guarantee of prior endorsements of a check drawn on the treasurer of the United States through the Federal Reserve Bank of Philadelphia would be governed by the commercial law of Pennsylvania. The Court said:

> In our choice of the applicable federal rule we have occasionally selected state law. . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflicts of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[568]

In *United States v. Standard Oil Co.*,[569] the Court found that the right of the government to recover for damages resulting from injuries to a soldier was a federal question governed by federal rules. Applicable state law was rejected because the case was said to raise issues "of federal fiscal policy, not of special or peculiar concern to the states or their citizens,"[570] and because it was said that the government's right of recovery ought not to "vary in accordance with the different rulings of the several states."[571] *De Sylva v. Ballantine*[572] involved the issue of whether the law of California could be relied upon in order to determine if an illegitimate offspring was the "child" of an author and therefore entitled under the federal copyright laws to renew the author's copyright. The Court answered this question in the affirmative, saying:

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.[573]

The Court warned, however, that if the applicable state law was aberrant, if it defined the term "child" "in a way entirely strange to those familiar with its ordinary usage," then it need not be adopted as a federal standard.[574] In *United States v. Little Lake Misere Land Co.*,[575] the issue was whether the prescription of the mineral rights of former owners of land subsequently

568. *Id.* at 367 (citation omitted). *See also* Miree v. DeKalb County, 433 U.S. 25, 29-31 (1977).

569. 332 U.S. 301 (1947).

570. *Id.* at 311.

571. *Id.* at 310.

572. 351 U.S. 570 (1956).

573. *Id.* at 580.

574. *Id.* at 581.

575. 412 U.S. 580 (1973).

acquired by the government pursuant to the Migratory Bird Conservation Act[576] would be controlled by the law of Louisiana, the state in which the land was situated. Under the relevant state statute, the rights of the former owners would be imprescriptible by the federal government, even if the transactions creating those rights occurred before the date that the statute became effective.[577] In addition to citing *De Sylva*'s dictum about aberrant state law, the Court also quoted language in *Reconstruction Finance Corp. v. Beaver County*[578] to the effect that courts need not incorporate state rules into an act of Congress where those rules "effect a discrimination against the Government, or patently run counter to the terms of the Act."[579] Here, it was said that the Louisiana rule of retroactive imprescriptibility was "plainly hostile to the interests of the United States" in that it deprived the federal government of bargained-for contractual interests.[580] Moreover, the Court noted that the legislative history underlying the enactment of the Migratory Bird Conservation Act indicated a concern about contractual certainty that would conflict with any efforts by a state to modify retroactively the terms of land conveyances to the United States.[581]

Thus, a close examination of these decisions suggests that they do not "require" the adherence to a putative federal policy as was done in *Smith*. The holding in *Clearfield Trust* was based on the perceived need for a "uniform rule" in transactions involving federal commercial paper that would avoid "great diversity in results" arising due to the "vagaries" of local laws. The same considerations do not govern section 1461 prosecutions. In *Hamling*, the Court rejected the need for a uniform national standard of decency, saying that more localized standards could be relied upon in postal obscenity prosecutions.[582] In so holding, the Court concluded:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violation of state

576. 16 U.S.C. §§ 715-715s (1970) (amended 1973 & 1974).

577. LA. REV. STAT. ANN. § 9:5806A (West Supp. 1973).

578. 328 U.S. 204 (1946). In this case, the Court held that Pennsylvania law would provide the definition for the term "real property" as it is used in a statute authorizing states to tax certain property of the Reconstruction Finance Corporation. *Id.* at 210.

579. *Id.* at 210, *quoted in* 412 U.S. at 596. *See also* U.A.W. v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966).

580. 412 U.S. at 597.

581. *Id.* at 597-99.

582. Hamling v. United States, 418 U.S. 87, 105-06 (1974).

> obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.[583]

At this point, one might respond that the Court in *Hamling* was referring to the burdens placed on defendants in obscenity cases due to the inconsistencies inherent in the varying standards developed by communities throughout the nation, whereas the Court in *Clearfield Trust* was concerned about the burden placed on the government in the enforcement of duties owed to it due to the diversity of local laws regarding commercial paper. But to the extent that the federal government has a right to regulate obscenity, that right is burdened by the construction accorded section 1461 in *Hamling*. A federal prosecutor may have greater or lesser difficulty in showing that an item sent through the mails was in fact obscene, depending upon in which judicial district he initiates a prosecution. Even if he brings an indictment in a district where the community standards are favorable to the government, he still faces the possibility that the defendant may win a change of venue under Federal Rule of Criminal Procedure 21(b)[584] to a district where the standards are less favorable. The choice of laws problems thus created might well lead to a result such as that in *United States v. Elkins*,[585] where the need to apply localized standards actually caused a court to dismiss an indictment on the grounds that the standards presumed to apply were unascertainable by the potential jurors of the transferee district. Thus *Hamling*, to the extent it requires application of localized standards, does "subject the rights . . . of the United States to exceptional uncertainty"; but the Court in that decision was apparently willing to accept this consequence in order to provide juries in postal obscenity cases with understandable criteria for reaching a judgment on the ultimate issue of obscenity *vel non*. Thus, unlike the situation in *Clearfield Trust*, section 1461 prosecutions present an area in which it has been judicially recognized that a "nationally uniform construction" is undesirable, at least to the extent that the term "obscene" in that statute is to be judged according to localized standards.

The same rationale suggests that the Court's citation to *Standard Oil* is also inapt, because the government's ability to win its case will, under *Hamling*, "vary in accordance" with the different standards of the several states or the discrete communities located therein. Moreover, while the Court in *Standard Oil* could find that federal fiscal policy was not of "special or peculiar concern to the states or their citizens," the Court in

583. *Id.* at 106.

584. *See* note 525 and accompanying text *supra*.

585. 396 F. Supp. 314 (C.D. Cal. 1975). *See* notes 534-37 and accompanying text *supra*.

Smith could make no similar assertion and, indeed, acknowledged that regulation of obscenity was a legitimate local concern.

De Sylva involved a situation where state law was in fact incorporated into a federal statute, so it appears to rebut the very point Justice Blackmun was making. One must then, however, ask whether the 1974 Iowa statute, presuming it did define "contemporary community standards," defined them in a way "entirely strange to those familiar with [the term's] ordinary usage." The obvious problem raised is: what *is* the "ordinary usage" of a term that expresses merely "the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness"?[586] The answer is that there can be none, because the content of the term was *intended* to vary from locality to locality. Even assuming the contrary, however, and presuming that the Iowa legislature did in fact desire to define community standards by enacting the 1974 legislation, it is not clear that restricting only the dissemination of obscenity to minors is an "entirely strange" definition; indeed, states other than Iowa do have laws regulating obscenity only as to minors.[587] Thus, the exception to incorporation specified in *De Sylva* would not seem to be very useful in the context of the *Smith* case.

The same can be said for the exceptions listed in *Little Lake Misere*. The 1974 Iowa legislation, unlike the Louisiana law in *Little Lake Misere*, in no way discriminated against the federal government. Nor did it appear to run counter to the terms of section 1461; the federal statute does not mandate regulation of the distribution of obscenity to adults. Moreover, the legislative history of section 1461, unlike that of the Migratory Bird Conservation Act involved in *Little Lake Misere*, does not evince a congressional concern in conflict with the presumed goals of Iowa's lawmakers. The one issue left is whether the 1974 legislation is "plainly hostile to the interests of the United States." The answer is no; the Louisiana legislation in *Little Lake Misere* was found plainly hostile because it retroactively deprived only the federal government of a bargained-for contractual interest. Neither retroactivity nor application solely to the federal government nor impairment of contract were features of the 1974 Iowa obscenity laws.

Thus, a close examination of the cases cited by Justice Blackmun indicates that "traditional principles of federal supremacy" in no way required the Court to follow federal law. Rather, this proffered rationale seems to be little more than an effort to disguise a *policy judgment* by the Court that state law on the issue of contemporary community standards

586. 431 U.S. at 302.

587. *See, e.g.*, OR. REV. STAT. § 167.065 (1974); S.D. COMPILED LAWS ANN. § 22-24-36 (Supp. 1975); W. VA. CODE § 61-8A (Supp. 1975).

would not be incorporated as a rule of decision in federal postal obscenity cases.

It is then necessary to consider how lower federal courts after *Hamling* have dealt with the problem. There are five decisions dealing directly with the subject. All of them rejected the contention that state law should be controlling, but they did so in rather suggestive ways. Two of these decisions, *United States v. Hill*[588] and *United States v. Slepicoff*,[589] were rendered by the Fifth Circuit and involved similar factual problems. In both cases, section 1461 prosecutions were initiated in federal district courts located in Florida. In each case, the defendant wished to show that the state of Florida had no enforceable obscenity law at the time of the alleged offense because a three-judge federal district court had declared that law unconstitutional in 1970.[590] The Fifth Circuit in *Hill* dismissed this contention with the remark that:

> There was no error in refusing to let the defense show that Florida did not have a valid, enforceable obscenity law at the time of Hill's interstate travel. The community *standard* is not necessarily gauged by the state law, and the fact that a three-judge federal court . . . declared Florida Statutes § 847.011 (1967) unconstitutional was not relevant to this federal obscenity prosecution.[591]

The court in *Slepicoff* merely quoted this language from *Hill* in disposing of the contention raised in the former case.[592]

In *United States v. Treatman*,[593] a defendant in a section 1461 prosecution similarly claimed that the fact that the Louisiana Supreme Court had invalidated the state's obscenity statute several months before the commission of the conduct for which the defendant was being prosecuted meant that there were no community standards by which that conduct could be judged.[594] The court cited *Hamling* for the proposition that "community standards" do not necessarily mean "statewide standards"; on this basis, it held that the action of the Louisiana Supreme Court "has no bearing" on a section 1461 prosecution.[595]

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588. 500 F.2d 733 (5th Cir. 1974), *cert. denied*, 420 U.S. 952 (1975).

589. 524 F.2d 1244 (5th Cir. 1975).

590. *See* Meyer v. Austin, 319 F. Supp. 457, 470 (M.D. Fla. 1970), *appeal dismissed*, 413 U.S. 902 (1973). The court therein held FLA. STAT. ANN. § 847.011 (West 1967) unconstitutional on vagueness and overbreadth grounds.

591. 500 F.2d at 739.

592. 524 F.2d at 1249.

593. 399 F. Supp. 258 (W.D. La. 1975).

594. *See* State v. Shreveport News Agency, Inc., 287 So.2d 464, 470 (La. 1974).

595. 399 F. Supp. at 264.

In *United States v. Danley*,[596] another section 1461 case, the trial court, situated in Oregon, admitted into evidence both the obscenity law of the forum state, where the materials in question were posted, and the laws of the various localities to which the materials in question were delivered. The defendants contended that Oregon law, which proscribed only the furnishing of obscene materials to minors,[597] fixed the applicable community standard. To this, the Ninth Circuit retorted:

> We deal with a federal law which neither incorporates nor depends upon the law of the states. . . . Rather, the federal law depends for its consitutionality upon definitions incorporating community standards. Community standards are aggregates of the attitudes of average people—people who are neither "particularly susceptible or sensitive . . . or indeed . . . totally insensitive." . . . The fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the trial court and in this case the trial court did resolve it.[598]

Finally, in *United States v. Harding*,[599] a prosecution under section 1462 of Title eighteen of the United States Code prohibiting the transportation of obscene materials in interstate commerce,[600] the defendant entered into a stipulation with the government that the materials in question were obscene. After a trial in 1972, the defendant was convicted; the Supreme Court eventually remanded this conviction for reconsideration in light of *Miller*.[601] After a retrial and on a second appeal, the defendant contended before the Tenth Circuit that the trial court had erred in not submitting the definitions contained in the forum state's obscenity laws to the jury. The court of appeals disagreed, saying "[s]urely the Supreme Court did not in *Miller* decree that state laws would henceforth govern these federal prosecutions."[602] Accordingly, it found no prejudice in holding the defendant bound by his prior stipulation.[603]

Hill and *Slepicoff* are intriguing because they indicate that state laws do not "necessarily" govern federal prosecutions. The implication of the enigmatic use of this adverb is that where a state law is voided by a court on constitutional grounds, no judgment of policy concerning the content of

596. 523 F.2d 369 (9th Cir. 1975), *cert. denied*, 424 U.S. 929 (1976).
597. *See* OR. REV. STAT. § 167.065 (1974).
598. 523 F.2d at 370 (citations omitted).
599. 507 F.2d 294 (10th Cir. 1974).
600. *See* note 273 *supra*.
601. Miller v. California, 413 U.S. 15 (1973). *See* Harding v. United States, 414 U.S. 964 (1973).
602. 507 F.2d at 297.
603. *Id.* at 298.

community standards can possibly be imputed to the state's elected representatives, so the fact of that voidance should not be admissible in evidence in a federal postal obscenity case. But presumably, if a state's lawmakers repealed the state's obscenity legislation and enacted no replacement, the Fifth Circuit might have been disposed to deem that fact controlling on the issue of community standards. The same cannot be said for the district court in *Treatman*, however; that court, although confronted with a similar situation, repudiated unconditionally the applicability of state law as evidence of community standards. But *Hill* and *Slepicoff* do point to an important insight. If state law is to govern at all, it can only do so if it represents a clear-cut policy judgment of the legislature, and making that determination requires a consideration of the context in which the law in question was enacted, amended, repealed or interpreted. The Court in *Smith* was not oblivious to the importance of context; it both suggested a variety of reasons why the 1974 Iowa legislation need not be construed as an expression of a legislative intent to leave unregulated the distribution of obscene materials to adults and it also pointed out that the enactment of the 1976 statutes by the state legislature indicated that the 1974 laws were probably never intended to be more than stopgap legislation.[604] This is a valid criticism. Moreover, it is a criticism that suggests that *Smith* falls within another one of the subcategories of section 1461 prosecutions where it would be improper to presume that state law is controlling. But *Hill* and *Slepicoff* could be construed as instances where this technique of contextual scrutiny will be utilized to distinguish between those state laws, or gaps in state laws, that define the content of community standards and those that do not. *Smith*, on the other hand, accepts the thesis that state legislatures cannot "freeze" community standards; the Court therein used the technique of contextual scrutiny in a *negative* fashion, solely in order to rebut the claim that it was nullifying Iowa law.

Danley, as noted earlier, is one of those cases in which the applicable standards include those of localities both within and without the forum state, so that, by definition, the law of the forum state should not be governing. But *Danley* also stands for the broader proposition that whether members of the relevant community condone what the state legislature permits is a question for the trier of fact. Superficially, *Harding* would seem to conflict with *Danley* on this point, because in the former case the Tenth Circuit upheld the decision of the trial court not to submit evidence of the forum state's laws to the jury. But the discrepancy may well be explained by the fact that in *Harding* the defendant had already entered into a stipulation with the government that the materials he was charged with distributing were in

604. *See* 431 U.S. at 306.

fact obscene. At any rate, to the extent that there was any difficulty on this point, the Court in *Smith* clarified it by expressly adopting the rule of *Danley*.[605]

Thus, it could be argued that the result in *Smith* was proper because that case represents one of those section 1461 prosecutions where the import of state law is ambiguous and thus evidence of that law should only be deemed probative, rather than conclusive. Indeed, except in those cases involving the clearest expressions by a state legislature of its intent to define community standards, one might well argue that most section 1461 prosecutions will fall within this subcategory of situations where the opinions of the state legislature are inherently ambiguous. But *Smith* goes further and says that even in those clear-cut, indisputable cases, states cannot fix community standards.[606] This conclusion with respect to federal postal obscenity cases is premised on the argument noted earlier that the community standards aspect of section 1461 presents issues of federal law, and that such law overrides inconsistent state legislation. But what is that "federal law"? It cannot be located in the language of section 1461, which never mentions community standards. It must therefore be the language in *Hamling* holding that the relevant standards are those of the jurors' vicinage.[607] The problem with this interpretation is that the language in *Hamling* never addresses the issue of what effect jurors must give to state law. Thus, *Smith* reads into the language of *Hamling* the assumption expressed in *Danley* that merely because one's elected representatives enact laws evincing a particular policy with respect to the suppression of obscenity, this does not mean that one must condone or abide by that policy. The Court in *Smith* then blithely proclaims that this newly-coined interpretation of *Hamling* is governing federal law. The troubling aspect of the decision is that the Court need not have taken this step. It could have attempted to identify passages in *Hamling* that supported its interpretation of what federal policy was. There are some such suggestive paragraphs in that earlier opinion. Thus, the Court in *Hamling* noted that evidentiary rulings of a federal trial judge will rarely constitute reversible error, "since 'in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence.' "[608] On this basis, the action of the district court judge in *Smith* in admitting the evidence of the 1974 Iowa legislation, but considering such evidence to be less than conclu-

605. *See id.* at 308.

606. *See id.* at 302.

607. Hamling v. United States, 418 U.S. 87, 105-06 (1974).

608. *Id.* at 124-25 (citing Salem v. United States Lines Co., 370 U.S. 31, 35 (1962); Michelson v. United States, 335 U.S. 469, 480 (1948); NLRB v. Donnelly Co., 330 U.S. 219, 236 (1947)).

sive on the issue of contemporary community standards could have been upheld by itself as a legitimate exercise of discretion. Or the Court could have engaged in the discriminating approach of *Hill* and *Slepicoff* and looked to the circumstances surrounding the enactment, amendment, repeal or interpretation of the law alleged to be controlling. Indeed, the technique of contextual analysis would have been consistent with *Hamling*. The Court in that case had rejected the contention that the materials involved therein were not obscene because they had been mailed under a second-class mailing permit; it noted that the federal law creating standards for the issuance of such permits[609] could not be controlling on the issue of obscenity *vel non* because it has been judicially determined that the law gave postal inspectors no power of censorship.[610] Thus, there were narrower bases for the result reached by the majority in *Smith*, which would not have entailed reading something into *Hamling* that was not explicitly there. The Court seemed to ignore these narrower bases of decision primarily because it initiated its discussion of the whole problem with the flat assertion that state legislatures can never define community standards even in the context of state obscenity prosecutions; it therefore began with the presumption that the same would hold true in federal prosecutions.

The rationale underlying this generality is that "contemporary community standards" represent no more than an inherently subjective measure of local mores, and that states cannot freeze the definition of that measure. Actually, the issue appears to be trivial; those state statutes that have explained the meaning of "contemporary community standards" have done no more than define the relevant community as the state as a whole,[611] a practice which *Smith* approves.[612] Moreover, Justice Powell, who provided the swing vote in *Smith*, specifically cautioned that "this case presents no question concerning the limits on a State's powers to design its obscenity statutes as it sees fit or to define community standards as it chooses for purposes of applying its own laws. Within the boundaries staked out by *Miller*, the States retain broad latitude in this respect."[613] Justice Powell's caveat is well taken; Justice Blackmun's assertion that states may never legislatively fix community standards would appear to be erroneous, at least

609. *See* 39 U.S.C. § 4354 (repealed 1970); 39 C.F.R. Pt. 132 (1973) (no longer in force).

610. Hamling v. United States, 418 U.S. 87, 126 (1974) (citing Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946)). The Court in *Hannegan* held that "[t]he validity of obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates."

611. *See* note 471 *supra*.

612. 431 U.S. at 303.

