of requests for proposals and evaluation of responses in competitive bidding and other procurement situations; (c) purchasing; and (d) inspection." *Id.* at 45.

\(^{87}\) 366 U.S. at 331-35.

\(^{88}\) See note 65 & accompanying text *supra*. 
approach to the control of vertically integrated public industry would be rendered useless.

In addition, the FCC did not discuss administration of the remedy. A significant factor in its rejection of a “pass through” of voting rights in \textit{du Pont} was the Court’s fear of the burdensome requirements of supervision. Yet, the same type of supervision would seem to be necessary in the case at hand to ensure the effectiveness of the Commission’s remedy of greater autonomy for the operating companies. Unfortunately, financial constraints coupled with numerous other demands for the FCC’s time, could well prevent the Commission from hiring the personnel necessary to supervise the remedy, in which case the remedy again would become ineffectual.

\section*{III. Conclusion}

The FCC’s “greater autonomy” remedy is a refreshing approach to control of vertically integrated industries. In attempting to capture both competitive and integrative benefits, the Commission goes beyond the traditional approaches which focus on one form of benefits, and beyond its own piecemeal remedy in \textit{Carterfone}. In re \textit{AT&T}, however, is flawed because the Commission failed to consider the effectiveness of its solution.

This flaw may require the Commission at some future date to pursue yet another avenue of control over Bell’s vertical structure. Moreover, the remedy’s weakness could be perpetuated if the courts and other agencies follow the FCC’s plan without analyzing its effectiveness. On the other hand, In re \textit{AT&T} provides firm precedent for the judiciary and agencies in dealing with vertically integrated industries. The consideration of both competitive and integrative benefits in designing remedies for the control of vertically integrated monopolies is a step forward that should ultimately benefit consumers through increased efficiency in production.

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\textsuperscript{89} \textit{See} note 42 \& accompanying text \textit{supra}. 

Through 42 U.S.C. § 1983 and its jurisdictional counterpart, Congress vested federal courts with the power to enjoin state court proceedings which threaten individual constitutional rights. Historically, however, the federal courts have been extremely reluctant to intervene in state court cases, especially when they are criminal in nature. In the area of civil litigation, the precise scope of this abstention doctrine has been the subject of considerable debate, but the trend is toward increased federal abstention. Recently, in *Juidice v. Vail*, the Supreme Court moved significantly closer to requiring abstention in all state civil cases, by refusing to permit intervention in a state civil contempt proceeding. In so ruling, the Court cast considerable doubt on the future viability of section 1983 injunctive relief.

The appellees in *Juidice* failed to satisfy judgments rendered against them in various civil actions in New York state court. Consequently,

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1. Section 1983, originally part of the Civil Rights Act of 1871, provides as follows: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person 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.
7. Justice Brennan, in his dissent, viewed the majority opinion in *Juidice* as "stripping all meaningful content from 42 U.S.C. § 1983." *Id.* at 342. See text accompanying notes 59-64 infra.
8. Originally there were eight named appellees. The district court ruled that the case
they were served with court orders requiring their attendance at hearings to show cause why they should not be held in contempt pursuant to state law. When they did not respond to the orders or attend the hearings, contempt citations were issued against them, imposing fines and, in some cases, imprisonment. Instead of pursuing the matter in state court, the parties brought a section 1983 action in the United States District Court for the Southern District of New York to restrain the contempt citations, asserting that the underlying state provisions violated procedural due process. The state, however, urged the district court to abstain out of respect for the integrity of the state judicial process. In rejecting the state's argument, the district court held that intervention is appropriate when the statutes in question permit incarceration without a preliminary hearing and when they cannot be construed in any manner which would avoid constitutional challenges. The court then enjoined the challenged state provisions insofar as they permitted incarceration and punitive

of appellee Harry Vail was typical of the cases of other judgment debtors under the challenged statutes. Vail v. Quinlan, 406 F. Supp. 951, 956 (S.D.N.Y. 1976). Vail and his wife were indigents who owed $534.63 on a loan from the Public Loan Company. The loan company filed suit in county court seeking payment and was awarded a default judgment when Vail did not respond to the summons or complaint. Shortly thereafter, Vail was served with a subpoena, requiring satisfaction of the judgment. Again, Vail did not appear. On an affidavit and motion filed by the loan company, Judge Joseph Juidice of the county court issued a show cause order requiring Vail's presence at a scheduled hearing. Three weeks later, after Vail had failed to respond to the order or appear at the hearing, Judge Juidice issued an "Order Imposing Fine" which held Vail in civil contempt and required him to pay $270 to the loan company. Six weeks later, when Vail had still not complied with the order, the loan company applied for and obtained an ex parte commitment order which resulted in Vail's arrest. Id. at 956-57.