613. *Id.* at 310 (Powell, J., concurring).

with respect to state obscenity actions. The "broad latitude" accorded by *Miller v. California*[614] and *Paris Adult Theater I v. Slaton*[615] would appear to support this view. Thus, in *Miller*, the Court claimed that "[w]e emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts."[616] *Paris* went even further, finding that "[t]he States of course may follow . . . a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, . . . but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction."[617] Earlier in *Paris*, the Court had spoken of the states' interests in protecting social order and morality. In conjunction with this statement it quoted with approval the following assertion by Justice Oliver Wendell Holmes:

> [T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.[618]

Both *Hamling* and *Miller* assert that the First Amendment does not require the application of national standards.[619] Conversely, it would seem that this same constitutional provision does not mandate local standards. Indeed, the Court in *Hamling* ruled that a jury instruction containing eighteen references to "national standards" would not constitute reversible error, absent a showing that it materially affected the deliberations of the jury.[620] Moreover, even Justice Blackmun in *Smith* noted that *Miller* only held that states could not be compelled to adopt a national standard; he left open the possibility that states might be permitted to adopt such a standard voluntarily.[621] Thus, *Miller, Paris* and even *Smith* point out that the matter of "contemporary community standards" is subject to the Supreme Court's notion of judicial convenience, not the dictates of the Constitution. If so, then Justice Holmes' statement would appear to support the proposition that the states can do whatever they "see fit" on the subject at least, according to *Paris*, so long as they act on "matters falling within their own jurisdiction."

614. 413 U.S. 15 (1973).

615. 413 U.S. 49 (1973).

616. 413 U.S. at 25.

617. 413 U.S. at 64 (emphasis in original).

618. Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting, joined by Brandeis, J.), *quoted in* 413 U.S. at 60 n.11.

619. Hamling v. United States, 418 U.S. 87, 106-07 (1974); Miller v. California, 413 U.S. 15, 31-32 (1973).

620. Hamling v. United States, 418 U.S. 87, 107-08 (1974).

621. 431 U.S. at 304 n.11.

A state obscenity prosecution based upon state law obviously falls within the jurisdiction of the state, so under *Paris* and *Miller* it seemed that a state could fix the definition of "contemporary community standards" with respect to such prosecutions. Justice Blackmun's holding on this issue in *Smith* would thus appear to run counter to the great deference due to the wishes of the state legislatures, as expressed in the 1973 obscenity cases.

Moreover, Justice Blackmun's remark that states cannot freeze community standards is inherently vacuous, at least with respect to state prosecutions. When a state revises its obscenity laws to permit criminal sanctions to be applied only against those who disseminate "obscene materials" to minors, for example, it is implicitly setting a standard with respect to adults, namely, that they can be sold or given any type of sexually-oriented materials with impunity. A community within the state might not condone this policy, but its condonation is irrelevant; the potential jurors will never get a chance to evince their disagreement with the policy of the state legislature, because they will never get a chance to be part of a trial involving one accused of distributing obscenity to adults under existing state law. Thus, the state has, as a practical matter, established a community standard by promulgating a policy of law enforcement. It has done so with the same force and effect as if it had passed a law saying "the contemporary community standards of this state are that sexually-oriented materials disseminated or displayed solely to persons over the age of eighteen can never appeal to prurient interests or be deemed patently offensive." Nevertheless, Justice Blackmun in *Smith* would permit a state to "define the kinds of conduct" that it will regulate. He never notices that one effect of such a definition may in fact be the "freezing" of community standards. Therefore, on this aspect of the case, Justice Powell's concurrence advocates not only a much more pragmatic approach, but also one that remains consistent with *Miller, Paris* and *Hamling*.

The obvious consequence of the *Smith* decision in light of Justice Powell's concurrence is that a jury composed of the citizens of a given state will be bound by the contemporary community standards defined explicitly or implicitly by that state's legislature, whenever they serve in a state prosecution. That identical jury, however, sitting in a federal prosecution conducted within the same state, is free to ignore the local legislature's definitions. The five prevailing justices in *Smith* elected to create this situation by relying on a flat assertion about preeminent federal policy, a policy which they themselves invented in this case. One can only wonder whether a narrower ground of decision, such as those suggested earlier, would not only have yielded a more internally consistent rule but would also be less likely further to obscure an already murky subject.

(2) Questions of Policy

Justice Stevens' dissent in *Smith* is interesting because he advocated a reconsideration of the step undertaken in *Hamling*, the repudiation of national standards for federal postal obscenity prosecutions. In arguing for a "principled re-examination" of the very premises upon which the result in *Smith* rests, he focused on some concerns that had formerly been well expressed by Justice Douglas, concerns that involve matters outside the relatively narrow issues resolved in this case. In his dissent in *Miller*, Justice Douglas had stated that "[t]o send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."[622] Similarly, in his dissenting opinion in one of *Miller*'s companion cases, Justice Douglas asserted that "[t]he Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions . . . [and to construe colonial history] . . . as qualifying the plain import of the First Amendment is both a *non sequitur* and a disregard of the Tenth Amendment."[623] Justice Stevens, when he argued that the line of demarcation between speech that is protected by the First Amendment and that which is not is "too blurred" to be left to the subjective reactions of individual jurors,[624] particularly for the purpose of identifying criminal conduct under federal law, is thus, to a great extent, reiterating the sentiments of the man whom he replaced on the Court.

Indeed, Justice Stevens' entire criticism of the policy of basing community standards on the viewpoints of individuals is an acute one. The majority's citation of the remark in *Hamling* that a juror can draw on his knowledge of the vicinage to judge the issue of obscenity *vel non* in the same way that he could draw on his knowledge of the propensities of a reasonable man is a specious comparison. The Court in *Hamling* cited as supporting authority for its statement tort cases involving issues of negligence.[625] While the exercise of common sense and sound judgment by each juror may well suffice for a determination of civil liability for personal injury, is it an appropriate method by which to measure criminal liability for speech that may or may not be protected by the First Amendment, depending upon the result of the measurement made? It can be argued persuasively that the application of such local standards creates a chilling effect on the dissemination of materials because sellers are unwilling to risk a criminal

622. Miller v. California, 413 U.S. 15, 43-44 (1973) (Douglas, J., dissenting).

623. United States v. Twelve 200-ft. Reels of Film, 413 U.S. 123, 130-31 (1973) (Douglas, J., dissenting).

624. *See* 431 U.S. at 316 (Stevens, J., dissenting).

625. Hamling v. United States, 418 U.S. 87, 104-05 (1974). *See* note 436 *supra*.

conviction for testing variations in standards from place to place. Justices Brennan and Marshall, joined at times by Justice Stewart, have often noted this problem in obscenity cases; they advocate the desirability of balancing the First Amendment interests of a defendant in an obscenity prosecution against those the government has in protecting public morals. Thus, in his dissent in *Paris Adult Theater I v. Slaton*,[626] Justice Brennan, joined by Justices Stewart and Marshall, stated:

> I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech and to avoid very costly institutional harms. Given these inevitable side effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.[627]

The majority in *Miller* was not insensitive to the "ill effects" adverted to by Justice Brennan. It noted that the use of national standards implies that materials deemed intolerable under such standards might, as a result, be unavailable in those communities where local tastes are such that those materials would be acceptable.[628] Consequently, the majority argued that the potential for suppression would be as significant were prurient interest and patent offensiveness to be judged in accordance with a nationwide standard as it might be under a regime utilizing local standards.[629] Therefore, it was said that it would be "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[630] But, as Justice Stevens points out, the standard applied by the majorities in *Miller* and in *Smith* focuses upon the content of the materials in question and their impact on the average person in the community and "that impact is not a constant; it may vary widely with the use to which the materials are put."[631] Thus, he argues that there is neither absolute immunity from governmental regulation for protected speech in

626. 413 U.S. 49, 73 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

627. *Id.* at 103 (emphasis in original) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.). *See also* Smith v. California, 361 U.S. 147, 150-54 (1959); Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 536-57 (1975) [hereinafter cited as *Chill of Uncertainty*].

628. Miller v. California, 413 U.S. 15, 32 (1973).

629. *Id.* n.13.

630. *Id.* at 32-33.

631. 431 U.S. at 317 (Stevens, J., dissenting).

fact, nor should there be absolute criminal liability for any use of obscene material. After all, "[w]hat is one man's amusement, teaches another's doctrine."[632] Justice Stevens then arrives at much the same conclusion reached by Justice Brennan in *Paris*. He would permit states to regulate obscenity in a manner short of outright suppression, particularly where the speech in question poses the threat of being a nuisance to unconsenting adults.[633] Thus, the slim majority of five that prevailed in *Miller* and *Hamling* remains exactly that, a slim majority.

Justice Stevens also points out that the effect of relying on jurors' subjective interpretations is to make guilty verdicts in obscenity cases virtually unreviewable by appellate courts.[634] The majority's opinion in *Smith* compels a consideration of the problem. Although the subsequent review of a particular conviction does little to alleviate the chilling effect of the jury's use of ill-defined, variable standards in arriving at a verdict of guilty, at least the possibility of reversal by an appellate court provides some assurance that "convictions from provincial communities where the views of what is acceptable material were badly out of line with contemporary views in most American communities"[635] will not prevail as precedent. As the majority in *Miller* appeared to concede, First Amendment values are protected not only by its definitional formula of obscenity, but also "by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[636] That power is especially crucial in obscenity cases. This is so because those cases involve issues concerning what are referred to as "constitutional facts." In *Roth v. United States*,[637] the Court held that obscenity is not speech protected by the First Amendment. The determination that an item is not obscene is therefore simultaneously a determination that it is or is not shielded by the Constitution. Thus, as Justice Harlan noted in his separate opinion in *Roth*, obscenity is "not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."[638]

One effect of denominating an issue to be one of "constitutional fact" is to require appellate courts to make an independent judgment on the issue by means of a de novo review of the trial record. As two commentators have phrased it:

632. Winters v. New York, 333 U.S. 507, 510 (1948).

633. *See* 431 U.S. at 318-19 (Stevens, J., dissenting).

634. *Id.* at 315-16.

635. *Chill of Uncertainty, supra* note 627, at 551.

636. Miller v. California, 413 U.S. 15, 25 (1973).

637. 354 U.S. 476 (1957). *See* notes 3-10 and accompanying text *supra*.

638. 354 U.S. at 498 (Harlan, J., concurring in part and dissenting in part) (emphasis in the original).

> This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts "in the form of determinations of fact"—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised.[639]

The Supreme Court acknowledged this obligation both before and after *Miller*. Thus, in *Kois v. Wisconsin*,[640] decided in 1972, the Court was confronted with the problem of whether two features appearing in an "underground" newspaper had, as their dominant theme, an appeal to prurient interest. The first was an article purporting to chronicle the author's arrest for possession of obscene material and including two photographs depicting naked men and women embracing each other, photographs that were said to be representative of the materials in question; the other was a "Sex Poem" that consisted of "an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse."[641] The Court noted that "[w]hile 'contemporary community standards,' . . . must leave room for some latitude of judgment, and while there is an undeniably subjective element in the test as a whole, the 'dominance' of the theme is a question of constitutional fact."[642] On the basis of its independent review of the items in question, the Court found no dominant appeal to prurient interest and thus reversed a judgment of conviction.[643] Similarly, in *Jenkins v. Georgia*,[644] decided in 1974, the Court was confronted with a conviction arising from the theatrical showing of a film entitled "Carnal Knowledge." The majority opinion cautioned:

> Even though questions of appeal to "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," . . . but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' conduct . . . ."[645]

639. Lockhart & McClure, *supra* note 3, at 116.

640. 408 U.S. 229 (1972).

641. *Id.* at 231.

642. *Id.* at 232 (citing Roth v. United States, 354 U.S. 476, 489 (1957)). *See also* Childs v. Oregon, 431 F.2d 272, 276 (9th Cir. 1970), *vacated on other grounds*, 401 U.S. 1006 (1971).

643. 408 U.S. at 232.

644. 418 U.S. 153 (1974). *See* notes 54-58 and accompanying text *supra*.

645. *Id.* at 160 (citations omitted).

Thus, after reviewing the film in question, the Court held that it was not legally obscene because it contained no depictions of "hard core pornography" as defined by the examples given in *Miller*.[646] In his concurrence, Justice Brennan remarked that "[a]fter the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity."[647] This assessment appeared to be correct and, as a result, the Court in *Jenkins* appeared to adopt a very wide-ranging concept of appellate review of the three elements of the *Miller* test.

How wide-ranging this concept is may be appreciated by considering Professor Schauer's explanation of what it entails:

> What the scope of review involves is a determination of whether, as a matter of constitutional law, the materials are of such character as to be clearly outside the scope of First Amendment protection, or, if the issue is not clear, to contain arguably prurient, patently offensive, and valueless depictions or descriptions such that jury findings of pruriency, offensiveness, and lack of value would not offend the Constitution. In other words, the appellate court must make an independent review, but the question to be asked is not whether the materials are obscene, but whether the materials create a jury issue of obscenity. Since this involves questions of constitutional law, more evidence is needed to create a jury issue than in other criminal cases, not by virtue of a different standard, but by virtue of the various elements of the *Roth-Miller* test. Thus, the independent review by an appellate court must deal with prurient interest, dominance of the theme, patent offensiveness, lack of value, and whether or not the materials depict or describe hard-core sexual conduct. If, as to each of these issues, a jury issue is created, then the verdict must be allowed to stand. But if, as to *any one* of these issues, the reviewing court finds that the material is not within the *Roth-Miller* definition of obscenity, then a verdict of obscenity must be reversed.[648]

This quotation certainly seems to be an accurate summary of *Jenkins*. Yet, language in *Smith* would appear to espouse a significantly different view of the scope of appellate review of obscenity cases. Justice Blackmun therein said review would be limited to four issues: (a) whether jurors were instructed to consider the views of their entire community and not just their own views or those of an atypical minority; (b) whether the conduct depicted falls within the examples specified in *Miller*; (c) whether the item in question meets the third part of the *Miller* test, *i.e.*, lacks serious literary, artistic, political, or scientific value and (d) whether the evidence was

646. *Id.* at 161.

647. *Id.* at 163 (Brennan, J., concurring, joined by Stewart and Marshall, JJ.).

648. SCHAUER, *supra* note 3, at 152 (emphasis in original).

sufficient.[649] By the fact that the Court in *Smith* specified that the third part of the *Miller* test was "particularly amenable" to appellate review, it suggested that the other two parts, appeal to prurient interest and patent offensiveness, are not. Presumably, this would be so because those two elements depend upon jurors' application of contemporary community standards, something judges sitting on appellate courts could never hope to ascertain. If this is so, then extensive review of these issues of constitutional fact is precluded. Instead of considering whether all the evidence creates a jury issue on each of these two aspects of the *Miller* test, appellate courts after *Smith* are alloted a much narrower role, one of ascertaining whether the materials in question consist either of "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" or of "[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[650] The effect of this limitation is to restrict appellate review of patent offensiveness solely to these enumerated examples, a fact which reduces such review to a mechanical exercise in matching the evidence adduced at trial with one or more of the types of depictions mentioned. Moreover, this limitation precludes any independent review on the issue of appeal to a prurient interest; the appellate court is instead allotted the minor role of ascertaining if the jurors were instructed on the right standard to be used in judging the existence of such an appeal. One might argue that the traditional scope of appellate review might be preserved by Justice Blackmun's inclusion of the catch-all phrase "sufficiency of the evidence" as an appropriate subject for consideration by judges sitting on a court of appeals. This phrase, however, refers merely to whether the government introduced sufficient evidence at trial to sustain a finding of obscenity. Thus, in *Smith*, for example, the issue would be whether the materials in question, which were all that the federal prosecutor introduced on this issue, would serve as a sufficient basis for a jury's determination on the matter of obscenity *vel non*. Phrasing the requirement in this way suggests that an appellate court might still be able to decide whether or not a jury issue of obscenity exists in the course of its review of the materials admitted by the trial court. In fact, however, the appellate court has no such broad powers under the "sufficiency of the evidence" criterion of review. As the Court said in *Paris Adult Theater I v. Slaton*:[651]

> Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials them-

649. 431 U.S. at 305-06.

650. *See* note 37 and accompanying text *supra*.

651. 413 U.S. 49 (1973).

> selves were actually placed in evidence. . . . The [materials], obviously, are the best evidence of what they represent. "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."[652]

Thus, once the government introduces the allegedly obscene materials into evidence at trial, appellate review of the issue of whether those items constitute sufficient evidence on which to base a finding of obscenity is virtually precluded. Consequently, as noted above, *Smith* would seem to foreclose independent appellate review on the issue of appeal to prurient interest, and fixes an extremely narrow range for such review on the issue of patent offensiveness. The Court appears to engage in this sharp departure from prior cases like *Kois* and *Jenkins* because of its perceived need for judges to defer to jurors' own assessments of what their community's standards are.

This deference in *Smith* in many ways compels the general conclusions on reviewability reached by Justice Blackmun. If jurors must apply contemporary community standards in accordance with "*their own understanding* of the tolerance of the average person in their community,"[653] can the Supreme Court, which sits in Washington, disagree with that assessment? The substantive examples of patent offensiveness suggested in *Miller* and incorporated in section 1461 prosecutions by the Court in *Hamling* will permit appellate courts to reassess the jury issue of obscenity *vel non* to some extent, but those examples will primarily be helpful only in the relatively easy cases like *Jenkins*. These substantive limitations will not forcefully constrain the trier of fact in a borderline case, and while "hard core" depictions may be obvious on many occasions, one can imagine numerous instances where sexually-oriented materials will be at the very periphery of acceptability. Thus, *Smith* confirms the view of Professor Lockhart that the Court has, in effect, placed "the application of two major factors in the constitutional standard—pruriency and offensiveness—beyond effective appellate judicial review, making virtually conclusive the views of local jurors and judges applying these highly subjective factors."[654] In so doing, the Court has also signaled that the "constitutional fact" doctrine simply may not apply with regard to these two aspects of the tripartite *Miller* test.

But what of the independent review accorded the third aspect of that test, the determination of whether the material, taken as a whole, lacks

652. *Id.* at 56 (citations & footnote omitted). For other similar expressions on this subject, see note 294 *supra*.

653. 431 U.S. at 305 (emphasis added).

654. *Chill of Uncertainty, supra* note 627, at 552.

serious literary, artistic, political or scientific value? The problem is that this is a rather difficult test to apply. It requires "not only a searching inquiry into the actual merit of the material, but an analysis of the relationship of the serious matter to the sexually explicit matter, which will inevitably involve a determination of intent as well as effect."[655] If the issue is explored by expert testimony at trial, an appellate court may be able to engage in a reasoned, careful evaluation of the problem. But what happens in a case like *Smith*, where no evidence on the subject is ever introduced? Obviously, the judges sitting on the court of appeals must then evaluate intent and effect on their own. A finding of saving value may be easy to make when the work in question is a book like *Ulysses* or *Tropic of Cancer* or *Psychopathia Sexualis*, or a film like "Carnal Knowledge." It becomes extremely difficult when the materials are similar to those involved in *Smith*:

> (1) issues of "Intrigue" magazine, depicting nude males and females engaged in masturbation, fellatio, cunnilingus, and sexual intercourse; (2) a film entitled "Lovelace," depicting a nude male and a nude female engaged in masturbation and simulated acts of fellatio, cunnilingus, and sexual intercourse; and (3) a film entitled "Terrorized Virgin," depicting two nude males and a nude female engaged in fellatio, cunnilingus, and sexual intercourse.[656]

Thus, from the perspective of the defendant in a case such as *Smith*, independent appellate review of the issue of whether the material in question, taken as a whole, has serious literary, artistic, political, or scientific value may not provide a helpful means by which to challenge a criminal conviction.

Given the virtually conclusive nature of juror determinations on the issues of pruriency and patent offensiveness, it thus becomes imperative that counsel select the members of the jury panel with care. *Smith*, however, recognizes the broad power of the trial judge to regulate the conduct of voir dire. The Court noted that the particular inquiries sought by the defendant in this case, which requested the jurors to describe their understanding of community standards, "would not have elicited useful information about the jurors' qualifications to apply [these standards] in an objective way."[657] It therefore held that the district court judge had not abused his discretion in declining to ask those questions.[658] While the Court implied that it would accept other "more specific and less conclusory questions for *voir dire*,"[659] Justice Blackmun's own examples of permissible questions were quite

655. SCHAUER, *supra* note 3, at 147. Thus, the issue of social value or lack of it must be gauged independently by a court. It may not be gauged by reference to contemporary community standards. United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977).

656. 431 U.S. at 293.

657. *Id.* at 308.

658. *Id.*

659. *Id.*

general in effect and would assist defense counsel in an obscenity prosecution only slightly in challenging the qualifications of a particular juror. Thus, Justice Blackmun said that it would be helpful to know "how long a juror has been a member of the community, how heavily the juror has been involved in the community, and with what organizations having an interest in the regulation of obscenity the juror has been affiliated."[660] With the exception of the last query, a juror's response to these inquiries would yield few insights into his awareness and comprehension of contemporary community standards concerning obscenity.

The Supreme Court's conclusion that a federal trial judge in a criminal prosecution possesses a great deal of discretion in how he chooses to conduct voir dire is well taken. Under Federal Rule of Criminal Procedure 24(a) such a judge may submit "such additional questions by the parties or their attorneys as [he] deems proper."[661] But one has to ask whether voir dire in an obscenity prosecution ought not be different from voir dire as conducted in other criminal cases. Professor Schauer states the problem well:

> Whether the voir dire examination is conducted by the judge or by the attorneys, an examination more searching than that in a more conventional case seems justified. In an obscenity case, more so than in most cases, the personal political, moral, religious, and sexual opinions of jurors are likely to affect the verdict they render. Few people think there ought not to be laws against murder, burglary, or rape, but many think there ought not to be laws against obscenity, and this is the kind of personal bias of which the prosecutor should be aware. Similarly, in few other areas of the law are jurors likely to discover that acts personally abhorrent and shocking to them are nonetheless legally protected. The defense should be given an opportunity to know of any such personal views in advance.[662]

Arguably, one way for a defense counsel to elicit these personal views is to test exactly what a potential juror knows about the contemporary standards of his community. The Supreme Court, however, has not accepted the need for a more "searching examination." In *Ham v. South Carolina*,[663] decided in 1973, the Court was asked to review a conviction for the possession of marijuana. The defendant was a young, bearded black. On voir dire, the trial judge did question potential jurors whether they were cognizant of any bias against the defendant in particular and whether they could render an

660. *Id.*

661. FED. R. CRIM. P. 24(a).

662. SCHAUER, *supra* note 3, at 261.

663. 409 U.S. 524 (1973). *See generally* Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65, 89-95 (1975).

impartial verdict. He refused, however, to submit questions to them about possible prejudices arising from the fact that the defendant was black and wore a beard. The Supreme Court ruled that the failure to inquire into the matter of possible racial bias constituted reversible error, but it declined to say the same about the failure to question prospective jurors regarding their attitude toward beards, claiming an inability "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices."[664] A year later, in *Hamling v. United States*,[665] the Court adopted the rule of *Ham* in an obscenity case. In *Hamling*, the trial court had refused to ask questions as to whether the jurors' educational, political and religious beliefs might affect their views on obscenity. The Court ruled:

> Here, as in *Ham*, the trial judge made a general inquiry into the jurors' general views concerning obscenity. Failure to ask specific questions as to the possible effect of educational, political, and religious biases did "not reach the level of a constitutional violation," . . . nor was it error requiring the exercise of our supervisory authority over the administration of justice in the federal courts.[666]

Thus, *Smith's* ruling on voir dire is consistent with precedent. But it deprives defense counsel of the opportunity to elicit any but the most general information about a potential juror's views concerning the standards of his community, and thus precludes him from ascertaining whether those views do in fact reflect communal values or are thoroughly idiosyncratic. The *Smith* decision leaves defense counsel in the unenviable position of attempting to construct questions "general" enough to protect his client, but at the same time, "specific" enough to avoid being ruled "conclusory," with very little substantive guidance from the Court and with an insignificant chance of reversal should the presiding judge refuse to submit a proffered question to potential jurors. Here, as elsewhere, the Court's desire to protect and defer to individual jurors' notions of contemporary community standards appears to deprive the defendant in a federal obscenity prosecution of opportunities with which he can wage a meaningful defense to the criminal charge leveled against him.

5. Ward v. Illinois: *The Specificity Requirement and the* Mishkin *Doctrine*

In the last obscenity decision of the 1976-77 term, the Court in *Ward v. Illinois*[667] faced yet another vagueness/fair notice challenge to a law regulating the distribution of sexually-oriented materials. Not only did it deal with

664. 409 U.S. at 528.
665. 418 U.S. 87 (1974).
666. *Id.* at 140 (quoting Ham v. United States, 409 U.S. 524, 528 (1973) (citation omitted)).
667. 431 U.S. 767 (1977).

the doctrine of variable obscenity established by the case of *Mishkin v. New York*[668] in a rather loose fashion, it also failed to consider the problems that arise when an authoritative judicial construction, which purportedly cures the vagueness inherent in a given obscenity statute, itself neglects to indicate the kinds of conduct judicially deemed to be proscribed by that statute. As a result, the Court's decision in *Ward* not only engenders significant confusion regarding both the current viability of the *Mishkin* doctrine and the exact nature of the specificity requirement in *Miller*, it also obscures the relationship between that requirement and the concept of furnishing a criminal defendant with fair notice of the crime that he is accused of having committed.

a. The Decision

In October of 1971, Wesley Ward was charged in the state of Illinois with having sold two publications, entitled *Bizarre World* and *Illustrated Case Histories, A Study of Sado-Masochism*, in violation of section 11-20(a)(1)[669] of the Revised Statutes of Illinois. That provision prohibits the sale of "obscene" matter; under section 11-20(b) of the same statutes,

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.[670]

668. 383 U.S. 502 (1966). *See generally* Reiss, *The Supreme Court and Obscenity: Mishkin and Ginzburg—Expansion of Freedom of Expression and Improved Regulation Through Flexible Standards of Obscenity*, RUTGERS L. REV. 43, 50 (1966).

669. ILL. ANN. STAT. ch. 38, § 11-20(a) (Smith-Hurd Supp. 1978) provides that a person commits the offense of obscenity whenever, with knowledge of the contents thereof or after recklessly failing to engage in a reasonable inspection that would have disclosed the contents thereof, said person

> (a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene [material] or other representation or embodiment of the obscene; or. . . .
>
> . . . .
>
> (3) Publishes, exhibits or otherwise makes available anything obscene, or. . . .
>
> . . . .
>
> (5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or
>
> (6) Advertises or otherwise promotes the sale of materials represented or held out by him to be obscene, whether or not it is obscene.

670. ILL. ANN. STAT. ch. 38, § 11-20(b) (Smith-Hurd Supp. 1978). Under § 11-20(c) of the same statute, "[o]bscenity shall be judged . . . with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience." ILL. ANN. STAT. ch. 38, § 11-20(c) (Smith-Hurd Supp. 1978).

Ward's nonjury trial resulted in a conviction. This judgment was upheld by both levels of the Illinois appellate system[671] in decisions rendered subsequent to the Supreme Court's ruling in *Miller v. California*.[672] The Illinois Supreme Court expressly rejected the petitioner's claims that section 11-20(b) did not comport with the specificity requirements of *Miller*[673] and that the two publications in question were not obscene.[674] The United States Supreme Court granted certiorari on these two issues to resolve the conflict between the judgment of the state court upholding the statute and the separate ruling of a three-judge federal district court that the Illinois law was void for vagueness.[675]

In an opinion authored by Justice White, in which Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined, the Court affirmed Ward's conviction and upheld the validity of the Illinois obscenity statute under the standards announced in *Miller*. Justice White began by briefly reviewing the *Miller* ruling and acknowledging that it had recognized that official regulation of obscenity must be limited to works that depict or describe hard-core pornography, and that such conduct " 'must be specifically defined by the applicable state law, as written or authoritatively construed.' "[676] The majority found that the Illinois statute fulfilled these requirements.

The Court interpreted Ward's questions on certiorari as presenting four distinct issues. The first of these was whether the Illinois law was written or had been construed in a fashion that comported with *Miller*'s specificity requirement; Ward asserted that "absent such compliance the Illinois law is unconstitutionally vague because it failed to give him notice that materials dealing with the kind of sexual conduct involved here could not legally be sold in the State."[677] Justice White replied by noting that the Illinois statutes did meet the standards of *Miller*,[678] but even assuming the contrary, Ward had ample guidance that the sale of sado-masochistic materials did violate state law. To support this proposition, Justice White cited the Illinois Supreme Court's 1965 decision in *People v. Sikora*,[679] which had upheld a

671. People v. Ward, 25 Ill. App. 3d 1045, 324 N.E.2d 205 (1975), *aff'd*, 63 Ill. 2d 437, 349 N.E.2d 47 (1976).

672. 413 U.S. 15 (1973). *See* notes 34-43 and accompanying text *supra*.

673. People v. Ward, 63 Ill. 2d 437, 441, 349 N.E.2d 47, 49 (1976).

674. *Id.* at 442, 349 N.E.2d at 49.

675. *See* Eagle Books, Inc. v. Reinhard, 418 F. Supp. 345, 350 (N.D. Ill. 1976), *vacated and remanded*, 432 U.S. 902 (1977).

676. 431 U.S. at 768 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

677. *Id.* at 771.

678. *Id.*

679. 32 Ill. 2d 260, 204 N.E.2d 768 (1965).

conviction under the predecessor of section 11-20(a)(1) for the sale of publications dealing with sadism and masochism. This construction by the state court was deemed to be binding on the Supreme Court, and thus, was said to preclude a claim of vagueness.[680]

Ward's second contention was that "sado-masochistic materials may not be constitutionally proscribed because they are not expressly included within the examples of the kinds of sexually explicit representations that *Miller* used to explicate the aspect of its obscenity definition dealing with patently offensive depictions of specifically defined sexual conduct."[681] Justice White retorted that the *Miller* examples were just that, examples that, according to *Hamling v. United States*,[682] were "not intended to be exhaustive."[683] Furthermore, he noted that the majority in *Miller* had not meant to extend constitutional protections to the kinds of flagellatory publications deemed obscene in the Court's 1966 decision in *Mishkin v. New York*.[684] Assuming such publications remained unprotected, "surely those before us today deal with a category of sexual conduct which, if obscenely described, may be proscribed by state law."[685]

The third issue raised by the petitioner was that the materials in question were simply not obscene under the tripartite standard of *Miller*.[686] The majority found that this argument was "foreclosed" by *Mishkin*, which permitted the regulation of obscenity directed to deviant groups.[687] Since the Illinois courts had found the two publications at issue to be obscene under state law, Justice White found no reason to differ with their conclusions.[688]

Finally, there remained Ward's contention that, even assuming that the Illinois statute was not inherently vague, the state had nevertheless "failed to conform to the *Miller* requirement that a state obscenity law, as written or authoritatively construed, must state specifically the kinds of sexual conduct the description or representation of which the state intends to proscribe by its obscenity law."[689] To this assertion, the majority responded by pointing to the case of *People v. Ridens*,[690] decided by the Illinois Supreme Court in

680. 431 U.S. at 772-73.
681. *Id.* at 773.
682. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.
683. *Id.* at 114.
684. 383 U.S. 502 (1966). *See* notes 737-740 and accompanying text *infra*.
685. 431 U.S. at 773.
686. *Id.*
687. *Id.*
688. *Id.*
689. *Id.* at 774.
690. 59 Ill. 2d 362, 321 N.E.2d 264 (1974), *cert. denied*, 421 U.S. 993 (1975). The Illinois Supreme Court had originally heard this case in 1972 and, at that juncture, had found that § 11-20 was constitutional in that it provided the same test for obscenity as was set forth in Roth v.

1974. In *Ridens*, the state court found[691] that section 11-20 of the Criminal Code incorporated parts (a) and (b) of the *Miller* test for obscenity[692] and part (c) of the test originally set forth in *Memoirs v. Massachusetts*.[693] The court in *Ridens*, however, did not go further and describe the kinds of conduct referred to under part (b) of the *Miller* guidelines. Finding that no difficulty had arisen from this omission, Justice White claimed:

> The Illinois court thus must have been aware of the need for specificity and of the *Miller* Court's examples explaining the reach of part (b). . . . The Illinois court plainly intended to conform the Illinois law to part (b) of *Miller*, and there is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the *Miller* examples, which gave substantive meaning to part (b) by indicating the kinds of materials within its reach. The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in *Miller*.[694]

Justice White also noted that in *People v. Gould*,[695] a 1975 ruling, the state court had reaffirmed its action in *Ridens* and, in doing so, had quoted not only part (b) of the *Miller* test, but also the examples that were intended to explicate that part.[696] Thus, the majority asserted that it would be a "needlessly technical and wholly unwarranted reading of the Illinois opinions to conclude that the state court did not adopt these explanatory examples as well as the guidelines themselves."[697] Justice White went on to observe that one might claim that section 11-20 was overbroad because "the state had not provided an exhaustive list of the sexual conduct the patently offensive description of which may be held obscene under the statute."[698] But he noted that under *Broadrick v. Oklahoma*,[699] the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[700] Because the Illinois courts had recognized limitations on the kinds of sexual conduct that could permissibly be depict-

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United States, 354 U.S. 476 (1957). *See* notes 2-9 and accompanying text *supra*. People v. Ridens, 51 Ill. 2d 410, 414, 282 N.E.2d 691, 694 (1972). This decision was vacated by the Supreme Court and remanded for reconsideration in light of *Miller*. Ridens v. Illinois, 413 U.S. 912 (1973). The state court's 1974 decision was its ruling on remand.

691. 59 Ill. 2d at 373, 321 N.E.2d at 270.

692. *See* note 37 and accompanying text *supra*.

693. 383 U.S. 413 (1966). *See* note 23 and accompanying text *supra*.

694. 431 U.S. at 775.

695. 60 Ill. 2d 159, 324 N.E.2d 412 (1975).

696. 431 U.S. at 775-76.

697. *Id.* at 776.

698. *Id.*

699. 413 U.S. 601 (1973).

700. *Id.* at 615. *See generally* SCHAUER, *supra* note 3, at 154-58; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

ed, no overbreadth claim could be made out.[701] In fact, the majority noted that *Ridens* and *Gould* could be interpreted to accomplish exactly what was achieved in *Hamling* and other federal cases, which was holding the applicable obscenity laws "to be limited to 'the sort of' patently offensive representations or descriptions of that specific hardcore sexual conduct given as examples in *Miller*."[702] The majority thus upheld the affirmance of Ward's conviction.[703]

Justice Brennan, joined by Justice Stewart, dissented, repeating his previously stated view that section 11-20 was unconstitutionally overbroad.[704] Justice Stevens, joined by Justices Brennan, Stewart and Marshall, also dissented. He claimed that the majority's opinion abandoned the specificity requirement of *Miller*.[705] Justice Stevens agreed that the Illinois court had made it clear that section 11-20 covered all the *Miller* examples; "[i]t has not, however, stated that the statute is limited to those examples, or to any other specifically defined category."[706] The fact that the *Sikora* decision had held that the law proscribed dissemination of sado-masochistic materials did not alleviate the problem:

> But, if such notice is all that is required, it is difficult to understand why the *Miller* case itself was remanded for consideration of the specificity issue. . . . For the description of the materials involved in *Miller* leaves no room for doubt that they were similar to materials which had often been the subject of prosecutions in the past; there clearly was no question of fair notice.[707]

Moreover, the majority's ruling that the list of conduct proscribed by a statute need not be exhaustive was tantamount to holding that a person could be prosecuted for selling materials not on the list. This conflicted with *Miller's* assurance that no one could be subject to prosecution except for the sale of hard core pornography defined by the regulating state law, as written or authoritatively construed.[708] Thus, Justice Stevens asserted that the Court in *Ward* withdrew the "cornerstone of the *Miller* structure and, undoubtedly, [hastened] its ultimate downfall."[709]

701. 431 U.S. at 776.
702. *Id.*
703. *Id.* at 777.
704. *Id.* (Brennan, J.,dissenting, joined by Stewart, J.) (citing Ridens v. Illinois, 413 U.S. 912, 914 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.)).
705. 431 U.S. at 777 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).
706. *Id.* at 779.
707. *Id.* at 780-81.
708. *Id.* at 781.
709. *Id.* at 782.

b. Analysis

Perhaps the best method of considering the *Ward* case is to analyze separately each of the four issues identified in Justice White's majority opinion. In order to maintain continuity, Justice Stevens' remarks on each of these issues will be discussed contemporaneously with the analysis made by the majority.

(1) Relevance of Prior Rulings

According to the majority, the 1965 decision in *People v. Sikora*[710] gave detailed meaning to section 11-20, which bound all subsequent courts. Unfortunately, the opinion in *Sikora* did not attempt to fix the meaning of the statute in the manner asserted by Justice White in *Ward*.[711] The Illinois Supreme Court in that case gave detailed descriptions of three books, *Lust Campus*, *Passion Bride* and *Crossroads of Lust*. The first two were said to contain several scenes of flagellation,[712] and the third was represented as including three voyeuristic tableaux, one of which was "characterized by sadism and masochism."[713] After presenting these summaries, the state court went on to say:

> The sole appeal of these books is to prurient interest and the stimulation of that interest, is clearly the author's intention. The aberrational conduct portrayed can appeal only to a shameful and morbid interest in nudity and sex. The kind of scenes that are described and the detail of description go beyond the customary limits of candor in this country. The defendant does not contend that any of these books has literary or artistic merit. No one of them can be said to represent a serious attempt to discuss any problem that confronts society. They are discussions of sex and perversion, almost totally unrelated to anything else. Such plot and characterization as they contain serve as transitions from one sexual episode, normal or abnormal, to another. It is not enough, in our opinion, to say that they are escapistic, and so serve a social function. Without their obscenity they would interest no one and would perform no function. All obscenity is essentially escapistic; it can not be allowed to justify itself on that basis.[714]

The court in *Sikora* did not hold that the category of sado-masochistic depictions was subsumed under the general definition of section 11-20(b). In fact, it offered no generalities regarding the extent to which the term "obscene" as utilized in that provision encompassed materials designed for deviant groups. Rather, the court simply acknowledged that materials

710. 32 Ill. 2d 260, 204 N.E.2d 768 (1965).

711. Indeed, it is worth noting that neither of the state appellate courts in *Ward* even mentioned the *Sikora* case in the course of their opinions.

712. *See* 32 Ill. 2d at 267-68, 204 N.E.2d at 772-73.

713. *Id.* at 268, 204 N.E.2d at 773.

714. *Id.* at 268-69, 204 N.E.2d at 773.

containing flagellatory depictions, in addition to numerous representations of other types of sexual encounters, both "normal" and "aberrational," may, as a whole, appeal to a prurient interest in nudity and sex. Ward could very well have argued that his materials, which presumably emphasized primarily sado-masochistic depictions, would not appeal to the average person's prurient interests, but instead would disgust and sicken everyone who was not a member of the deviant group to whom he directed these publications.[715] Under *Sikora*, this may have been a valid argument, because the court never considered the character of the group being addressed; that is, is the prurient interest that of the average person, or that of the "typical" sadist or masochist? The court in *Sikora* simply stated that some specific materials containing sado-masochistic elements appealed primarily to a shameful interest in nudity and sex. These remarks, which were made in a specific context, should not be interpreted as a conclusive effort to give fair notice that the concept of "shameful interest in nudity and sex" would thereafter be construed to include sado-masochistic representations. Remarks in a 1965 decision could not realistically inform Ward seven years later that only materials containing depictions of deviant sex were proscribed by the law. Nor could this decision inform Ward of the prurient interests that would provide the relevant measuring standard. Indeed, Justice White's attempt to derive a broad clarifying gloss from language construing the intentions of certain authors and the content and structure of three specific books seems clearly vacuous; it is an attempt to read too much into a rather narrow decision.