9. See N.Y. JUD. LAW §§ 750-781 (McKinney 1968). Section 756 provides for the issuance of a warrant to commit a judgment debtor without warning. Section 757 allows a state judge to issue a discretionary show cause order or attachment warrant. Section 770 authorizes the imposition of punishment. Sections 773 and 774 provide for fines and imprisonment, respectively.

10. 406 F. Supp. at 953. A three-judge court was convened pursuant to 28 U.S.C. § 2281 (1970)(repealed 1976), which required that injunctions staying the enforcement of state statutes only be issued by "a district court of three judges."

11. The fourteenth amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The appellees alleged that the statutory scheme permitted adjudication of contempt and an order of imprisonment without an actual hearing, failed to provide adequate notice or warning of the consequences of failure to appear at the show cause hearing, subjected the debtor to imprisonment without informing him of his right to counsel, and permitted punitive fines and imprisonment. 406 F. Supp. at 959.

12. The state contended that federal intervention was inappropriate since state proceedings were pending and the state had not been afforded an opportunity to construe the challenged provisions. Id. at 957.

13. Id. at 957-59.
fines without providing for adequate notice, hearing or assistance of counsel.14

On direct appeal,15 the Supreme Court reversed this decision, ruling that federal intervention is improper when the litigant has an adequate state remedy and fails to establish bad faith harassment by the state officials enforcing the challenged statute.16 Writing for the majority, Justice Rehnquist reasoned that the state's interests in the integrity of its contempt proceedings were sufficiently significant to prohibit intervention, notwithstanding the federal claims raised by the judgment debtors.17 Justice Brennan, in dissent, sharply disagreed, arguing that section 1983 manifested congressional intent to establish the federal courts as the primary forum for the litigation of federal constitutional rights regardless of the pendency of state civil proceedings.18

14. Id. at 959-60. The court held that the state contempt provisions violated procedural due process because: (1) they permitted imprisonment based solely upon an ex parte proceeding; (2) the notice provided for by the statutes failed to "contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment;" (3) the statutes failed to provide for notice of the debtor's right to counsel; and (4) the statutes allowed punitive fines without "the procedural safeguards of indictment and jury trial."

15. The appeal was taken in accordance with 28 U.S.C. § 1253 (1970), which provides for direct appeal to the Supreme Court of all orders granting injunctions in civil actions "required by any Act of Congress to be heard and determined by a district court of three judges."

16. 430 U.S. at 337-38. The Supreme Court also held that only two of the named appellees, Patrick Ward and Joseph Rabasco, had the requisite standing to challenge the contempt citations because, at the time the challenges were initiated, all named appellees except Ward and Rabasco had been released from prison and "no longer had a live controversy with appellants or other New York State officials . . . ." Id. at 332-33 (citing Ellis v. Dyson, 421 U.S. 426, 434-35 (1975) and Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974), both cases held that a genuine threat of prosecution or other live controversy must be shown at each stage of the litigation). Cf. Rizzo v. Goode, 423 U.S. 362, 372 (1976) (citizens lack standing to challenge police department procedures when their claim of injury rests not upon what the police department will do to them, but what an unnamed minority of policemen might do).

17. 430 U.S. at 335-37. See text accompanying notes 49-58 infra.

18. Id. at 342. (Brennan, J., joined by Marshall, J., dissenting). Justice Brennan observed that:

Congress created [§ 1983] over a century ago, and at the same time expressly charged the federal judicial system with responsibility for the vindication and enforcement of federal rights under it against unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial,' Mitchell v. Foster, 407 U.S. 225, 240 (1972) (emphasis in original). In congressional contemplation, the pendency of state civil proceedings was to be wholly irrelevant.

Id. See text accompanying notes 59-67 infra for a discussion of the dissent.

Justices Stevens and Stewart also viewed abstention as inappropriate under the circumstances. Id. at 341, 348. Justice Stevens, although concurring in the judgment, disputed the majority's belief that the New York state courts provided adequate litigational forums,
I. DEVELOPMENT OF THE MODERN ABSTENTION DOCTRINE

Abstention can best be characterized as a judicial doctrine which seeks to avoid conflicts between state and federal courts in areas of overlapping jurisdiction. Originally, abstention was invoked by the federal courts to avoid review of state statutes by providing state courts with an opportunity to interpret their challenged laws first. But within the last decade the Supreme Court has developed a new variety of abstention, much more fundamental in nature, which requires federal courts to abstain completely in all cases in which intervention would threaten important state interests. Since the Supreme Court has recognized that the states' interests in their criminal processes are paramount, application of the modern abstention doctrine has been concentrated in the area of criminal litigation.

In *Younger v. Harris*, the Supreme Court enunciated the rule to be followed by federal courts when asked to intervene in state proceedings, holding that courts should abstain in all such cases except for those in which a state statute is facially challenged on constitutional grounds and observing that "[i]f, as appellees' contend, [the challenged statutes] violate the Due Process Clause of the Fourteenth Amendment, they cannot provide an adequate remedy for appellees' federal claim." *Id.* at 340 & n.3 (citing *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975)). For a discussion of *Gerstein*, see text accompanying notes 33-35 infra. In his dissent, Justice Stewart would resolve the competing interests with a temporary abstention by the federal court pending an authoritative state court construction of the challenged statutes. 430 U.S. at 347 (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)). For a discussion of *Pullman*, see note 20 & accompanying text infra.

19. See *England v. Louisiana Medical Examiners*, 375 U.S. 411, 415 (1964), in which the Supreme Court characterized abstention as "a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems' " (quoting *Louisiana v. P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29 (1959)).

20. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The federal plaintiffs in *Pullman* challenged a rule promulgated by the state railroad commission which discriminated against black railroad employees by requiring that conductors (always white) rather than porters (always black) be in charge of railroad cars. The plaintiffs did not challenge the rule as provided for by the state enabling act but sought a federal injunction instead. The district court granted the injunction, but the Supreme Court reversed, holding that it was an abuse of discretion for the district court to intervene without giving the state an adequate opportunity to construe the regulation in question. *Id.* at 501. One of the most important aspects of this decision was the fact that the Court expressly permitted the state litigant to return to federal court if the state court failed to resolve the constitutional issues. *Id.* See generally *Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071 (1974).

21. This doctrine has been termed "*Younger*" abstention. See *Younger v. Harris*, 401 U.S. 37 (1971). Under *Younger* abstention, the federal power to review alleged state violations of individual constitutional rights was substantially curtailed. See notes 23-31 & accompanying text infra.


bad faith is established on the part of the state in enforcing the statute.\footnote{24}{Id. at 54. The Supreme Court stated "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." \textit{Id.} This decision was essentially based on two principles: that of equity jurisprudence prohibiting interference with criminal proceedings when the litigant has an adequate remedy at law, and the somewhat more abstract tenets of comity and federalism implying judicial restraint when legitimate state interests may be affected. \textit{Id.} at 43-44. The Court also stated, however, that there might be cases so extraordinary that they would permit intervention even if the state were acting in good faith. \textit{Id.} at 54. In the seven years since the Court's ruling in \textit{Younger}, however, no such case has come to light. It has been suggested that intervention is appropriate under \textit{Younger} when prosecution is threatened under more than one statute, but brought only under one; when actual police behavior suggests harassment; and when the police make arrests, but release the defendants prior to trial. In all these instances, the forum state would be precluded from affording adequate review of state laws and actions and would be acting in bad faith. \textit{See The Supreme Court, 1970 Term, 85 HARV. L. REV. 38, 314-15 (1971).}}