The same criticism applies to the other two cases cited by the majority, *City of Blue Island v. DeVilbiss*[716] and *City of Chicago v. Geraci*.[717] Again, the Illinois Supreme Court mentioned sado-masochism in these rulings only to a limited extent; it noted that the publications involved in each of these cases contained, *inter alia*, flagellatory sequences, which were described so vividly and in such a detailed fashion that they necessarily appealed to morbid or shameful interests in sex.[718] No attempt was made to state in general terms the extent to which the relevant statute regulated materials designed for deviant tastes. Moreover, even if the court had made such a general determination, it is questionable whether it would be relevant to Ward's case. Neither *DeVilbiss* nor *Geraci* involved section 11-20; rather,

715. For a similar argument, see Mishkin v. New York, 383 U.S. 502, 508 (1966). For a consideration of how the Supreme Court responded to that argument, see notes 737-741 and accompanying text *infra*.

716. 41 Ill. 2d 135, 242 N.E.2d 761 (1969).

717. 46 Ill. 2d 576, 264 N.E.2d 153 (1970).

718. *See* 41 Ill. 2d at 142, 242 N.E.2d at 765; 46 Ill. 2d at 582-83, 264 N.E.2d at 157.

they concerned local municipal ordinances that resembled the state law to a greater or lesser extent.[719]

Thus, the prior interpretations cited by Justice White are, on closer examination, not persuasively authoritative. Merely because the state supreme court found three publications, *Lust Campus*, *Passion Bride* and *Crossroads of Lust*, to be obscene does not mean that it provided an interpretation that would guide Wesley Ward in determining whether he would suffer criminal liability for disseminating *Bizarre World* and *Illustrated Case Histories: A Study of Sado-Masochism*. Considered separately from *Miller*, the general rationale underlying the void-for-vagueness rule is that a law must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[720] Thus, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."[721] It is certainly *not* clear that, as a result of *Sikora*, Ward was not required to speculate as to the extent to which section 11-20 proscribed the dissemination of sado-masochistic publications.

719. The court in *DeVilbiss* noted that the city ordinance of Blue Island involved therein was identical to section 11-20(b). 41 Ill. 2d at 137, 242 N.E.2d at 762. *Geraci*, however, involved a Chicago ordinance that defined "obscene" by relying on language from Roth v. United States, 354 U.S. 276 (1957): "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 46 Ill. 2d at 578, 264 N.E.2d at 155.

720. Connally v. General Constr. Co., 269 U.S. 385, 391 (1925). *Cf.* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), in which the three vices of vagueness were described as:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment Freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Cf. United States v. Harriss, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.")

721. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). *Accord*, United States v. Cardiff, 344 U.S. 174, 176-77 (1952); Pierce v. United States, 314 U.S. 306, 311 (1941); McBoyle v. United States, 283 U.S. 25, 27 (1931). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

Apart from these difficulties, it is necessary to confront the larger question raised by Justice Stevens. Even assuming that the Illinois court had held that materials identical to those distributed by Ward were prohibited by section 11-20, would this fact have any relevance to the issue of vagueness? He pointed out that the materials involved in *Miller* were similar to others that had been the subject of state prosecutions in the past, but this had not caused the *Miller* Court to refuse to remand the suit for further consideration by the California courts on the specificity requirement with respect to that state's penal code.[722] Justice Stevens' point is well-taken. The fact that similar publications were the subject of prior prosecutions tells a person nothing about whether the subsequent distribution of his publications will expose him to criminal liability. Indeed, a similar point was made in *Hamling v. United States*.[723] In that case, the petitioner made two related arguments. First, that because materials similar to those at issue were available on newsstands throughout the country, they should be admissible on the issue of nonobscenity. Second, because materials allegedly similar to those at issue had been deemed nonobscene by other courts construing the same statute, those judgments were probative on the issue of obscenity *vel non*. To these contentions, the Court replied, first, that the mere fact that similar publications are for sale elsewhere does not make those publications "witnesses of virtue"[724] and, second, that "[a] judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials . . . ."[725] Similarly, one could argue that the mere fact that the Illinois court in *Sikora* found certain publications that contained masochistic elements obscene did not provide Ward with any relevant information regarding the potential obscenity of his publications. Only a determination that section 11-20 proscribed deviant materials in general would have supplied sufficient notice to future distributors, and the *Sikora* court carefully refrained from making any such broad-gauged assertion. Thus, under the logic of *Hamling*, the prior decisions of the Illinois courts did not provide guidelines that would be dispositive in later cases.

(2) Sado-Masochism and the Miller *Examples*

It is certainly true that sado-masochism is not among the types of representations referred to by the Court in *Miller* when it explained part (b)

722. 431 U.S. at 780-81 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).

723. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.

724. *Id.* at 126 (quoting United States v. Hamling, 481 F.2d 307, 320 (9th Cir. 1973)).

725. 418 U.S. at 126-27.

of its tripartite definition of obscenity.[726] The problem is to what extent the depictions listed in that explication were intended to be all-inclusive. The Court in *Miller* referred to these as merely a "few plain examples of what a state statute could define for regulation . . . ."[727] This language would suggest that Justice White was correct in assuming that the mere fact that the Court in 1973 provided a few instances of what it regarded as "hard core pornography" does not mean that the definition of that term will be forever fixed by those examples.

This interpretation, however, would appear to conflict with footnote seven of *United States v. Twelve 200-ft. Reels of Super 8mm Film*.[728] In that case, the Court noted that existing federal obscenity laws would be construed as "*limiting* regulated materials to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California* . . . ."[729] If this language were construed literally, it would seem that the *Miller* examples were meant to be all-inclusive in federal obscenity prosecutions. This interpretation, however, would seem to be belied by the Court's later decision in *Hamling v. United States*,[730] another federal case. The majority in that action reiterated the substance of footnote seven of *Twelve 200-ft. Reels*, but then went on to observe with respect to the *Miller* examples: "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases."[731] Similarly, in a companion case to *Hamling, Jenkins v. Georgia*,[732] the majority made the following observation about the instances of hard core pornography discussed in *Miller*: "While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination."[733] The net effect of *Hamling* and *Jenkins* would seem to be that while the *Miller* standards set a certain minimum limit on what types of depictions may patently offend, states, and perhaps the federal government, can always proscribe other, unspecified conduct falling above that minimum. There

726. Miller v. California, 413 U.S. 15, 24 (1973). *See* note 37 and accompanying text *supra*.
727. *Id.* at 25 (1973).
728. 413 U.S. 123 (1973).
729. *Id.* at 130 n.7 (emphasis added).
730. 418 U.S. 87 (1974).
731. *Id.* at 114.
732. 418 U.S. 153 (1974). *See* notes 54-58 and accompanying text *supra*.
733. *Id.* at 160-61.

nevertheless remains a problem with the use of the verb "limiting" in *Twelve 200-ft. Reels*. It is a problem exacerbated by the *Ward* decision itself. On the one hand, Justice White repeated the assertion in *Hamling* that the *Miller* examples were never intended to be exhaustive;[734] on the other hand, he analogized the action of the Illinois courts to what was done in *Hamling*, where a federal obscenity law was said "to be limited to 'the sort of' patently offensive representations or descriptions of that specific hard-core sexual conduct given as examples in *Miller*."[735] Not only does this sentence imply that the verb "limit" signifies "limited to the kinds of depictions specified" rather than "setting a minimum level of offensiveness below which the state cannot regulate," but it also implies that this construction constitutes an accurate description of the restrictions imposed by *Miller* upon the states, something no previous decision had ever intimated.

Thus, regardless of Justice White's pat assertions, the extent to which the examples in *Miller* were intended to be all-inclusive remains unsettled. Indeed, a number of state courts have sustained obscenity statutes by reading into their provisions only those definitions of specific sexual conduct that appear in the *Miller* opinion.[736] On reflection, such a restrictive approach seems unwarranted. The term "hard core pornography" would seem to encompass a number of categories of conduct, including sado-masochism; the few examples enunciated in *Miller* are so obviously cursory that their very incompleteness suggests that the states would be free to supplement them as they wished. Thus, Justice White's broad assertion in *Ward* that the *Miller* examples are in no way exhaustive has merit.

Mishkin v. New York[737] only underscores this point. In that case, the Court upheld the validity of section 1141 of the New York Penal Law,[738]

734. 431 U.S. at 773.

735. *Id.* at 776.

736. *See, e.g.*, Pierce v. State, 292 Ala. 473, 478, 296 So. 2d 218, 222 (1974); Gibbs v. State, 255 Ark. 997, 1007, 504 S.W.2d 719, 725-26 (1974); Bloom v. Municipal Court, 16 Cal. 3d 71, 81, 545 P.2d 229, 235, 127 Cal. Rptr. 317, 323 (1976); Mangum v. Maryland State Bd. of Censors, 273 Md. 176, 188, 328 A.2d 283, 289-90 (1974); State v. Welke, 298 Minn. 402, 409, 216 N.W.2d 641, 648-49 (1974); State v. De Santis, 65 N.J. 462, 471-72, 323 A.2d 489, 495 (1974); State v. Bryant, 285 N.C. 27, 40, 203 S.E.2d 27, 35-36 (1974), *cert. denied*, 419 U.S. 974 (1974); State v. Watkins, 262 S.C. 178, 182, 203 S.E.2d 429, 432 (1973), *appeal dismissed*, 418 U.S. 911 (1974); West v. State, 514 S.W.2d 433, 441 (Tex. Cr. App. 1974); State v. J-R Distrib., Inc., 82 Wash. 2d 584, 601, 512 P.2d 1049, 1060 (1973), *cert. denied*, 418 U.S. 949 (1974); State *ex rel.* Chobot v. Circuit Court, 61 Wis. 2d 354, 372, 212 N.W.2d 690, 697 (1973).

737. 383 U.S. 502 (1966).

738. N.Y. PENAL LAW § 1141 (McKinney 1965) (repealed 1967):

> 1. A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . or who . . . prints, utters, publishes, or in any matter manufactures, or prepares any such book . . . or who

which proscribed the dissemination of, *inter alia*, sado-masochistic publications. Mishkin argued that his works would not appeal to the prurient interests of the average "normal" person. To this, the Court responded:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of members of that group. The reference to the "average" or "normal" person in *Roth* . . . does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the "average" or "normal" person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.[739]

On this basis, the Court held that New York could proscribe the distribution of books depicting deviant sexual practices, including fetishism, flagellation and lesbianism.[740] As a result, the Court ruled that such materials are permissible subjects of regulation.

Unfortunately, Justice White's citation to *Mishkin* in *Ward* raises some problems. The *Mishkin* decision dealt only with the "prurient interest" test of *Roth* because the New York courts read a similarly stringent test into section 1141.[741] Thus, there was some question as to the extent to which

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2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them, Is guilty of a misdeameanor. . . .

739. 383 U.S. at 508-09.

740. *Id.* at 509-10.

741. *See* People v. Richmond County News, Inc., 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369, 376-77 (1960), in which the court noted:

> It [obscene material under section 1141] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable "by the insult it offers invariably, to sex, and to the human spirit". . . it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, "a debauchery of the sexual faculty."

Cf. People v. Fritch, 13 N.Y.2d 119, 123, 192 N.E.2d 713, 716, 243 N.Y.S.2d 1, 5 (1963) (section 1141 proscribes only "hard core pornography"). The trial court in *Mishkin* had noted that the terms "sadistic" and "masochistic" are "synonymous with 'obscene.' " State v. Mishkin, 26

Mishkin survived *Miller* and its tripartite definition of obscenity. The *Miller* Court did state that as a result of the vagueness inherent in many obscenity laws, it would "confine the permissible scope of such regulation to works which depict or describe sexual conduct."[742] One could argue that representations of flagellation or torture that do not culmininate in the performance of ultimate sexual acts do not depict "sexual conduct," but rather depict only violence per se, albeit violence from which certain individuals will derive prurient gratification. But this argument would seem to be foreclosed by the *Miller* Court's citation to the Oregon and Hawaii obscenity statutes.[743] The former included a provision defining proscribed "sado-masochistic abuse" as "flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed,"[744] whereas the latter simply defined the same term as "flagellation or torture by or upon a person as an act of sexual stimulation or gratification."[745]

Under *Miller* then, "sexual conduct" can include torture not culminating in an ultimate sexual act. Indeed, later in the same opinion, the Court cited *Mishkin*'s variable standard with respect to deviant groups without criticizing that earlier holding.[746] Similarly, in *Hamling v. United States*,[747] the Court, quoting *Mishkin* at length, upheld an instruction, which required jurors to decide the issue of prurient interest by taking into account the extent to which the materials in question appealed to the tastes of a deviant group as well as to those of the average person.[748] But these references only disclose a problem inherent in the *Mishkin* case: that decision referred only to that aspect of the obscenity definition dealing with prurient appeal, and later discussions by the Court were similarly restricted. This suggests that the patent offensiveness component of that definition will still be judged by reference to the attitudes of the average "normal" person, even in a case involving materials directed to deviates. This sounds sensible; it would be absurd to try to determine what will or will not offend the average member of the recipient deviant group in such a case. Indeed, if such a determination

Misc. 2d 152, 154, 207 N.Y.S.2d 390, 393 (1960), *aff'd*, 17 App. Div. 2d 243, 234 N.Y.S.2d 342 (1962), *aff'd*, 15 N.Y.2d 671, 204 N.E.2d 209, 255 N.Y.S.2d 581 (1964), *remittitur amended*, 15 N.Y.2d 724, 205 N.E.2d 201, 256 N.Y.S.2d 935 (1965).

742. Miller v. California, 413 U.S. 15, 24 (1973).

743. *Id.* at n.6.

744. OR. REV. STAT. § 167.060(9) (1977).

745. HAW. REV. STAT. § 712-1210(9) (1976).

746. *See* Miller v. California, 413 U.S. 15, 33 (1973).

747. 418 U.S. 87 (1974).

748. *Id.* at 128-29.

were to be made, it would militate against the point raised by the petitioner in *Ward*. If the instances of hard core pornography given in *Miller* only exemplified what the average "normal" person considered patently offensive, one would have to posit a set of unmentioned, alternative types of conduct that would offend the average fetishist, the average sadist, the average masochist and so on. As a result, the *Miller* examples would by definition be underinclusive and inherently subject to supplementation, depending upon the circumstances of each prosecution. But such an assertion assumes that *Miller* made the task of the trier of fact in all obscenity cases involving deviant materials well-nigh impossible. It assumes that the variable standard of *Mishkin* will encompass those elements of the *Miller* test, prurient interest and patent offensiveness, that are innately subjective in nature. Certainly, *Mishkin* did not mandate such an interpretation; it specifically limited its discussion to the prurient interest test.[749] By utilizing *Mishkin* to rebut a point made regarding the patent offensiveness element of the *Miller* criteria, however, *Ward* creates unnecessary problems in determining how *Mishkin* is to be applied after *Miller*.

(3) Obscenity Vel Non

After conducting a presumably independent review of the record and the materials in question on this issue, the Court found no reason to differ with the determination of the Illinois courts that those materials were obscene. In so doing, however, it seemed to acknowledge that *Ward* is a *Mishkin*-type case, wherein the prurient interest aspect of the tripartite *Miller* test would have to be measured according to the sensibilities of the average member of the deviant group.[750] Clearly, sado-masochism is a legitimate category of deviance. But in order to show appeal to the prurient interest of the individuals falling within that category, the state should present expert psychiatric or other testimony on this issue. Certainly, the trial judge in *Ward* could not be expected to know independently whether sadists and masochists found prurient appeal in the publications in question.

749. Indeed, in the other leading case involving variable obscene materials directed to a specified group, Ginsberg v. New York, 390 U.S. 629 (1968), the Court upheld a state law that incorporated a modified version of the tripartite test of Memoirs v. Massachusetts, 383 U.S. 413 (1966). *See* note 23 and accompanying text *supra*. That law, which was intended to regulate the dissemination of sexually-oriented materials to minors, proscribed the distribution of materials that (a) predominantly appeal to the prurient interest of minors, (b) are patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors and (c) are utterly without redeeming social importance to minors. N.Y. PENAL LAW § 484-h (McKinney 1965) (repealed 1967). It is worth noting that even under this modified standard, the test of patent offensiveness is measured not by the tastes of the recipient group but by the criteria of the community as a whole.

750. *See* 431 U.S. at 773.

Yet, as the intermediate state appellate court in this case pointed out, the only evidence presented by the state to establish violation of the statute were the magazines themselves, unaccompanied by any kind of opinion testimony.[751] On appeal, the Illinois Supreme Court simply concluded that "the average person applying contemporary community standards would consider that, taken as a whole, the sole appeal of the two publications is to the prurient interest and that the dominant theme of the magazines is a morbid interest in nudity and sex."[752]

If, as Justice White contends, the obscenity *vel non* of these materials was foreclosed by the decision in *Mishkin*, it can be argued that the Illinois courts failed to apply some of the corollaries flowing from the holding in that case. One corollary would seem to be that the state must demonstrate by some relevant testimony that the publications *Bizarre World* and *Illustrated Case Histories, A Study in Sado-Masochism* in fact appealed to the prurient interest of the average member of the probably deviant recipient group, something it failed to do in *Ward*. Indeed, the Court in *Mishkin* pointed to the testimony of the authors as to how the books involved therein were conceived and marketed, as well as to the publisher's explicit reliance on sourcebooks of deviant behavior in order to determine how to merchandise his product.[753] Nevertheless, despite this express reliance, the issue of the necessary evidence to show prurient appeal to deviant groups has engendered considerable controversy and a wide spectrum of opinions on the part of lower federal courts, both before and after *Mishkin*.

One extreme is represented by the Second Circuit's opinion in *United States v. Klaw*.[754] In that case, the materials in question were bondage magazines; as in *Ward*, there was no evidence introduced into the trial record to suggest whether the materials in question appealed to members of the intended recipient deviant group,[755] assuming there was such a group. The court of appeals reversed the conviction, stating:

> The state of the record gave the jurors impermissibly broad freedom to convict just because, having no more informative evidence than the material itself, they might think that the average person would "recognize" that the material has prurient appeal. But again, *to whom*? In this case the jury had insufficient evidence even to "recognize" that the material appealed to the prurient interest of the average person. It had absolutely no evidentiary basis from which to "recognize" any appeal to the prurient

751. People v. Ward, 25 Ill. App. 3d 1045, 1046, 324 N.E.2d 205, 206 (1975).
752. People v. Ward, 63 Ill. 2d 437, 442, 349 N.E.2d 47, 49 (1976).
753. Mishkin v. New York, 383 U.S. 502, 509-10 (1966).
754. 350 F.2d 155 (2d Cir. 1965).
755. *Id.* at 166.

> interest of the deviate or the typical recipient—a class never defined in the record.[756]

An opposite extreme is represented by the Second Circuit's decision in *United States v. Wild*.[757] The materials in question in that case consisted of photographic slides depicting nude males masturbating themselves or fellating each other. The court of appeals noted that no expert testimony on the issue of prurient appeal was necessary, because this was "hard core pornography" that spoke for itself.[758] The opinions in other cases tend to take a middle road on this issue. In *United States v. Ewing*,[759] the Tenth Circuit was confronted with a prosecution for the distribution of various books such as *Madame Sado Meets Mrs. Meso*, *Torture Bare-Bottom*, *Degraded in Bondage* and *Whipping Lez*. It distinguished *Klaw* by pointing out that:

> Both the class of recipients and the nature of its prurient interests were well defined by expert testimony. A professional psychiatrist examined the exhibits, described the groups to whom various exhibits would hold some appeal, and testified that the dominant theme of the exhibits when taken as a whole appealed to the prurient interest in sex of the sado-masochist type.[760]

Similarly, in *United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"*[761] the Fourth Circuit found sufficient evidence as to the prurient appeal of a magazine consisting almost entirely of photographs of nude adolescent males. It pointed to expert testimony by a psychiatrist that the magazine would appeal to pedophiles and male homosexuals, and to the fact that the distributors' brochures indicated that the intended purchasers would, in fact, be male homosexuals.[762] On the other hand, when confronted with a prosecution for publications depicting the conduct of lesbians and male homosexuals, the Second Circuit in *United States v. Manarite*[763] stated that the prurient interest test would be satisfied merely by a showing that the "probable recipient group" consisted of deviates. Such a showing was said to be made whenever the material in question is obviously "designed for a clearly defined deviant sexual group."[764]

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756. *Id.* at 167-68.