In so ruling, the Court effectively overruled its earlier decision in \textit{Dombrowski v. Pfister}\footnote{25}{380 U.S. 479 (1965).} in which it held that either a first amendment facial challenge or a showing of bad faith would warrant federal intervention.\footnote{26}{\textit{Id.} at 489-90. \textit{Dombrowski} involved a first amendment challenge to two Louisiana subversive control statutes, \textit{La. Rev. Stat.} §§ 14:358-74, 390-90.08 (Cum. Supp. 1962), invoked by the state in an effort to discourage civil rights activities. These statutes restricted protests against state laws and actions. The plaintiffs, representatives of an organization active in promoting the civil rights of blacks in Louisiana, sued in federal district court under § 1983, seeking to restrain any pending or threatened prosecutions under these statutes. The district court denied the requested relief on the ground that federal equity powers should not be employed to interfere with ongoing state criminal prosecutions. 227 F. Supp. 556, 563-64 (E.D. La. 1964). On appeal, Justice Brennan, writing for the majority, ruled that intervention was appropriate when the state statutes at issue were justifiably challenged as facially abridging first amendment guarantees or were applied in bad faith to discourage parties from freely exercising their constitutional rights. 380 U.S. 479, 489-90 (1965). Since Justice Brennan found both the abridgement of first amendment rights and bad faith enforcement by the state, the \textit{Younger} Court was able to characterize his disjunctive ruling as dicta and replace it with a ruling requiring a litigant to establish both unconstitutional abridgement and bad faith. 401 U.S. at 48-49. In so doing, it appears that the \textit{Younger} Court effectively overruled Justice Brennan's disjunctive test for intervention, and, therefore, rendered \textit{Dombrowski} significant for historical purposes only.} The plaintiffs in \textit{Younger} had invoked section 1983 to challenge pending prosecutions brought by the state of California under its antisubversive statute.\footnote{27}{The California Criminal Syndicalism Act, \textit{Cal. Penal Code} §§ 11400-02 (1968). The Act sought to control the organization and activities of subversive groups in California.} A three-judge district court enjoined the state prosecutions relying solely upon the fact that, on their face, the challenged statutes violated first amendment guarantees.\footnote{28}{281 F. Supp. 507, 516 (C.D. Cal. 1968). The district court construed \textit{Dombrowski} as permitting federal intervention based solely upon a successful first amendment facial challenge.} Because the lower court concluded that facial invalidity was sufficient to permit intervention, it did
not rule on the question of whether the statutes had been invoked in bad faith.\textsuperscript{29} The state appealed the district court judgment directly to the Supreme Court and won a reversal. Not only did the Supreme Court rule that both a facial challenge to the statutes and a showing of bad faith enforcement are necessary to permit intervention, but the Court also reached the factual conclusion that California was enforcing its statutes in good faith and not in an attempt to harass the federal plaintiffs.\textsuperscript{30} Therefore, the Court dissolved the district court injunction and dismissed the suit.\textsuperscript{31}

In subsequent decisions, the Supreme Court has retreated from this absolute position by loosening the requirements for intervention in two ways. First, the Court held that the conjunctive test enunciated in \textit{Younger} applies only to pending state proceedings.\textsuperscript{32} Second, the Court ruled that abstention is not required when the federal litigant lacks sufficient opportunity to fairly adjudicate all of his federal claims in state court. This latter rationale is exemplified by the Supreme Court's decision in \textit{Gerstein v. Pugh}.\textsuperscript{33} In that case, the Court permitted intervention in a state criminal prosecution in which the state defendants were detained without a judicial determination that probable cause existed for their arrest. The state proceeding in question failed to provide for challenges to the detention procedures.\textsuperscript{34} Therefore, the Court concluded that the defendant had not been afforded an adequate state remedy and was thus entitled to federal injunctive relief.\textsuperscript{35}

\textsuperscript{29} \textit{Id.} at 517. For a discussion of the requisites of establishing bad faith enforcement, see note 49 infra.
\textsuperscript{30} \textit{See} 401 U.S. at 54. The Court merely stated that the appellees had failed to show bad faith on the part of the state. There was no analysis of the facts or inferences which led the Court to reach that conclusion.
\textsuperscript{31} \textit{Id.} Interestingly, Justice Brennan wrote a short concurrence in which he simply stated that abstention was proper under the circumstances. \textit{Id.} at 56-58. \textit{See} note 65 & accompanying text infra.
\textsuperscript{32} \textit{See} Steffel v. Thompson, 415 U.S. 452 (1974). \textit{Steffel} did not involve a request for injunctive relief, but a request for declaratory relief. The Court ruled that if no state proceedings were pending, the federal court could intervene. The following term, the Court clarified this with respect to injunctions by holding that federal intervention was proper only when actual proceedings of substance were held in the federal forum prior to the filing of the state claims. Hicks v. Miranda, 422 U.S. 332, 349 (1975).
\textsuperscript{33} 420 U.S. 103 (1975).
\textsuperscript{34} \textit{See} FLA. RULES CRIM. PRO. chs. 901-45, which set out numerous defenses which may be asserted in a criminal case, none of which relate to challenging the detention procedures.
\textsuperscript{35} 420 U.S. at 108 n.9. Gibson v. Berryhill, 411 U.S. 564 (1973), represents another example of permissible intervention when the state forum is inadequate. In that case the Court held intervention appropriate because the state board adjudicating the federal claims was biased against the federal litigant since members of the forum stood to profit by their decision. \textit{Id.} at 578-79.
Both *Younger* and *Gerstein* involved federal challenges to state criminal proceedings. Nevertheless, the Supreme court had implied that the same logical underpinnings of *Younger* and the gloss added subsequently by *Gerstein* could be applied to civil litigation. Indeed, in *Huffman v. Pursue, Ltd.*, the Supreme Court did apply the *Younger* principles to a state civil proceeding and concluded that abstention was proper. In *Huffman*, the state of Ohio brought an action under its civil nuisance statutes against the proprietor of a pornographic movie theater. The state could easily have brought the action under its criminal nuisance statutes instead, but chose not to do so. Moreover, since the civil and criminal nuisance statutes were highly integrated, employing many of the same procedures and requiring much of the same proof, the threat to the state’s interests posed by federal intervention did not vary because the civil rather than the criminal nuisance statutes were invoked. At least Justice Rehnquist saw little difference. He held that abstention was justified in accordance with the *Younger* doctrine because the nuisance action was “more akin to a criminal prosecution than are most civil cases.” Once again the Supreme Court dissolved a district court injunction on the ground that federal intervention would pose a greater harm to the judicial system than would state adjudication of federal constitutional issues. Because of the similarity between the state criminal and civil statutes, the Court’s decision in *Huffman* did not, by itself, portend great expansion of *Younger* into civil litigation. Nonetheless, by focusing on the substantiality of the state’s interest in its proceedings, instead of the

36. At least three federal courts of appeals took the lead and applied *Younger* to civil proceedings. See *Duke v. Texas*, 477 F.2d 244, 248 (5th Cir. 1973); *Lynch v. Snepp*, 472 F.2d 769, 773 (4th Cir. 1973); *Cousins v. Wigoda*, 463 F.2d 603, 606-07 (7th Cir. 1972). All three cases involved first amendment challenges to state court proceedings and orders brought to restrict the rights of various organizations seeking to demonstrate against state policies.


38. *Ohio Rev. Code Ann.* §§ 3767.01-.99 (1971), which provide that a place exhibiting obscene films constitutes a nuisance and may be ordered closed for up to one year.

39. *Ohio Rev. Code Ann.* §§ 2907.01, .31-.37 (1975), which provide for criminal penalties in addition to closure.

40. One example of this integration is that the definitions of such terms as “obscenity” needed to invoke the civil nuisance statute were based on those contained in Ohio’s criminal nuisance statutes. *See State ex rel. Keating v. Vixen*, 27 Ohio St. 2d 278, 272 N.E.2d 137 (1971), *rehearing denied*, 414 U.S. 818 (1975).

41. 420 U.S. at 604. Justice Brennan, joined by Justices Marshall and Douglas, dissented. Justice Brennan distinguished criminal and civil cases on the fact that a civil defendant is not protected by the requirements of indictment and a finding of probable cause. *Id.* at 615. He presented substantially the same arguments regarding the impact of § 1983 on the federal structure as he advanced in his *Juidice* dissent. *See* text accompanying notes 61-66 infra.

42. *Id.* at 612-13.
Casenotes

equity interests traditionally invoked to support abstention in criminal cases, the Court signaled the possible future expansion of the Younger doctrine to all civil cases.

II. JUDICE v. VAIL: MOVING TOWARD THE EXTREMES

Juidice v. Vail, like all other abstention cases, involved two conflicting interests: the state’s in maintaining the integrity of its judicial proceedings, and the federal government’s in insuring individual constitutional rights. The central differences that surfaced between the majority and the major dissent were a function of the relative weight each accorded these interests. Unfortunately, instead of balancing the differing state and federal concerns, each opted for an extreme. The majority, represented by Justice Rehnquist, supported the authority of state governments and demanded federal abstention, while Justice Brennan in his dissent favored the federal government and demanded federal intervention. Interestingly, both Justices supported their respective positions by embracing the abstract concept of federalism. But since neither gave due consideration to the opposing position, their opinions suffer from a fundamental shallowness in both logic and legal theory.