757. 422 F.2d 34 (2d Cir. 1969), *cert. denied*, 402 U.S. 986 (1971).

758. 422 F.2d at 36. *Accord*, Young v. United States, 465 F.2d. 1096, 1098 (9th Cir. 1972).

759. 445 F.2d 945 (10th Cir. 1971), *vacated on other grounds*, 413 U.S. 913 (1973).

760. 445 F.2d at 948 (footnote omitted). *See also* United States v. Pinkus, 551 F.2d 1155, 1158-59 n.7 (9th Cir. 1977); United States v. Hamling, 481 F.2d 307, 321-22 (9th Cir. 1973), *aff'd*, 418 U.S. 87 (1974).

761. 373 F.2d 635 (4th Cir.), *rev'd on other grounds sub nom.* Potomac News Co. v. United States, 389 U.S. 47 (1967).

762. 373 F.2d at 640.

763. 448 F.2d 583 (2d Cir.), *cert denied*, 404 U.S. 947 (1971).

764. 448 F.2d at 592. Of course, it is permissible to instruct the jury that a given publication is aimed at both deviates and "normal" persons, if in fact there are discrete recipient groups.

The facts in *Ward* most resemble those of *Klaw* and *Wild*. Not only was there no identification in the record of the deviant group who constituted the intended recipients of the materials in question, but no evidence was adduced as to whether those materials appealed to that group. These omissions create significant problems to the extent that *Ward* is viewed as a *Mishkin*-type case. It is not surprising that the Illinois appellate courts ignored these problems; neither of them even cited *Mishkin*. But the Supreme Court did so. Not only did it cite that earlier decision, but it also asserted that *Mishkin* apparently applied in the instant case. In spite of this assertion, the Court found no reversible error in the determination of obscenity made by the lower courts in *Ward*. This suggests that the Supreme Court tacitly adopted the rule of *Wild* that on the issue of prurient interest, hard core pornography speaks for itself, even when the prurient interest in question is that of a deviant group.[765] If this assessment is accurate, the Court undermined *Mishkin* in *Ward*. *Mishkin* required a specific definition of the intended recipient, and based its holding on a review of voluminous evidence concerning the intentions of the publisher. In so doing, the Court made the point that all this evidence distinguished *Mishkin* from the *Klaw* case.[766] *Ward*, however, appears to hold that a specific definition is no longer required and that judicial presumptions can now serve as a substitute for opinion testimony.

Ward goes beyond this point as well. As noted earlier, the Illinois Supreme Court phrased the prurient interest consideration solely in terms of

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See Hamling v. United States, 418 U.S. 87, 129-30 (1974); United States v. Pinkus, 551 F.2d 1155, 1159 (9th Cir. 1977). It is also apparent that to the extent that a judge frames an instruction based on appeal to a deviant group, he must frame the prurient appeal requirement to the typical constituent of that group. *See* Mishkin v. New York, 383 U.S. 502, 509 (1966); United States v. Treatman, 524 F.2d 320, 323 (8th Cir. 1975).

765. This development is somewhat surprising. In Paris Adult Theater I v. Slaton, 413 U.S. 49, 56 n.6 (1973), the Court said:

> This [proof of obscenity] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. . . . No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. . . . "Simply stated, hard core pornography can and does speak for itself." *United States* v. *Wild*, 422 F.2d 34, 36 (CA2 1970), cert. denied, 402 U.S. 986 . . . (1971). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. *See Mishkin* v. *New York*, 383 U.S. 502, 508-10, 86 S. Ct. 958, 963-64, 16 L.Ed. 2d 56 (1966); *United States* v. *Klaw*, 350 F.2d 155, 167-68 (CA2 1965).

Thus, as late as 1973, it appeared as if the Supreme Court might still follow *Klaw*.

766. *See* Mishkin v. New York, 383 U.S. 502, 510 (1966).

what the average person believed.[767] Again, this is not surprising, because that court perceived no *Mishkin* issue.[768] But, again, the same cannot be said for the United States Supreme Court. Nevertheless, it approved the action of the lower state tribunal. Yet, if this is a *Mishkin*-type case, the prurient interest test should have been analyzed in light of the appeal to typical members of the deviant recipient group, not in light of the appeal to the average "normal" person. Accordingly, the Illinois Supreme Court would have appeared to commit reversible error. By failing to find such error, Justice White raises a significant issue about the current viability of the *Mishkin* doctrine. Certainly, what was done in *Ward* conflicts squarely with the teachings of the Court's 1966 decision, which the majority stated "foreclosed" all points raised by the petitioner on the issue of obscenity *vel non* in the instant case. Yet neither the majority nor the dissenters noticed this problem. Thus, *Ward*'s discussion of *Mishkin* raises far more questions than it answers.

(4) The Specificity Requirement of Miller

According to Justice White, the issue of specificity presented no problem because the Illinois Supreme Court had cured that deficiency in the state obscenity statute by means of its authoritative judicial constructions.[769] In order to analyze this assertion, it is necessary to consider in detail those cases in which that state court discussed *Miller*.

The first of these decisions is *People v. Ridens*,[770] decided in 1974. There, the state court quoted the tripartite standard of *Memoirs v. Massachusetts*,[771] then said:

> We need not and do not attempt to analyze the changes from the three-part *Roth-Memoirs* standard effected by the enunciation of the three-part *Miller* standard. It suffices to, and we now construe section 11-20 of the Criminal Code . . . to incorporate parts (a) and (b) of the *Miller* standards.[772]

From the context of the quotation, it would appear that the court was referring solely to part (b) of the *Miller* test and not to the examples given to explicate that part. But this construction is not the only possible one; earlier in the opinion in *Ridens*, the court had quoted *Miller* at length, including

767. People v. Ward, 63 Ill. 2d 437, 442, 349 N.E.2d 47, 49 (1976).

768. But what is surprising is that the state courts failed to give effect to the variable obscenity standard set forth in § 11-20(c), which permits the adjustment of the definition of obscenity to the interests of the probable recipient group. *See* note 670 *supra*.

769. *See* 431 U.S. at 774.

770. 59 Ill. 2d 362, 321 N.E.2d 264 (1974).

771. 383 U.S. 413 (1966). *See* note 23 and accompanying text *supra*.

772. 59 Ill. 2d at 373, 321 N.E.2d at 270.

both the language of the tripartite test and the explanatory examples.[773] One could argue that by incorporating part (b) of that test into section 11-20, it also meant to include the sample "hard core" depictions provided by the United States Supreme Court.

In *People v. Gould*,[774] decided in 1975, the Illinois court once again quoted *Miller* at length, both as to its three-part test and as to the examples for part (b).[775] It then characterized its decision in *Ridens* as follows:

> We construed our statute to incorporate parts of guidelines (a) and (b) of the *Miller* standards (which are set out in the above quotation from *Miller*) and stated that under our statute the third question or guideline which must be considered in determining whether the matter or work is obscene is whether it is "utterly without redeeming social value." We explained that the more restrictive guideline (c), or part (c), of the *Miller* standard, i.e., whether "the work, taken as a whole, lacks serious literary, artistic, political, or social value" cannot be used.[776]

Here, too, there is no direct indication that the court is reading the *Miller* examples into section 11-20. But, unlike *Ridens*, the court in *Gould* said of the materials in question, "[e]ach magazine taken as a whole appeals to the prurient interest and depicts offensive conduct, *including lewd exhibitions of the genitals*."[777] The emphasized phrase is a direct quotation from the second of the two *Miller* examples,[778] and thus does provide evidence that the Illinois court incorporated them *sub silentio*.[779] The opinion of the state supreme court in the *Ward* case itself undermines this construction, however. There it was stated:

> The defendant argues that we erred in *Ridens* . . . in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in *Ridens* . . . It is extremely difficult to define the term "obscenity" with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections.[780]

The import of this language is that the state court never attempted to define "obscenity" with any great degree of precision, but instead merely ex-

773. *Id.* at 366-67, 321 N.E.2d at 266.

774. 60 Ill. 2d 159, 324 N.E.2d 412 (1975).

775. *Id.* at 163-64, 324 N.E.2d at 414-15.

776. *Id.* at 164, 324 N.E.2d at 415.

777. *Id.* at 165, 324 N.E.2d at 415 (emphasis added).

778. Miller v. California, 413 U.S. 15, 24 (1973). *See* note 37 and accompanying text *supra*.

779. After *Gould*, the state supreme court also decided People v. Hume, Inc., 60 Ill. 2d 397, 327 N.E.2d 329 (1975). It quoted its holding in *Ridens*, but offered no further substantive discussion on the issue of specificity. *Id.* at 399, 327 N.E.2d at 331.

780. People v. Ward, 63 Ill. 2d 437, 442, 349 N.E.2d 47, 49 (1976).

pressed the "opinion" that section 11-20 was constitutional. In summary, then, *Ridens* was susceptible to two varying interpretations: either that the Illinois court had incorporated only the language of part (b) of the *Miller* test into the state statute, or that it had incorporated both part (b) *and* the United States Supreme Court's descriptions of depictions exemplifying that part's strictures. Language in *Gould* seemed to favor the latter interpretation. But language in the state supreme court's decision in *Ward* seemed to imply that the court had yet to even attempt to define "obscenity" with any measure of specificity. Thus, what Justice White terms a "needlessly technical and wholly unwarranted" reading of *Ridens* and *Gould* may well be compelled by the Illinois Supreme Court's statement in *Ward* itself, a statement that he pointedly ignored.

One might well ask whether the state statute would then be unconstitutionally vague, assuming that the state courts incorporated part (b) of the *Miller* test but not the examples illustrating that part into section 11-20. A three-judge district court in *Eagle Books, Inc. v. Reinhard*[781] convincingly answered this question in the affirmative:

> An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller*'s specificity requirement. *Miller* explicitly reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens* . . . might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling [v. United States]*, but *Ridens* . . . did not. It remained after *Ridens* . . . for section 11-20 to be amended either legislatively or by state judicial construction to supply the wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carrying out the law, as it is to juries* like the one in *Jenkins [v. Georgia]*, who must apply the law to a set of facts.[782]

In support of this proposition, the three-judge district court cited the statute involved in *Miller v. California*,[783] which was extremely similar to section

781. 418 F. Supp. 345 (N.D. Ill. 1976), *vacated and remanded*, 432 U.S. 902 (1977).

782. 418 F. Supp. at 349-50 (emphasis in original). At least one other federal district court before *Ward* had concluded, however, that *Ridens* did provide the Illinois statute with sufficient specificity. United States v. Miscellaneous Pornographic Magazines, 400 F. Supp. 353, 355 (N.D. Ill. 1975). *Accord*, Weissbaum v. Harmon, 439 F. Supp. 873, 880 (N.D. Ill. 1977); People v. Glass, 41 Ill. App. 3d 43, 52, 353 N.E.2d 214, 221 (1976).

783. 413 U.S. 15 (1973). The statute is CAL. PENAL CODE §·311(a) (West 1970) (amended 1978). *See* note 36 *supra*.

11-20 of the Illinois Criminal Code. It reasoned that if the former statute had to be construed in light of the *Miller* examples, then so should the latter.[784] The United States Supreme Court in *Ward* did not dispute that proposition. It admitted that had the Illinois Supreme Court failed to incorporate the *Miller* examples into section 11-20, its omission would have created a "fatal flaw" in the statute.[785] Thus, the majority in *Ward* simply disagreed with *Reinhard's* interpretation of what the Illinois Supreme Court had done in *Ridens* and *Gould*.

Because the majority in *Ward* assumed that the Illinois court had incorporated the *Miller* examples, and thus differentiated among the kinds of sexual conduct the depiction of which could be subject to regulation, it was able to dismiss an overbreadth challenge quite cursorily. In *Erznoznik v. City of Jacksonville*,[786] the Court struck down as overbroad a municipal ordinance prohibiting the showing of any motion picture depicting bare buttocks, breasts or pubic areas, if such a film was visible from any public street or thoroughfare. The Court stated:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.[787]

Thus, nonobscene speech is surrounded by constitutional protections against governmental interference and, in light of *Erznoznik* and *Miller*, "[t]here may not be any room . . . for suppression of anything other than hard-core pornography, regardless of context."[788] Since *Erznoznik* prohibits regulation of speech solely on the basis of content, any overbreadth claim in the obscenity area must be rebutted by a showing that the law in question distinguishes carefully and explicitly between obscene and nonobscene representations of sexual conduct.[789] *Ward* eases the state's task in making

784. 418 F. Supp. at 350.

785. 431 U.S. at 775.

786. 422 U.S. 205 (1975).

787. *Id.* at 209 (citations omitted). *But cf.* Young v. American Mini Theaters, Inc., 427 U.S. 50, 69-70 (1976) (suggesting that the state may accord speech differential treatment based on the content of that speech). For a discussion of *Young*'s effect on *Erznoznik*, *see* notes 410-413 and accompanying text *supra*.

788. SCHAUER, *supra* note 3, at 94. *But see* Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L. J. 1275, 1286 (1977).

789. It is not entirely clear that the holding in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), erodes *Erznoznik's* overbreadth analysis. The Court in *Erznoznik* noted that none of the alleged justifications for the Jacksonville ordinance *i.e.*, that it protected the privacy of citizens, that it was an implementation of the state's police power to protect children, that it constituted a traffic regulation, had any merit. *See* 422 U.S. at 208-17. In contrast, the

such a rebuttal, because the majority in that case evinces a willingness to ascertain such a distinction not only in the explicit language of the statute itself or in an authoritative judicial construction of it, but also in the presumption that the state court making such a construction of an obscenity law would not create a fatal flaw in its own decision and so must have drawn the distinction *sub silentio* between obscene and nonobscene depictions of sex and nudity.[790] If *presumptions* about what a state court meant to do are now to serve as surrogates for an explicit holding by such a court, overbreadth challenges to any but the most loosely-drafted obscenity laws may well have become a thing of the past.

Even if one assumes the majority in *Ward* is right about the Illinois Supreme Court's intent to incorporate the *Miller* examples into section 11-20, one must then confront the question raised by Justice Stevens in his dissent: is that tactic sufficient to preclude a vagueness challenge? The problem of vagueness in obscenity cases is tied into the specificity requirement in *Miller*; the latter remedy was intended to cure the former disease. While the majority in *Ward* acknowledged this crucial aspect of the *Miller* holding,[791] it virtually ignored a corollary to that holding emphasized by Justice Stevens. The specificity requirement, if it is to have any significance at all, must provide a potential defendant with fair notice of the types of depictions the distribution of which will create criminal liability. Thus, the Court in *Miller* said:

Court found that the Detroit zoning ordinance at issue in *Young* did have a legitimate purpose in that it was directed at ameliorating the problem of the deterioration of neighborhoods and urban crime. 427 U.S. at 71 & n.34. So the cases are ostensibly distinguishable. Moreover, *Erznoznik's* overbreadth analysis appears to state accurately the relevant doctrines. The Court cited Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973), to the effect that the challenged statute's deterrence of speech must be real and substantial. 422 U.S. at 216. It then noted that the possibility of a limiting construction would be "remote," especially in light of the precise terms of the municipal regulation. *Id.* Accordingly, the Court concluded, "[i]n these circumstances, particularly where as here appellee offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed." *Id.* at 217. In *Young*, the Court appeared to follow this general level of analysis, although it arrived at a different result. It noted that the only possibly overbroad portion of the Detroit zoning ordinance was that under the regulation, an "adult theater" was defined as one "distinguished or characterized by an emphasis" on sexually-oriented material. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, NO. 742-G, § 32.0007 (1972). But it noted that any doubt on this issue could be settled by a state court construction narrowing the coverage of the ordinance. 427 U.S. at 60. The overbreadth doctrine of *Erznoznik* thus appears to have survived *Young*.

790. In this respect, the Court in *Ward* merely did what the Court in *Erznoznik* declined to do, make an assumption that the challenged law could be and was construed in a restrictive, constitutional manner. *See* note 789 *supra*.

791. *See* 431 U.S. at 774.

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.[792]

In light of this passage, one may well ask, is the recognition of "the limitations on the kinds of sexual conduct which may not be represented or depicted" under a state obscenity law equivalent to a specific definition for the purposes of fulfilling the fair notice prerequisite? If so, does such a recognition "give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law?' "[793]

The majority in *Ward* assumed that judicial incorporation of the *Miller* examples into the obscenity law in question provided that law with sufficient specificity for purposes of fair notice. One can very well argue a contrary position, as Justice Stevens does. While incorporation of the *Miller* examples may define specifically some proscribed conduct the depiction of which is patently offensive, such an incorporation, without more, does not limit the potential reach of the statute being construed to fall only within those examples. As a result, some activities that do not fall within the literal meaning of the exemplifications of hard core pornography offered in *Miller* can still be prosecuted. The majority in *Ward* argued that such an incorporation was equivalent to the Supreme Court's own post-*Miller* construction of federal obscenity statutes and cited *Hamling v. United States*.[794] But, as Justice Stevens pointed out, *Hamling* appeared to limit expressly the generic terms of one of those statutes to the types of depictions offered as examples in *Miller*.[795] As was observed earlier, however, there are intimations in *Hamling* that, even in the context of federal laws, those examples were never meant to be "exhaustive."[796] Nevertheless, at least with respect to section 1461 of Title eighteen of the United States Code,[797] the Court in *Hamling* was able to say that, even before 1973, that statute had been "authoritatively construed in a manner consistent with *Miller*."[798] Thus, the Court in *Hamling* could point to the following passage from Justice

792. Miller v. California, 413 U.S. 15, 27 (1973).

793. Roth v. United States, 354 U.S. 476, 491 (1957) (quoting United States v. Petrillo, 332 U.S. 1, 7 (1947)).

794. 418 U.S. 87 (1974).

795. *Id.* at 114.

796. *Id.* *See* notes 730-731 and accompanying text *supra*.

797. 18 U.S.C. § 1461 (1970). *See* note 8 *supra*.

798. 418 U.S. at 112.

Harlan's opinion in *Manual Enterprises, Inc. v. Day*,[799] a 1962 decision sustaining section 1461 against a vagueness challenge in a manner that anticipated the "hard core pornography" limitation subsequently fashioned by *Miller*:

> The words of § 1461, "obscene, lewd, lascivious,indecent, filthy or vile," connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of *United States v. Bennett*, 24 Fed. Cas. 1093 [(S.D.N.Y. 1879)] (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth* v. *United States*, [354 U.S. 476, 489 (1957)], "taken as a whole appeals to prurient interest."[800]

The same argument cannot be made about the Illinois statute in *Ward*, which was harmonized with *Miller*, if at all, by the *Ridens* and *Gould* decisions, rendered in 1974 and 1975 respectively. While prior Illinois cases had construed the reach of the statute, they had not upheld it against a vagueness challenge in a manner similar to what was done by the Supreme Court in the *Manual Enterprises* case. Indeed, when the state supreme court in *Ridens* came to consider a vagueness challenge to section 11-20, it could not cite its own prior decisions construing that statute. Instead, it had to argue from analogy, relying on its decision in *People v. Raby*,[801] which held that the Illinois laws prohibiting public disorders[802] were not void for vagueness. In so doing, the court in *Ridens* quoted the following passage from *Raby*:

> It is true that section 26-1(a) does not attempt to particularize all of the myriad kinds of conduct that may fall within the statute. The legislature deliberately chose to frame the provision in general terms, prompted by the futility of an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise.[803]

As Justice Stevens noted caustically, "[t]his may be true for other vagueness attacks, but does not square with the special *Miller* requirement that

799. 370 U.S. 478 (1962). *See* note 11 and accompanying text *supra*.