Justice Rehnquist defined the notion of comity as the proper respect for state functions, recognizing that government will be most effective if the states and their institutions are free to perform their independent functions in their own ways. Although superficially compelling, this definition may be misleading when the issue concerns individual rights guaranteed by the Federal Constitution. In such a situation, the respective concerns of state and federal courts cannot be separate, but must be

43. Id. at 604-09. Justice Rehnquist reversed the importance of the considerations cited by the Court in Younger. See notes 56-58 & accompanying text infra.

44. After Huffman, the number of federal courts which chose to abstain when requested to intervene in state civil proceedings increased substantially. See, e.g., Forest Hills Util. Co. v. City of Heath, 539 F.2d 592 (6th Cir. 1976) (condemnation); ACLU v. Bozardt, 539 F.2d 340 (4th Cir.), cert. denied, 425 U.S. 1022 (1976) (attorney discipline). But see Sartin v. Comm’r of Pub. Safety, 535 F.2d 430 (8th Cir. 1976) (driver’s license, and noting that Huffman does not apply to claims for damages).

45. Justice Rehnquist made the expected disclaimer that the scope of his opinion did not include all civil litigation. 430 U.S. at 336 n.13. Nevertheless, by gauging the propriety of intervention by the substantiality of the state’s interests and ignoring the federal interests, he has effectively expanded the abstention doctrine far into the civil realm. See text accompanying notes 49-55 infra.

46. The only Justice who appeared to balance both of the competing federal and state interests was Justice Stewart. See note 18 supra. The procedure adopted by the Supreme Court in Pullman appears to effectively balance these interests by providing the state with an initial opportunity to resolve the constitutional issues, but permitting the federal court to retain jurisdiction should the state’s resolution fail to be adequate. See note 20 supra.

47. 430 U.S. at 334 (quoting Younger v. Harris, 401 U.S. at 44).
identical. Each must logically strive to ensure that individual rights are protected from governmental infringement.\textsuperscript{48} To take the position that federal courts have little, if any, role in this process is to distort the true meaning of the federal system. The main question to be answered, therefore, is how far Justice Rehnquist would go in prohibiting federal courts from intervening in state proceedings for the protection of these rights. The answer, unfortunately, appears to be too far.

Under his view, a federal court would be effectively prohibited from intervening except when the state proceedings are brought in bad faith\textsuperscript{49} or fail to provide an adequate opportunity for the litigation of the federal claims.\textsuperscript{50} Even under these circumstances, however, it would appear that Justice Rehnquist would be hesitant to permit intervention. For instance, in \textit{Juidice}, the sole state remedy available to the appellees was not available until after the imposition of fines or imprisonment.\textsuperscript{51} Furthermore, in order for the appellees to have pursued their challenge to the contempt provisions in state court, they would have been forced to rely upon the same provisions to gain jurisdiction for their challenge. Recognizing this dilemma, the district court applied \textit{Gerstein v. Pugh}, which it interpreted as permitting intervention when the constitutional challenge is directed not against the criminal prosecution, but against incarceration without a preliminary hearing.\textsuperscript{52} Justice Rehnquist disagreed, and distinguished \textit{Gerstein} by finding that the appellees in \textit{Juidice} had an opportunity to present their federal claims in the state proceeding.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{48} By placing the emphasis on the propriety of litigating in federal versus state courts, both Justices Rehnquist and Brennan place the choice of forum over the substance of the litigation. The major concern should be vindication of individual rights, not the propriety of a particular forum. \textit{See also} notes 59-66 & accompanying text \textit{infra}.
\item \textsuperscript{49} \textit{See} 430 U.S. at 338. Under the \textit{Younger} conjunctive test, a party must prove both facial abridgement and bad faith enforcement. Since, in \textsection 1983 actions, facial abridgement is almost always established, bad faith becomes the crucial issue. For this reason, it shall be assumed, when discussing the bad faith exception, that facial abridgement has been established. Justice Rehnquist limited the bad faith exception by observing that it “may not be utilized unless it is alleged and proved that [the state officials] are enforcing the contempt procedures in bad faith or are motivated by a desire to harass.” \textit{Id.} This exception which encompasses the bad faith and constitutional infringement requirements of \textit{Younger} can be traced to the equity considerations cited by the \textit{Younger} Court. Under equity principles, intervention is appropriate to prevent irreparable injury to the parties. \textit{See} \textit{Younger v. Harris}, 401 U.S. at 43-44.
\item \textsuperscript{50} \textit{See} 430 U.S. at 337. This exception can also be traced to the equity component underlying the Court’s decision in \textit{Younger}. 401 U.S. at 43. In fact, it was the failure of the state forum to provide adequate review of the constitutional claims in \textit{Gerstein} which led to the Court’s permitting intervention in that instance. 420 U.S. at 107-08 & n.9. \textit{See} notes 34-35 \textit{supra}.
\item \textsuperscript{51} \textit{See} 406 F. Supp. at 958.
\item \textsuperscript{52} \textit{Id.} at 957-59.
\item \textsuperscript{53} \textit{See} 430 U.S. at 337. Justice Rehnquist went on to conclude that “[n]o more is
cantly, he arrived at this conclusion despite the fact that this opportunity
Rehnquist relied on both these considerations to support his abstention
ruling, but reversed their significance.\textsuperscript{57} Finally, in \textit{Juidice}, Justice Rehn-
quist took this process one step further and deleted the equity con-
sideration completely.\textsuperscript{58} In so doing he has taken the Court from a
moderate resolution of the conflicting federal and state interests to an
extreme.

At the other extreme is the dissenting opinion of Justice Brennan.
Under his view with respect to civil proceedings, section 1983 was
would not arise until after the imposition of the state sanctions. Under
this analysis, it would appear that any opportunity for state litigation of
the federal issue, no matter how remote, is sufficient to invoke \textit{Younger}
abstention.\textsuperscript{54} Thus, the only practical avenue to a federal court for the
state litigant is a showing of bad faith by the state in enforcing the
challenged statute. Regretfully, this requirement also appears to be dif-
ficult for a party to fulfill since it requires the showing of a specific intent
to harass one who is exercising his constitutional rights. Except in
extreme circumstances, it would seem all but impossible to determine
whether the state is harassing an individual or merely enforcing the law.\textsuperscript{55}

Beyond the theoretical difficulties in accepting Justice Rehnquist's
analysis there are legal dilemmas as well. The majority opinion does not
clearly comport with the Supreme Court's decision in \textit{Younger}. As
noted, the Court in \textit{Younger} ruled that intervention in criminal proceed-
ings is inappropriate because it violates the principles of comity and
equity jurisprudence. Of these two principles, the \textit{Younger} Court ap-
peared to place primary emphasis on equity.\textsuperscript{56} In \textit{Huffman}, Justice

\begin{itemize}
\item \textsuperscript{54} In contrast, Justice Stevens recognized the inadequacy of the state remedy in
\textit{Juidice} and would have permitted intervention. \textit{Id.} at 339-41.
\item \textsuperscript{55} This conclusion is supported by Justice Rehnquist's test for finding bad faith. See
note 49 supra.
\item \textsuperscript{56} In \textit{Younger}, the Court stated that:
\begin{quote}
The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.
\end{quote}
\end{itemize}

401 U.S. at 43-44.

57. 420 U.S. at 603-05.

58. In failing to even mention the equity considerations underlying the Court's decision in \textit{Younger}, Justice Rehnquist placed total reliance upon the considerations of comity and federalism. 430 U.S. at 334.
enacted "for the express purpose of altering the federal-state judicial balance" which existed prior to its inception so as to offer "a uniquely federal remedy against incursions under the claimed authority of state law . . ." upon individual rights guaranteed by the Federal Constitution. A necessary corollary of this perspective, however, would be that in this same statute Congress intended to relegate state courts to a secondary and greatly inferior role within our two-court system when federal rights are at issue. This position assumes that the federal courts are peculiarly able to protect individual rights guaranteed by the Federal Constitution. In some instances, especially in cases involving minority group rights, this federal court sensitivity has proven to be fairly accurate. Nonetheless, as an absolute rule, it lacks a sufficient basis in either logic or experience. Both federal and state courts must be cognizant of the practical considerations which may require a certain degree of infringement upon a particular individual's rights. There is no assurance that federal courts will bend less to the demands of public policy considerations or the demands of a full docket than will state courts. Instead, an absolute right to go to federal court for injunctive relief