800. 370 U.S. at 482-84 (opinion of Harlan, J., joined by Clark, J.) (emphasis in original) (footnotes omitted), *quoted in* Hamling v. United States, 418 U.S. 87, 112 (1974).

801. 40 Ill. 2d 392, 240 N.E.2d 595 (1968).

802. ILL. ANN. STAT. ch. 38, §§ 26-1(a), 31-1 (Smith-Hurd Supp. 1977).

803. 40 Ill. 2d at 396, 240 N.E.2d at 598, *quoted in* People v. Ridens, 59 Ill. 2d 362, 372, 321 N.E.2d 264, 269 (1974).

conduct be specifically defined."[804] Thus, the attempt by the majority in *Ward* to analogize what the Illinois courts did in regard to section 11-20 of that state's criminal code with what the Supreme Court did in regard to federal obscenity laws collapses. The two situations simply are not comparable, and any attempt to compare them only engenders further confusion. One is then left with the conclusion reached by Justice Stevens that there does not appear to be anything in the Illinois decisions that would preclude the state from prosecuting forms of obscenity not specifically defined by the text of the applicable law itself or by prior judicial interpretation.

If what was done in *Ward* does not comport with *Miller's* assurance of fair notice to dealers in potentially proscribed materials, what will? Justice Stevens, unfortunately, never provides an answer. But that does not mean that some answer could not be suggested. Indeed, the Court in *Miller* profferred some useful guidelines. It cited "as examples of state laws directed at depiction of defined physical conduct, as opposed to expression"[805] the Oregon and Hawaii obscenity statutes. Both contain sections defining specifically the terms that are thereafter used in the substantive provisions proscribing sale or distribution of obscene materials. The Oregon law has a section containing eleven definitions, including those of "nudity," "obscene performance," "obscenities," "sado-masochistic abuse," "sexual conduct" and "sexual excitement."[806] The relevant definition of "sexual conduct" in the statute reads as follows:

> "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.[807]

The Hawaii penal code has a section containing nine definitions;[808] it is, on the whole, less detailed that its Oregon counterpart, but it does provide a fairly succinct summary of what is meant by the term "sexual conduct":

> "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification, or perversion.[809]

804. 431 U.S. at 780 n.4 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.)

805. Miller v. California, 413 U.S. 15, 24 n.6 (1973).

806. OR. REV. STAT. §§ 167.060(5), (6), (9), (10), (11) (1977).

807. OR. REV. STAT. § 167.060(10) (1977).

808. HAW. REV. STAT. §§ 712-1210(1)-(9) (1976).

809. HAW. REV. STAT. § 712-1210(7) (1976).

When compared with the *Miller* examples,[810] these statutory definitions would seem to provide a needed specificity. *Miller*'s reference to "ultimate sexual acts, normal or perverted" is somewhat nebulous and could encompass a wide range of conduct. The Oregon and Hawaii statutes erase a good deal of that nebulousness by naming explicitly the prohibitable conduct. In contrast, section 11-20, as written, is thoroughly obscure, with its arcane references to a "shameful or morbid interest in nudity, sex and excretion."[811] And the Illinois Supreme Court in the *Ward* case seemed clearly hesitant to do what the Hawaii and Oregon legislatures had done, that is, to define hard core pornography with some precision. While it is true that the Court in *Miller*, in citing these statutes, did "not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power,"[812] it did apparently intend to cite these laws as guidelines for the type of specificity that it deemed necessary. This type of specificity was nowhere present in *Ward*, so it is accurate to say that this case apparently relaxes the stringent implications of *Miller*.

At this juncture, one could simply observe that while it is all very well to have legislatures draft detailed definitions, courts of law cannot be expected to do so. Indeed, *Miller* made this point when the majority said, "[w]e emphasize that it is not our function to propose regulatory schemes for the states. That must await their concrete *legislative* efforts."[813] Consequently, a number of courts have refused judicially to cure the vagueness inherent in state obscenity laws, preferring instead to leave that task to the legislatures.[814] Others have simply incorporated the *Miller* examples verbatim into the challenged statute,[815] whereas still others have sustained obscenity laws by concluding that previous judicial constructions had already provided the specificity now mandated by *Miller*.[816] A few courts,

810. Miller v. California, 413 U.S. 15, 25 (1973). *See* note 37 and accompanying text *supra*.

811. *See* note 670 and accompanying text *supra*.

812. Miller v. California, 413 U.S. 15, 24 n.6 (1973).

813. *Id.* at 25 (emphasis added). Some legislatures have responded to *Miller* by providing more exact obscenity statutes. *See, e.g.*, 11 DEL. CODE. § 1364(2) (Supp. 1974); IDAHO CODE § 18-4105 (Supp. 1977); LA. REV. STAT. ANN. § 14:106 (1974); N.Y. PENAL LAW § 235.00 (McKinney 1974); N.C. GEN. STAT. § 14-190.1(c) (Supp. 1975). Where the *Miller* examples are incorporated into the text of the law itself, the requisite specificity has been held to exist. DeSalvo v. Codd, 386 F. Supp. 1293, 1300 (S.D.N.Y. 1974).

814. *See, e.g.*, People v. Tabron, — Colo. —, —, 544 P.2d 372, 379 (1976); Stroud v. State, 261 Ind. 58, 60, 300 N.E.2d 100, 101 (1973); State v. Wedelstedt, 213 N.W.2d 652, 656-57 (Iowa 1973); State v. Shreveport News Agency, Inc., 287 So. 2d 464, 470 (La. 1974); Commonwealth v. Horton, 365 Mass. 164, 171-72, 310 N.E.2d 316, 322 (1974); ABC Interstate Theaters, Inc. v. State, 325 So. 2d 123, 127 (Miss. 1976); Commonwealth v. McDonald, 464 Pa. 435, 452, 347 A.2d 290, 299 (1975); Art Theater Guild, Inc. v. State, 510 S.W.2d 258, 260-61 (Tenn. 1974).

815. *See* cases cited note 736 *supra*.

816. *See, e.g.*, People v. Enskat, 33 Cal. App. 3d 900, 908-09, 109 Cal. Rptr. 433, 438-39 (1973), *cert. denied*, 418 U.S. 937 (1974); Rhodes v. State, 283 So. 2d 351, 355-56 (Fla. 1973);

however, like those of Illinois, "have done little more than pay lip service to the specificity requirement in *Miller*."[817] For example, in *B & A Co. v. State*,[818] a Maryland appellate court upheld an obscenity law which had been construed to permit state tribunals to apply whatever definition of the term "obscene" was established by the United States Supreme Court.[819] The court of appeals remarked airily, "[w]hile a more specific statutory definition may have been preferred by the *Miller* Court, it was not mandated."[820] In *State v. Little Art Corp.*,[821] the statute in question prohibited dissemination of "obscene, lewd, indecent, or lascivious materials";[822] the standard for applying those adjectives was defined as one of dominant appeal to a prurient interest, and "prurient" itself was explained as "tending to excite lasciviousness."[823] Confronted with this model of circular reasoning, the Nebraska Supreme Court nevertheless found it well within the strictures of *Miller*.[824] A similar result was reached by an Ohio appellate court in *State ex rel. Keating v. "Vixen"*,[825] which upheld a law[826] prohibiting the display of a motion picture depicting sexual intercourse in such a way that the "cumulative effect" of the film would consist of a tendency to appeal to prurient interest, without more.[827] Prior to *Ward*, one might have assumed that these decisions were simply irresponsible; after that case, however, it may well be that such irreverent treatment of *Miller's* specificity requirement will not constitute reversible error.

Certainly, few courts have attempted to incorporate detailed and exhaustive definitions of hard core pornography into challenged obscenity laws. It can be done, however, and a good example is provided by the New Hampshire Supreme Court's decision in *State v. Harding*.[828] There it was said:

Jenkins v. State, 230 Ga. 726, 728, 199 S.E.2d 183, 184-85 (1973), *rev'd on other grounds sub nom.* Jenkins v. Georgia, 418 U.S. 153 (1974); Hall v. Commonwealth, 505 S.W.2d 166, 168 (Ky. 1974); State *ex rel.* Wampler v. Bird, 499 S.W.2d 780, 784 (Mo. 1973); People v. Heller, 33 N.Y.2d 314, 327, 307 N.E.2d 805, 814, 352 N.Y.S. 2d 601, 613 (1973), *aff'd sub nom.* Heller v. New York, 413 U.S. 483 (1973); Price v. Commonwealth, 214 Va. 490, 493-94, 201 S.E.2d 798, 800-01 (1974).

817. SCHAUER, *supra* note 3, at 167.

818. 24 Md. App. 367, 330 A.2d 701 (1975).

819. MD. ANN. CODE art. 27, § 418 (1976).

820. 24 Md. App. at 372, 330 A.2d at 704.

821. 191 Neb. 448, 215 N.W.2d 853 (1974).

822. NEB. REV. STAT. § 28-921 (1974) (repealed 1974).

823. NEB. REV. STAT. § 28-926.07 (1974) (repealed 1974).

824. 191 Neb. at 452, 215 N.W.2d at 856.

825. 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

826. OHIO REV. CODE ANN. §§ 2905-34, 2905-35 (Page 1953), *superseded by* OHIO REV. CODE § 2907.01 (Page 1975).

827. 35 Ohio St. 2d at 219, 301 N.E.2d at 882.

828. 114 N.H. 335, 320 A.2d 646 (1974).

> While it is possible to give some meaningful content to these words ["nudity," "excretion"], the crucial word "sex" and the related phrase "sexual conduct" cannot be so easily packaged. These words are loosely used in contemporary vernacular to describe conduct ranging from actual intercourse to nonphysical interpersonal relations, such as a seductive smile or the use of an alluring perfume. In attempting to tailor their meaning to the context of the obscenity statute, it is important to bear in mind that the *Miller* Court expressly stated that prosecutions will be limited to representation or depictions of "patently offensive 'hard core' sexual conduct." . . . The Court gave two examples of the type of activity falling within this phrase: (1) "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and; (2) "Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.". . . It is true that the qualifying phrases "patently offensive" and "lewd" do not precisely describe the activities banned by such examples. . . . Nevertheless, the thrust of the opinion is addressed to graphic representations or descriptions of (1) all forms of actual or simulated intercourse between humans or humans and animals in which the genitalis [*sic*] of one party is inserted into an orifice of another; (2) oral contact with the genitalia or manual contact with genitalia in a turgid state; (3) the insertion of any instrument or other device into the genital or anal passage in the course of activity designed to arouse or excite the genitalia; (4) the use of instruments or other devices by one party to inflict pain on another in the course of activity designed to arouse or excite the genitalia; or (5) the use of excrement or excretory functions in the course of activity designed to arouse or excite the genitalia; or (6) the genitalia in a turgid state. . . . In our view these enumerated categories are sufficiently concrete to describe patently offensive "sex" or "sexual conduct" and to provide fair warning under *Miller* as to the scope of RSA 571-A:1 (Supp. 1972).[829]

Harding offers no panacea in this area; one can argue that its six criteria may still exclude types of sexual conduct, such as fetishism, necrophilia, voyeurism or analingus, the depiction of which ought properly to be regulated. But *Harding* exemplifies what courts can do to meet the specificity requirement of *Miller*, and its detailed analysis only underscores what was missing in *Ward*: a list of depictions sufficiently precise and so fixed that an

829. *Id.* at 341-42, 320 A.2d at 651 (citations omitted). The statute in question says material is obscene

> if (a) considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social importance. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

N.H. REV. STAT. ANN. § 650:1 (1974).

individual has fair notice of what types of materials will be subject to subsequent regulation by the state.

The Supreme Court in *Ward* does not require *Harding*'s level of specificity and, as a result, it is undermining the very concept of fair notice that it deemed necessary in *Miller*. Consequently, as Justice Stevens observed, the cornerstone of the *Miller* test is quietly being abandoned by the five Justices responsible for formulating that test in the first place.[830] Because he feels such an abandonment presages the "ultimate downfall" of *Miller*, Justice Stevens characterized the majority opinion in *Ward* as a "mixed blessing."[831] On reflection, however, one cannot be so sanguine about what is happening. The Court during this term has indicated clearly that *Miller* is still vital, controlling law and will presumably remain so for the foreseeable future. But by eviscerating that decision's specificity requirement in *Ward*, and by sharply limiting the scope of independent appellate review in *Smith v. United States*,[832] the five Justices responsible for *Miller* have effectively managed to adulterate the principles upon which that earlier decision was said to rest without at the same time overruling it. The net result is that after these most recent decisions, the *Miller* ruling may now have a far different significance than it seemed to have when it was first promulgated in 1973. In light of the many difficulties raised by the *Miller* ruling as originally constituted, one can safely predict that the reformulation of *Miller* effected by *Smith* and *Ward* can only increase those difficulties exponentially.

830. 431 U.S. at 777 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).

831. *Id.* at 782.

832. 431 U.S. 291 (1977). *See* notes 417-666 and accompanying text *supra*.

B. Speech

1. *Silence as Protected Speech: The New Constitutional Doctrine of* Wooley v. Maynard

Perhaps the most far-reaching speech case decided by the Court during its 1976-1977 term was that of *Wooley v. Maynard*.[1] In this ruling, the Court heralded a number of important developments. First, it announced a new, and to some extent unprecedented, exception to the principles of equitable restraint set forth in *Younger v. Harris*.[2] Second, it suggested new substantive limitations on the doctrine of symbolic speech utilized in a number of previous Supreme Court cases.[3] Third, and most importantly, the Court created a new constitutional right of silence that may have wide ramifications in future cases.

a. The Decision

Section 262:27-c of the New Hampshire revised statutes makes it a criminal offense knowingly to obscure "the figures or letters" on license plates attached to any motor vehicle.[4] In 1972, the state's supreme court construed the term "letters" used in the statute to include the state motto printed on license registration plates.[5] Between 1957 and 1970, all plates issued by the state simply bore the legend "Scenic New Hampshire."[6] In 1969, however, legislation was enacted requiring noncommercial registration plates to bear the state motto "Live Free or Die."[7] Plates embossed

1. 430 U.S. 705 (1977).

2. 401 U.S. 37 (1971). For a detailed description of this case, *see* note 20 *infra*.

3. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 409-11 (1974) (exhibition of an American flag with a peace symbol attached to it is a permissible communication of pacifistic sentiments); Tinker v. Des Moines School Dist., 393 U.S. 503, 505-14 (1969) (wearing of black armbands conveyed a constitutionally-safeguarded message about the war in Vietnam); United States v. O'Brien, 391 U.S. 367, 376-82 (1968) (assuming the burning of one's draft card is symbolic speech, it was held that the government's interest in prohibiting that form of communication prevailed); Stromberg v. California, 283 U.S. 359, 369 (1931) (found the display of a red flag as a symbol of opposition to organized government to be constitutionally protected expression). *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 79-86 (1970); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

4. N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975).

5. State v. Hoskin, 112 N.H. 332, 334, 295 A.2d 454, 456 (1972).

6. *Id.* at 333, 295 A.2d at 455.

7. N.H. REV. STAT. ANN. § 263:1 (Supp. 1975). Display of the license plates so embossed is required by the same statute. The motto is derived from the words of Major General John

with that motto began to be issued in 1971.[8]

George Maynard and his wife Maxine were both practicing Jehovah's Witnesses. Each of them deemed the motto of New Hampshire repugnant not only to their religious convictions, but also to their political philosophy.[9] As a consequence, they found it objectionable to disseminate the message conveyed in that motto by displaying it on either of the two automobiles they owned. Therefore, in March or April of 1974, George Maynard began tampering with the registration plates issued to him. He initially snipped the words "or Die" from his plates and concealed both the resultant hole and the words "Live Free" with red reflective tape. On subsequent occasions, he simply taped over the entire motto.[10]

Because of these actions, Maynard was subjected to three criminal prosecutions within a period of two months. His first citation for violating section 262:27-c was issued on November 27, 1974. Maynard, appearing pro se, entered a plea of not guilty in a district court in Lebanon, New Hampshire and proceeded to justify his conduct on the basis of his religious beliefs. The trial judge, deeming himself bound by a 1972 decision of the New Hampshire Supreme Court upholding the validity of section 262:27-c,[11] imposed a twenty-five dollar fine, which he then suspended during the continuance of the defendant's "good behavior." On December 28, 1974, a second citation was issued to Maynard. He was again found guilty, and was fined fifty dollars and sentenced to six months in jail. The penalty of incarceration was suspended, but Maynard was required to remit the twenty-five dollar fine previously assessed against him. When he in-

Stark, reputed to have been written in 1809 as part of a toast in a letter to a former comrade-at-arms: "Live Free or Die; death is not the worst of evils." W. MOORE, A LIFE OF GENERAL JOHN STARK OF NEW HAMPSHIRE 500 (1949).

8. *See* Maynard v. Wooley, 406 F. Supp. 1381, 1383 n.1 (D.N.H. 1976).

The Supreme Court noted that categories of vehicles not required to bear license plates embossed with the motto in question are numerous. They include "trailers, agricultural vehicles, car dealers, antique automobiles, the Governor of New Hampshire, its Congressional Representatives, its Attorney General, Justices of the State Supreme Court, veterans, chaplains of the State Legislature, sheriffs, and others." 430 U.S. at 707 n.1.

9. In an affidavit, Maynard claimed

> [B]y religious training and belief, I believe my "government"—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.
>
> . . . I also disagree with the motto on political grounds. I believe life is more precious than freedom.

430 U.S. at 707 n.2. Maxine Maynard testified that she shared her husband's views. Maynard v. Wooley, 406 F. Supp. 1381, 1383 n.3 (D.N.H. 1976).

10. 430 U.S. at 708 n.4; Maynard v. Wooley, 406 F. Supp. 1381, 1384 (D.N.H. 1976).

11. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).

formed the court that he could not, as a matter of conscience, comply with this requirement he was sentenced to and served fifteen days in jail. Prior to trial on the second offense, a third citation was issued to Maynard on January 3, 1975. He appeared to answer this complaint on the same day as for the second offense, and was again adjudged guilty; this third conviction was "continued for sentencing" so that Maynard received no punishment in addition to the fifteen days of confinement previously imposed against him.[12]

On March 4, 1975, both Maynard and his wife brought an action in federal district court pursuant to section 1983 of Title forty-two of the United States Code.[13] They sought both an injunction against future criminal prosecutions for violation of section 262:27-c and an injunction decreeing that in future years they be issued license plates not embossed with the state's motto.[14] Declaratory relief was also requested.[15] A three-judge district court[16] ruled that Maynard had engaged in symbolic speech fully protected by the First Amendment;[17] it therefore enjoined the state from making any further attempts to arrest and try him for violating section 262:27-c.[18]

On appeal, the United States Supreme Court affirmed. In his opinion for the majority,[19] Chief Justice Burger began by noting that the district court had correctly assumed that the principles of equitable restraint did not bar it from hearing this case on its merits. The Court said that in *Younger v.*

12. For narrations of these series of events, *see* 430 U.S. at 708; Maynard v. Wooley, 406 F. Supp. 1381, 1384 (D.N.H. 1976).

13. 42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . 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."

14. 430 U.S. at 709 n.5. On March 11, 1975, a single district judge issued a temporary restraining order against any further arrest and prosecution of the Maynards. *Id.* at 709.

15. *Id.*

16. A three-judge court was convened pursuant to 28 U.S.C. § 2281 (1970) because the appellees had sought an injunction against a state statute on grounds of unconstitutionality. This three-judge court provision has since been repealed. Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976).

17. Maynard v. Wooley, 406 F. Supp. 1381, 1387 (D.N.H. 1976). For a more detailed discussion of this portion of the district court's opinion, *see* notes 91-118 and accompanying text *infra*.

18. *Id.* at 1389.

19. Chief Justice Burger was joined by Justices Brennan, Marshall, Stewart, Powell and Stevens. Justice White also joined in the majority opinion, with the exception of its determination of the property of injunctive relief. 430 U.S. at 717-19 (White, J., dissenting, joined by Blackmun and Rehnquist, JJ.).

Harris,[20] it was recognized that concepts of "judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions."[21] But Chief Justice Burger then observed that there are two well-established qualifications of the *Younger* doctrine. First, when a genuine threat of prosecution exists, a litigant may seek redress in a federal forum for the alleged infringement of his constitutional rights;[22] second, a litigant is always entitled to gain access

20. 401 U.S. 37 (1971). In *Younger*, a three-judge federal district court enjoined the state from proceeding with a prosecution for violation of the California Criminal Syndicalism Act, CAL. PENAL CODE §§ 11400, 11401 (West 1970). Harris v. Younger, 281 F. Supp. 507, 517 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971). On appeal, the Supreme Court noted that Congress had severely limited the power of federal courts to stay proceedings in state tribunals. *Id.* at 43 (citing 28 U.S.C. § 2283 (1970)). Apart from three exceptions specifically mentioned in that statute, *i.e.*, where there is express authorization by congress to issue injunctions, where a stay is necessary to aid the jurisdiction of a federal court and where a stay is necessary to effectuate the judgment of a federal court, the Court in *Younger* acknowledged that a judicial exception had also been created to cover situations where irreparable hardship would ensue were an injunction not issued. *Id.* at 43. The Court concluded, however, that none of those exceptions applied:

> It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.

Id. at 54. In so holding, the Court in *Younger* was able to distinguish Dombrowski v. Pfister, 380 U.S. 479 (1965). *Dombrowski* had upheld an injunction against the enforcement of state criminal statutes. There, however, the Court was presented with allegations of a series of systematic efforts by law enforcement authorities to harass blacks and civil rights workers in Louisiana. *Id.* at 482. For discussion of *Younger*, see Geltner, *Some Thoughts on the Limiting of Younger v. Harris*, 32 OHIO ST. L.J. 744 (1971); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972); Sedler, *Dombrowski in the Wake of Younger: The View from Without and Within*, 1972 WIS. L. REV. 1. For discussion of post *Younger* developments, see Kanowitz, *Deciding Federal Law Issues in Civil Proceedings: State Versus Federal Trial Courts*, 3 HASTINGS CONST. L.Q. 141 (1976); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975); Comment, *Post-Younger Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L.J. 523.

21. 430 U.S. at 710 (citing Younger v. Harris, 401 U.S. 37, 43 (1971)).

22. *Id.* at 710 (citing Steffel v. Thompson, 415 U.S. 452 (1974)). In *Steffel*, the petitioners were individuals who attempted to disseminate leaflets protesting the Vietnam war on an exterior sidewalk of a municipal shopping center. One of them, threatened with arrest on charges of criminal trespass, sought injunctive and declaratory relief against the Georgia law enforcement officials in question. A district court dismissed the complaint, finding no averment of bad faith on the part of the officials, and, hence, no case or controversy. Becker v. Thompson, 334 F. Supp. 1386, 1389-90 (N.D. Ga. 1971), *aff'd*, 459 F.2d 919 (5th Cir. 1972), *rev'd sub nom.* Steffel v. Thompson, 415 U.S. 452 (1974). On an appeal from the denial of declaratory relief, the Fifth Circuit affirmed, finding that the "test of bad faith harassment is prerequisite . . . for declaratory relief in a threatened prosecution." Becker v. Thompson, 459 F.2d 919, 922 (5th Cir. 1972), *rev'd sub nom.* Steffel v. Thompson, 415 U.S. 452 (1974). The Supreme Court reversed. It said that when no state proceeding is actually pending, a request for

to a federal forum in order to preserve his rights by means of lodging an action pursuant to section 1983.[23]

To this pair of contentions, the state responded that under the ruling of *Huffman v. Pursue, Ltd.*,[24] "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court . . . ."[25] Because Maynard had not appealed any of his convictions,[26] the state argued that federal courts were restrained from intervening in this situation. The Supreme Court disagreed. It distinguished *Huffman* by pointing out that it involved factual circumstances wherein federal intervention was sought to bar enforcement of a judgment issued by a state court.[27] In contrast, Maynard was not seeking similar relief; he had already served his jail sentence.[28] The redress he

declaratory relief may be considered independently of one for injunctive redress. Steffel v. Thompson, 415 U.S. 452, 462 (1974). It therefore held that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether the attack is made on the constitutionality of the statute on its face or as applied." *Id.* at 475. *Cf.* Doran v. Salem Inn, Inc., 422 U.S. 922, 930-31 (1975) (preliminary injunction). *Steffel* is thus distinguishable from Samuels v. Mackell, 401 U.S. 66, 73 (1971), which held that federal courts cannot issue declaratory judgments against a pending, as opposed to a merely threatened, state criminal prosecution.

23. 430 U.S. at 710 (citing Huffman v. Pursue, Ltd., 420 U.S. 592, 609-10 n.21 (1975)). The Court in *Huffman* reaffirmed the rule of Monroe v. Pape, 365 U.S. 167, 183 (1961), that one seeking redress under section 1983 need not first initiate state court proceedings based on related state causes of action. 420 U.S. at 609 n.21. Moreover, section 1983 has been held by the Court to be a congressional exception to the anti-injunction principles expressed in section 2283 of Title twenty-eight of the United States Code. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). *See also* Vendo Co. v. Lektro-Vend. Co., 433 U.S. 623, 630-41 (1977) (provision of the Clayton Act authorizing injunctions to prevent violations of federal antitrust laws held not to be an express congressional exception to the principles of section 2283).

24. 420 U.S. 592 (1975). In *Huffman*, an Ohio court in a nuisance proceeding had, after determining that a particular theater had illegally exhibited obscene films, entered a judgment ordering the theater closed and the personalty used in the course of its operations seized. Rather than appealing this judgment through the state court system, the successor in interest of the losing party filed a section 1983 action requesting declaratory and injunctive relief against the enforcement of the nuisance statute. The Supreme Court held that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." *Id.* at 609. Nevertheless, despite this broad language, the scope of the Court's holding was clearly limited to the circumstances presented by the case, namely an attempt to enjoin "a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases." *Id.* at 604. Consequently, the Court made no effort to determine to what extent *Younger* would apply in other types of civil proceedings. *Id.* at 607.

25. *Id.* at 608.

26. The deadline for Maynard to file an appeal expired seven days before he initiated his suit in federal court. Maynard v. Wooley, 406 F. Supp. 1381, 1384 n.4 (D.N.H. 1976).

27. 430 U.S. at 710-11. *See* note 24 *supra*.

28. The conviction arising from the citation issued on January 3, 1975, which had been "continued for sentencing," did not alter this conclusion: "No collateral consequences will

sought was "wholly prospective to preclude further prosecution under a statute alleged to violate [his] constitutional rights."[29] Therefore, the Court held that the principles of *Younger* did not bar federal jurisdiction in this case.[30]

The Court next considered the appropriateness of the district court's conferral of injunctive relief. Chief Justice Burger first noted that injunctive and declaratory relief may have virtually an identical practical effect.[31] He then observed that the Court has expressed a strong reluctance to invalidate criminal statutes even though they are unconstitutional, because "[s]uch a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*."[32] Such a reluctance could only be overcome by a showing that injunctive relief was fully necessary to protect a constitutional right.[33] The Court concluded that Maynard had made such a showing: "[t]he threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile, is sufficient to justify injunctive relief."[34] Consequently, the Chief Justice found that the injunctive remedy granted by the district court was proper.

The Court then proceeded to consider the merits of the case. It did not rely on the symbolic speech doctrine that had been utilized by the district court. Instead, the Court focused on what it deemed to be the "essence" of Maynard's objection, "whether the state may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose

attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future." Maynard v. Wooley, 406 F. Supp. 1381, 1384 (D.N.H. 1976).

29. 430 U.S. at 711.

30. *Id.*

31. *Id. See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Samuels v. Mackell, 401 U.S. 66, 73 (1971).

32. 430 U.S. at 712 (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)). *Accord*, Younger v. Harris, 401 U.S. 37, 44 (1971); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943); Watson v. Buck, 313 U.S. 387, 400 (1941); Fenner v. Boykin, 271 U.S. 240, 243-44 (1926).

33. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 442-44 (1977); Kugler v. Helifant, 421 U.S. 117, 124-25 (1975); Younger v. Harris, 401 U.S. 37, 45 (1971); Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965); Douglas v. City of Jeannette, 319 U.S. 157, 163-64 (1943); Williams v. Miller, 317 U.S. 599, 599 (1942); Watson v. Buck, 313 U.S. 387, 400 (1941); Beal v. Missouri Pac. R.R. Co., 312 U.S. 45, 50 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95 (1935); Fenner v. Boykin, 271 U.S. 240, 243-44 (1926); *Ex Parte* Young, 209 U.S. 123, 145-47 (1908).

34. 430 U.S. at 712.

that it be observed and read by the public."[35] Chief Justice Burger reasoned that the First Amendment embraces both the right to speak freely and the right to refrain from speaking at all: "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."[36] Relying on language in *West Virginia Board of Education v. Barnette*,[37] a case that invalidated the practice of compelling school children to engage in a daily salute to the American flag, he concluded that both the right of speech and the right of silence are constituent parts of the much broader concept of "individual freedom of mind."[38] Of course, compulsory flag salutes could not be equated precisely with having to display the motto of "Live Free or Die" on one's license plates. But the difference was said to be one of degree rather than one of kind. "Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[39] Thus, the Court found that the Maynards' interests did merit First Amendment protection.

The Court next balanced the individuals' interests against those of the state. New Hampshire offered two justifications. First, the state asserted that the inclusion of the motto on passenger vehicle license plates facilitated the task of police officers in distinguishing between passenger and commercial vehicles, the latter of which bore plates not containing such a legend. Second, it argued that the inclusion of the motto promoted "appreciation of history, individualism, and state pride."[40] In regard to the first contention, the majority observed that commercial plates were distinguishable without reference to the motto, because of differing configurations of letters and numbers.[41] Moreover, even if this attempted justification was deemed credible, the state could achieve its goal by means of a less drastic alternative.[42] Regarding the second contention, the Court claimed that the state's motto was not ideologically neutral. It was an attempt to express an "official

35. *Id.* at 713.

36. *Id.* at 714.

37. 319 U.S. 624, 637 (1943). For further discussion of this case, *see* notes 120-23 and accompanying text *infra*.

38. 430 U.S. at 714 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

39. *Id.* at 715.

40. *Id.* at 716.

41. *Id.* New Hampshire license plates for passenger vehicles consist of two letters followed by four numbers. No other registration plate category displays such a combination. However, of 325,000 passenger plates in the state, 9,999, used mainly by state governmental officials, display only numbers not preceded by letters. *Id.* at 716 n.13.

42. *Id.* at 716.

view" concerning individualism and state pride.[43] Thus, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[44] Accordingly, the majority voted to affirm the judgment of the district court.

Justice White, joined by Justices Blackmun and Rehnquist, dissented in part. His objections were addressed to that portion of the majority's opinion dealing with the doctrine of equitable restraint. He pointed out that a declaratory judgment could be obtained against a state statute where the agents of the state threatened to initiate proceedings to enforce its terms.[45] But the same could not be said for the granting of injunctive relief. As early as 1943, in *Douglas v. City of Jeannette*,[46] the Court had recognized that federal courts could not enjoin threatened state criminal prosecutions, even though the underlying law furnishing a basis for those prosecutions had been invalidated by prior judical ruling.[47] The one exception to this rule would be the presence of "unusual circumstances"; but

> [h]ere the State's enforcement of its statute prior to the declaration of unconstitutionality by the Federal court would appear to be no more than the performance of their duty by the State's law enforcement officers. If doing this much prior to the declaration of unconstitutionality amounts to unusual circumstances sufficent to warrant an injunction, the standard is obviously seriously eroded.[48]

Justice Rehnquist, joined by Justice Blackmun, also dissented; but he addressed the First Amendment issue. He found no evidence that the Maynards were being compelled to affirm an ideological view abhorrent to them: they "have not been forced to affirm or reject [New Hampshire's] motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes."[49] Moreover, Justice Rehnquist found no compulsory advocacy in this case[50] because the Maynards were never placed in the position of either apparently or actually asserting the validity of the motto embossed on their license

43. *Id.* at 717.

44. *Id.*

45. *Id.* (White, J., dissenting, joined by Blackmun and Rehnquist, JJ.) (citing Steffel v. Thompson, 415 U.S. 452 (1974)). *See* note 22 *supra*. *Steffel* expressly left open the question of whether an injunction should be issued under the same circumstances. *Id.* at 453. *Accord*, Younger v. Harris, 401 U.S. 37, 41 (1971).

46. 319 U.S. 157 (1943). For further discussion of this case, *see* notes 82-87 and accompanying text *infra*.

47. *Id.* at 163-64.

48. 430 U.S. at 719.

49. *Id.* at 720 (Rehnquist, J., dissenting, joined by Blackmun, J.).

50. *Id.* at 722.

plates. At all times, the appellees could express their disagreement with that motto, as long as in so doing they refrained from mutilating or obscuring the letters or figures on their registration plates. Because the majority's premise about the applicability of the First Amendment to Maynard's conduct was faulty, Justice Rehnquist indicated that he would accord much more deference to New Hampshire's claimed justifications of vehicle identification and tourist promotion.[51]

b. Analysis

In order best to consider the problems raised by *Wooley v. Maynard*, it is necessary to scrutinize the impact of the decision on three distinct areas of the law: the doctrine of equitable restraint, the concept of symbolic speech and the concept of a constitutional right to refrain from speaking.

(1) Equitable Restraint

The holding of *Wooley* on this issue may be summarized quite succinctly: a federal court is empowered to issue a permanent injunction against potential future prosecutions for violation of a state criminal law, even though the party seeking injunctive relief has failed to exhaust his remedies in state court with respect to prior prosecutions for transgressions of that same law. The obvious question is whether this holding about the permissibility of injunctions having purely prospective effect is consistent with prior cases.

Certainly, *Wooley* is not directly controlled by *Younger v. Harris*.[52] *Younger* involved an attempt to enjoin a pending state criminal proceeding. The Court therein identified two rationales underlying the doctrine that federal courts should not use their equity powers to restrain state actions. The first was the fundamental concept that equitable relief is improper when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied such relief.[53] The second rationale was that federal courts are bound by the concept of comity:

> that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[54]

51. *Id.*

52. 401 U.S. 37 (1971). *See* note 20 *supra*.

53. *Id.* at 43-44.

54. *Id.* at 44. *Accord*, Juidice v. Vail, 430 U.S. 327, 334 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922, 927-28 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975).

Based on this line of reasoning, the Court in *Younger* adhered to the traditional view that, absent a showing of irreparable injury, an ongoing state criminal prosecution cannot be enjoined by a federal judge.[55] But, as the majority in *Wooley* pointed out, that case involved no ongoing prosecution.[56] Maynard's three prior convictions were final and irrevocable; he sought injunctive relief against potential future prosecutions yet to be initiated against him. Therefore, *Younger* could be, and was, easily distinguished by Chief Justice Burger in *Wooley*.

The harder problem is to what degree cases subsequent to *Younger* have extended the principles reaffirmed in that decision to other types of factual situations more similar to that encountered in *Wooley*. There are two relevant rulings by the Supreme Court. In *Steffel v. Thompson*,[57] the Court held that the principles of *Younger* did not preclude a federal court from affording a plaintiff declaratory relief against threatened state criminal prosecutions.[58] It indicated that the concepts of comity and "Our Federalism" could not be utilized to justify too stringent restrictions on the equity powers of federal courts:

> In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. § 1983 . . .—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.[59]

This same rationale can be used to explain the result in *Wooley*. Like *Steffel*, it involved a section 1983 proceeding lodged to deter future official action by agents of the state. Like the plaintiff in *Steffel*, Maynard was presented with the Hobson's choice of intentionally violating state law or abandoning what he sincerely believed to be a constitutionally protected course of conduct in order to avoid becoming embroiled in another criminal prosecution. Unlike *Steffel*, however, *Wooley* involved the conferral of injunctive, rather than declaratory, relief. This differentiating factor may be insignificant; because the Court has admitted on other occasions that the

55. 401 U.S. at 54.

56. 430 U.S. at 711.

57. 415 U.S. 452 (1974). *See* note 22 *supra*.

58. *Id.* at 475.

59. *Id.* at 472-73. *Accord*, Hochman v. Board of Educ., 534 F.2d 1094, 1096 (3d Cir. 1976); Hardwick v. Ault, 517 F.2d 295, 297 (5th Cir. 1975); McCray v. Burrell, 516 F.2d 357, 364-65 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); Fialkowski v. Shapp, 405 F. Supp. 946, 956 (E.D. Pa. 1975).

practical effect of either remedy may be identical,[60] one could perhaps argue that the distinction between *Wooley* and *Steffel* in this respect is de minimis. In fact, however, *Steffel* itself rebuts such an assertion; the Court therein expressly left open the question of whether or not an injunction should issue under similar circumstances.[61] The effect of such a caveat is to suggest that injunctive and declaratory relief are measurably different forms of redress, the availability of which is to be determined by separable criteria.[62] Indeed, this suggestion is the whole point of Justice White's dissent in *Wooley*.[63] Thus, though *Steffel* is helpful precedent, it necessarily is distinguishable from *Wooley* in at least one crucial respect.[64]

60. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Samuels v. Mackell, 401 U.S. 66, 73 (1971).

61. 415 U.S. at 463. *Cf.* Dempsey v. McQueeney, 387 F. Supp. 333, 339 (D.R.I. 1975) (declines to decide whether *Steffel* should apply when injunctive relief is sought).

62. The Court in *Steffel* underscored this distinction by engaging in a lengthy analysis of the purposes underlying the creation of the remedy of a declaratory judgment. It noted that the congressional history of the Declaratory Judgment Act of 1934, 28 U.S.C. §§ 2201-02 (1970), indicated that its express purpose was to serve as an alternative to injunctive relief. 415 U.S. at 466-68. *See* H.R. REP. No. 1264, 73d Cong., 2d Sess. 2 (1934); S. REP. No. 1005, 73d Cong., 2d Sess. 2-3, 6 (1934). Moreover, the Court observed that different considerations enter into the granting of a declaratory judgment than those needed to be considered for the issuance of an injunction. First, declaratory relief is likely to have a less intrusive effect on the operation of state criminal laws; second, engrafting upon the Declaratory Judgment Act a requirement that traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate. 415 U.S. at 469-71. *See* Perez v. Ledesma, 401 U.S. 82, 115-16, 121-26 (1971) (Brennan, J., dissenting in part and concurring in part, joined by Marshall and White, JJ.). *See also* Doe v. Bolton, 410 U.S. 179, 201 (1973); Roe v. Wade, 410 U.S. 113, 166 (1973); Zwickler v. Koota, 389 U.S. 241, 252-55 (1967). These different considerations are ignored only where principles of federalism militate altogether against federal intervention; the Court found that *Steffel* was not such a case. 415 U.S. at 472. *See* text accompanying notes 58-59 *supra*.

63. *See* 430 U.S. at 717-18 (White, J., dissenting in part, joined by Blackmun and Rehnquist, JJ.).