60. See 430 U.S. at 342 (quoting Mitchum v. Foster, 407 U.S. 225, 239 (1972)). Justice Brennan stated that:

Rather than furthering principles of comity and our federalism, forced federal abdication . . . undercuts one of the chief values of federalism—the protection and vindication of important and overriding federal civil rights, which Congress, in § 1983 and the Judiciary Act of 1875, ordained should be a primary responsibility of the federal courts.

61. Justice Brennan's position would also appear to allow a defendant in state court to go to federal court and seek restraint of any state proceeding at any stage so long as federal questions are involved. This liberal access approach would clearly result in substantial disruption of the state judicial process.


63. See, e.g., Konigsberg v. State Bar of Cal., 366 U.S. 36, 46-51 (1961), in which the Court held that a state may bar a lawyer from practice for refusing to answer questions about his subversive activities without violating his first amendment rights. Speaking for the Court, Justice Harlan stated that whenever first amendment "protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."
would significantly increase the burden on the already overloaded federal courts.64

Even assuming that Justice Brennan's view on federal intervention in civil proceedings is a proper interpretation of the scope of section 1983, his view, nevertheless, is inconsistent with his earlier position with respect to federal intervention in state criminal proceedings. In his concurring opinion in *Younger*, Justice Brennan stated that, absent bad faith, intervention in a state criminal proceeding was improper when the litigant's "constitutional contentions may be adequately adjudicated in the state criminal proceeding."65 However, section 1983 makes no distinction between criminal and civil proceedings and addresses all deprivations of individual rights under color of state law.66 Therefore, it is inconsistent for Justice Brennan to develop a virtually absolute rule for intervention in civil proceedings and concomitantly deny that this rule carries over to any degree in the area of criminal litigation.67

CONCLUSION

In *Juidice v. Vail*, the Supreme Court effectively limited federal intervention to instances in which either the state forum fails to provide an adequate remedy or the challenged state action is brought in bad faith. One must wonder, however, whether this decision embodies a satisfactory resolution of the competing interests underlying federal abstention. The major problem with respect to the opinions of Justices Rehnquist and Brennan in *Juidice* is the fact that each adheres to one of the two competing interests within our dual court system and proceeds from there to an inflexible conclusion. This process distorts the salient interests which must be considered when determining whether or not a federal court should intervene in a state court proceeding. A more appropriate test would be for the Court to weigh the relative values of

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64. An absolute right for a state litigant to go to federal court for relief from a state proceeding whenever Federal Constitutional rights are at issue would upset the federal-state judicial balance in two ways. First, as a practical matter, it would postpone state court judgments until the entire federal appeals process had been exhausted. Second, it would greatly increase the load on the federal courts. These two effects are interrelated since by overloading the federal court dockets, Justice Brennan's position would also substantially increase the time for final adjudication of federal rights. Therefore, an absolute right to federal review could unconscionably postpone the finality of most state litigation involving federal issues.

65. 401 U.S. at 56-57.

66. See note 1 supra.

67. It has been asserted that Justice Brennan's opinions in *Younger* and *Huffman* (and therefore *Juidice*) are irreconcilable. See *The Supreme Court, 1974 Term*, supra note 5, at 156-58. See also note 31 supra.
each of these interests in the context in which they are presented and
determine whether, in that instance, federalism will best be served by
abstention or intervention.

Unfortunately, regardless of the propriety of Justice Rehnquist's ex-
pansion of Younger abstention, it is a majority view and presently the
law on the subject. Until it is overruled or modified, Juidice will result in
the continued closing of the federal courts to state litigants. It should be
remembered, however, that in Juidice the Court was divided five-to-four
over the propriety of intervention. Therefore, should a single Justice
reevaluate his position or should a new Justice be appointed to the Court
with views differing from those of his predecessor, the expanding trend of
the abstention doctrine may be reversed. In any case, the area of federal
intervention is much too volatile for anyone to assume that the breadth
of abstention in Justice Rehnquist's ruling in Juidice may not later be
narrowed.

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