64. One might ask, since *Wooley* was a section 1983 case, why the principles of Mitchum v. Foster, 407 U.S. 225 (1972), *see* note 23 *supra*, were not relied upon. *Mitchum* held that section 1983 was an authorized exception to the anti-injunction principle of 28 U.S.C. § 2283 (1970). *See* note 20 *supra*. But the Court has never said to what extent this recognition of the special status of the Civil Rights Act may be used to create an exception to the equitable restraint doctrine of *Younger*. Indeed, *Younger* expressly avoided relying on section 2283. Younger v. Harris, 401 U.S. 37, 54 (1971). It has been suggested by dissenting justices in later cases extending *Younger* that the equitable restraint doctrine has been utilized to undermine the acknowledgment in *Mitchum* of the legislative purpose underlying the enactment of section 1983. *See* Juidice v. Vail, 430 U.S. 327, 344-45 (1977) (Brennan, J., dissenting, joined by Marshall, J.); Huffman v. Pursue, Ltd., 420 U.S. 592, 618 (1975) (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.). *Wooley's* failure to even mention *Mitchum* is therefore consistent with prior rulings.

A much closer case is presented by *Doran v. Salem Inn, Inc.*[65] That litigation involved a section 1983 action challenging the validity of a municipal ordinance making it unlawful for bar owners to permit waitresses, barmaids or entertainers to appear topless in their establishments. The plaintiffs were three corporations, M&L Restaurant, Inc., Salem Inn, Inc. and Tim-Rob Bar, Inc. All three sought a preliminary injunction and declaratory relief against the enforcement of the ordinance. Pending the judgment by the federal court, the latter two establishments complied with the enactment by issuing bikini tops to their go-go dancers. For a time, M&L Restaurant did the same, but it eventually decided to flout the local law and, as a result, was issued a number of summonses. The district court thereafter granted a temporary injunction pending its decision on the merits. It included M&L Restaurant within the coverage of its order, saying that a contrary result would be anomalous.[66] The Second Circuit affirmed, concluding that the interest of avoiding contradictory outcomes, of conserving judicial energy and of clarifying procedure militated in favor of granting identical relief to all three appellees.[67]

The Supreme Court disagreed in part. It noted that because a prosecution was *pending* against M&L Restaurant, disposition of that party's claim was governed by *Younger*, which barred equitable intervention.[68] Salem Inn and Tim-Rob were in a different situation. Justice Rehnquist, writing for the majority, noted that each of these plaintiffs could have secured a declaratory judgment under *Steffel*; he then concluded that in the circumstances of this case, "the issuance of a preliminary injunction is not subject to the restrictions of *Younger*."[69] In so holding, he pointedly observed:

> At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment,

65. 422 U.S. 922 (1975).

66. Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 481-82 (E.D.N.Y. 1973), *aff'd*, 501 F.2d 18 (2d Cir. 1974), *aff'd in part and rev'd in part sub nom.* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

67. Salem Inn, Inc. v. Frank, 501 F.2d 18, 22 (2d Cir. 1974), *aff'd in part and rev'd in part sub nom.* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). After the Second Circuit's opinion, there were further proceedings in this litigation. The municipal ordinance in question was amended and the district court once again temporarily enjoined its enforcement. Salem Inn, Inc. v. Frank, 381 F. Supp. 859, 864 (E.D.N.Y. 1974), *aff'd*, 522 F.2d 1045 (2d Cir. 1975). Subsequently, the district court refused to enjoin preliminarily an action by the New York State Liquor Authority to withdraw Salem Inn's license, noting that the state's interest under the Twenty-First Amendment restricted equitable relief. Salem Inn, Inc. v. Frank, 408 F. Supp. 852, 856 (E.D.N.Y. 1976). *See generally* Inturri v. Healy, 426 F. Supp. 543, 546-49 (D. Conn. 1977).

68. 422 U.S. at 929.

69. *Id.* at 930.

> and therefore the stronger injunctive medicine will be unnecessary. But prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm. Moreover, neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.[70]

Based on this language in *Doran*, one can argue that *Wooley* was wrongly decided. While it is true that the permanent injunction in *Wooley*, like the temporary one issued in *Doran*, only deprived the state of the capacity to prosecute a particular group of federal plaintiffs,[71] the latter case points out that although in its final order of relief a federal court can always choose between injunctive and declaratory remedies, the same is not the case in an intermediate order of relief, where a preliminary injunction is the only option available. *Wooley* did not involve such an intermediate order; there, the district court issued a permanent injunction. Moreover, it had a choice of which remedy to grant, because the Maynards initially sought either injunctive or declaratory relief.[72] Thus, as Justice White points out, in both *Steffel* and *Doran*, the Court engaged in a conscious attempt to balance the interests of federalism against the need to provide a federal plaintiff with a meaningful remedy to prevent his victimization by state courts.[73] In contrast, the majority in *Wooley* cites *Steffel* and *Doran* in support of the proposition that a plaintiff threatened by the state with prosecution is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights and disposes cursorily of *Younger* by making the same argument advanced in *Steffel*, that the doctrines of equitable restraint do not bar the conferral of purely prospective federal relief. But neither *Doran* nor *Steffel* mandates such a conclusion. Indeed, both cases eschewed reliance on lawmaking by ipse dixit in favor of a relatively careful analysis of the procedural practicalities inherent in each case. *Wooley* seems to evince a more expansive approach by foregoing any attempt at such balancing. It

70. *Id.* at 931. For cases applying the doctrines of *Doran*, *see, e.g.*, International Soc'y for Krishna Consciousness v. New York Port Auth., 425 F. Supp 681, 688 (S.D.N.Y. 1977); Tedesco v. O'Sullivan, 420 F. Supp. 194, 196 (D. Conn. 1976); Notey v. Hynes, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976); Saxe v. Brennan, 416 F. Supp. 892, 894-95 (E.D. Wis. 1976); Cobb v. Beame, 401 F. Supp. 19, 23-25 (S.D.N.Y. 1975); Brown v. Brannan, 399 F. Supp. 133, 146-47 (M.D.N.C. 1975). All these cases have retained *Doran's* distinction between pending and threatened prosecutions.

71. *See* Maynard v. Wooley, 406 F. Supp. 1382, 1389 (D.N.H. 1976).

72. *See* note 15 and accompanying text *supra*.

73. *See* 430 U.S. at 717-18 (White J., dissenting in part joined by Blackmun and Rehnquist, JJ.).

adopts without qualification the thesis that federal intervention in situations involving threatened state prosecutions is always permissible, provided the threat is a genuine one.

Once one overlooks the discrepancy between the caution of *Steffel* and *Doran* and the boldness of *Wooley*, it is comparatively easy to dispose of the state's counterargument. New Hampshire contended that under *Younger* an aggrieved party must exhaust all his remedies in a state court proceeding before seeking federal intervention.[74] This is accurate, but, as the Court points out, *Younger* involved a challenge to a pending prosecution. Maynard never contested the validity of his three prior convictions. He was challenging the right of the state to initiate future prosecutions against him. Thus, the reasons underlying *Younger's* exhaustion prerequisite simply were not present in *Wooley*. Even if one assumes otherwise, however, it would not make an appreciable difference to the result reached on this point by both the lower court and the Supreme Court. Only George Maynard had been prosecuted. His wife Maxine, a co-plaintiff, had never been convicted for violating section 262:27-c. Thus, she could seek federal relief independently of her husband and not be concerned with *Younger's* exhaustion requirement because she had never been involved in a prior state proceeding in which there were further remedies to be exhausted. Any argument to the contrary would deprive her of the right to file a section 1983 action, a deprivation that the Court refused to countenance.[75] Of course, one might claim that the Maynards as a couple would be covered by the qualification broached in *Doran* that they constituted an instance "in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them . . . ."[76] This argument could be rebutted by pointing out, as was noted earlier, that the *Younger* doctrine of exhaustion did not apply to either of the Maynards. Even if one assumed otherwise, however, the *Doran* test was still not met. In that case, the Court concluded that M&L Restaurant, Salem Inn and Tim-Rob Bar, though they were represented by the same counsel and had similar business activities and difficulties, were not related "in terms of ownership, control, and management" and thus were separable entities.[77] Similarly, there was no evidence adduced that Maxine Maynard's religious and political views were anything other than the product of her own independently held moral precepts. It was not shown that she controlled her husband's

74. *Id.* at 710. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975).

75. 430 U.S. at 712 n.9. *See also* Maguin v. Miller, 433 F. Supp. 223, 228 (D. Kan. 1977).

76. Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975). *Cf.* Wisconsin Socialist Workers 1976 Campaign Comm'n v. McCann, 433 F. Supp. 540, 546 (E.D. Wis. 1977) (test is whether the plaintiffs are "legally separate parties").

77. Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975).

conduct or vice versa.[78] Thus, the state's counter-argument was meritless in all respects.

The final procedural issue left was whether the district court had appropriately granted a permanent injunction in this case. As noted earlier,[79] it could have restricted its order to the conferral of declaratory relief, which was also requested; it simply declined to choose that alternative. The Supreme Court affirmed the propriety of its election. It noted that although in most instances a declaratory judgment will suffice to protect the rights of a federal plaintiff, this may not be true where unusual circumstances are presented.[80] Such circumstances were said to exist in *Wooley* because the threat of future prosecutions for violations of section 262:27-c would hinder the Maynards from performing all those diurnal tasks for which the use of an automobile is vitally necessary.[81] In support of this statement, the majority cited only one case, *Douglas v. City of Jeannette*.[82]

Jeannette involved a municipal ordinance that prohibited anyone from soliciting orders for merchandise without first procuring a license from city authorities and paying a license tax. That ordinance was held unconstitutional in a companion case decided by the Court, *Murdock v. Pennsylvania*.[83] In *Jeannette*, various Jehovah's Witnesses had been arrested in April, 1939, for distributing sectarian literature without a permit. After being convicted and serving their sentences, they initiated a suit in federal district court requesting injunctive relief against further enforcement of the ordinance. After a trial, the district court held the law invalid in that it deprived the petitioners of their First Amendment rights and granted them a permanent

78. Maynard v. Wooley, 406 F. Supp. 1381, 1385 (D.N.H. 1976). The district court noted that Maxine and George Maynard were really in a situation similar to that of the petitioners in Steffel v. Thompson, 415 U.S. 452 (1974). *See* note 22 *supra*. In *Steffel*, there were two anti-war protesters. Both were threatened with prosecution for criminal trespass. One desisted in his activity. The other did not, and was arrested and charged. *Id.* at 455-56. One point noted by the district court is that the state might have claimed that Maynard's prior convictions would bar relitigation of the federal constitutional issues. 406 F. Supp. at 1385 n.6. The district court noted, however, that the First Circuit has rejected any collateral estoppel effect in a section 1983 action where the constitutional issue was never actually litigated at the state trial. *See* Mastracchio v. Ricci, 498 F.2d 1257, 1260 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). *Accord*, Lombard v. Board of Educ., 502 F.2d 631, 637 (2d Cir. 1974); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); Liquifin Aktiengesellschaft v. Brennan, 383 F. Supp. 978, 982-83 (S.D.N.Y. 1974); Ames v. Vavreck, 356 F. Supp. 931, 941 (D. Minn. 1973); Moran v. Mitchell, 354 F. Supp. 86, 89 (E.D. Va. 1973).

79. *See* note 72 and accompanying text *supra*.

80. 430 U.S. at 712.

81. *Id.*

82. 319 U.S. 157 (1943).

83. 319 U.S. 105, 116-17 (1943).

injunction.[84] The Third Circuit sustained the jurisdiction of the trial court, but reversed on the merits.[85] The Supreme Court found that there was a statutory conferral of jurisdiction to dispose of the merits of the case, but also found a want of equitable jurisdiction to order injunctive relief. As in *Wooley*, the Court in *Jeannette* said federal tribunals may enjoin threatened state criminal prosecutions only upon a showing of irreparable injury.[86] It then went on to observe:

> The trial court found that respondents had prosecuted certain of petitioners and other Jehovah's Witnessess for distributing the literature described in the complaint without having obtained the license required by the ordinance, and had declared their intention further to enforce the ordinance against petitioners and other Jehovah's Witnesses. But the court made no finding of threatened irreparable injury to petitioners or others, and we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case.
>
> Before the present suit was begun, convictions had been obtained in the state courts in cases Nos. 480-87, *Murdock et. al. v. Pennsylvania*, . . . which were then pending on appeal and which were brought to this Court for review by certiorari contemporaneously with the present case. It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. In these respects the case differs from *Hague v. C.I.O.*, [307 U.S. 496, 501-02 (1939)], where local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial.
>
> There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional, petitioners could not complain of penalties which would have been but consequence of their violation of a valid state law.[87]

Younger reiterates this view, noting that a showing of irreparable injury will be credited only if one can demonstrate harassment, bad faith on the part of law enforcement officials or the prospect of prosecution under a law " '[f]lagrantly and patently violative of express constitutional prohibitions

84. Douglas v. City of Jeannette, 39 F. Supp. 32, 33 (W.D. Pa. 1941) (citing Reid v. Borough of Brookville, 39 F. Supp. 30, 32 (W.D. Pa. 1941)).

85. Douglas v. City of Jeannette, 130 F.2d 652, 659 (3d Cir. 1942), *aff'd*, 319 U.S. 157 (1943).

86. 319 U.S. at 163-64.

87. *Id.* at 164-65.

in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' "[88]

Wooley presented no such unusual circumstances. Neither the trial court nor the Supreme Court purported to find bad faith or harassment. Nor was section 262:27-c deemed facially invalid. The district court limited its enforcement solely as applied to the plaintiffs.[89] *Wooley*, in fact, most resembles *Jeannette*. In the latter case, future good-faith prosecutions were threatened, but the Court claimed this prospect did not qualify as an irreparable injury. Moreover, in *Wooley*, no showing was made that New Hampshire officials would not acquiesce in the final judgment by the Supreme Court on the constitutionally of their actions. The officials were not attempting to enforce a law that they knew had been declared invalid. While it is true that *Jeannette* did not involve a statute creating a deterrent effect on the use of one's own automobile, that fact should be irrelevant. The Maynards objected to section 262:27-c because it purportedly required them to engage in a course of conduct they deemed morally abhorrent. Certainly the Jehovah's Witnesses in *Jeannette* objected to paying the state a license tax on similar grounds, but the Court rejected any effort to grant them injunctive relief. Under the logic of *Jeannette* and *Younger*, George Maynard would have had to subject himself to one more criminal prosecution, suffered a fourth conviction and then appealed that conviction in an orderly manner to the United States Supreme Court. By not requiring him to do so, the majority in *Wooley* has, as Justice White observed, diluted the criterion of unusual circumstances to the point of meaninglessness.[90] Accordingly, *Wooley* may very well ease the access of aggrieved parties to federal courts, thus undermining the entire concept of equitable restraint, at least in situations where intervention is not sought in a pending state prosecution.

88. Younger v. Harris, 401 U.S. 37, 53-54 (1971) (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). For other cases to the same effect, *see* note 33 *supra*. For cases where unusual circumstances were said to exist, *see, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 487-88 (1965) (raids on plaintiff's files by state police, arrest of plaintiffs without probable cause, threatened prosecutions); Hague v. C.I.O., 307 U.S. 496, 501-02 (1939) (wrongful denial of forums for meetings, eviction of undersirables from the locality, discriminatory enforcement of anti-pamphleteering law, deportation from the state, unlawful searches and seizures, threatened arrests); Cline v. Frink Dairy Co., 274 U.S. 445, 450-51 (1927) (multiple filings of criminal and civil suits and existing imposition of substantial pecuniary losses); Terrace v. Thompson, 263 U.S. 197, 215-16 (1923) (threat to deprive lessor of his right to lease, threat to deprive lessee of right to pursue his occupation as a farmer); *Ex parte* Young, 209 U.S. 123, 149, 165 (1908) (threatened prosecution entailing great expense and threatening railroad with financial calamity).

89. Maynard v. Wooley, 406 F. Supp. 1381, 1389 (D.N.H. 1976).

90. 430 U.S. at 719 (White, J., dissenting, joined by Blackmun and Rehnquist, JJ.).

(2) Symbolic Speech

The district court in *Wooley* concluded that the Maynards, by covering the motto embossed on their license plates, were engaging in symbolic speech. Its reasoning merits detailed consideration. The court noted that the conduct of George Maynard was not capricious or whimsical, but was instead "motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthy [*sic*] life for the state, even if the alternative is living in bondage."[91] By that conduct, Maynard accomplished two objectives. He relieved himself of the onus of displaying an offensive message and he also indicated his disagreement with the implications of that message. These objectives could be established by considering Maynard's own affidavit regarding his motivations.[92]

One aspect of the concept of symbolic speech is that the speaker must not only intend to communicate an idea, but he must also be perceived by others as making such a communication.[93] The case of *Spence v. Washington*,[94] decided in 1974, illustrates the difficulty. The petitioner therein was a college student prosecuted for displaying an American flag with a peace symbol affixed to it. He did so on May 10, 1970, at the height of the Cambodian invasion and right after several students had been killed by national guardsmen at Kent State University. The Court found that the nature of appellant's activity, combined with the actual context and environment in which it was undertaken, led to the conclusion that he had engaged in a form of protected expression.[95] In so finding, the Court observed that "[a] flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it

91. Maynard v. Wooley, 406 F. Supp. 1381, 1386 (D.N.H. 1976).

92. *See* note 9 *supra*.

93. [T]he following criteria seem helpful in defining the symbolic conduct. First, the conduct should be assertive in nature. This will generally mean that the conduct is a departure from the actor's normal activities and cannot adequately be explained unless a desire to communicate is presumed. Second, the actor must have reason to expect that his audience will recognize his conduct as communication. Third, communicative value does not depend on whether the idea sought to be expressed can be verbalized. The symbolism or medium may be an idea in itself.

Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1117 (1968). *See generally* Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 U.C.L.A. L. REV. 29, 37 (1973); Comment, *Flag Desecration as Constitutionally Protected Symbolic Speech*, 56 IOWA L. REV. 614, 620-21 (1971).

94. 418 U.S. 405 (1974).

95. *Id.* at 409-10. Prior to *Wooley*, federal courts had primarily applied the teachings of *Spence* to other flag desecration cases. *See, e.g.*, Cline v. Rockingham County Superior Court, 502 F.2d 789, 790 (1st Cir. 1974); Royal v. Superior Court, 397 F. Supp. 260, 262-63 (D.N.H. 1975); United States *ex rel.* Radich v. Criminal Court, 385 F. Supp. 165, 173-75 (S.D.N.Y. 1974).

would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it."[96] The district court in *Wooley* also examined the problem of context and decided that most people would recognize that the Maynards were engaging in symbolic communication. It based this decision on two factors. First, it observed that the New Hampshire motto possessed intrinsic political and philosophical significance:

> Although the vast majority of, if not all other, state mottos seem to lack ideological content, "Live Free or Die" has obvious political and philosophical significance for many. The New Hampshire motto may not be as politically charged as other slogans that might be placed on license plates, e.g., "Amnesty Now," but we can conceive of no neutral principle which would permit us to distinguish "Live Free or Die" from such others.[97]

Because of this significance, it was said that the plaintiffs could show not only that they intended to convey a message by their act, but that the message was likely to be understood.[98] Second, the district court noted evidence in the record that residents of New Hampshire were aware that the conduct of people like the Maynards was engaged in for the purpose of communicating "their opposition to the motto's implication that political freedom is the greatest good."[99]

Having found symbolic speech to be involved, the district court then identified the countervailing interests of the state, namely, identification of passenger vehicles and promotion of tourism and state pride.[100] It then engaged in the weighing process mandated by the Supreme Court's decision in *United States v. O'Brien*.[101] In *O'Brien*, which upheld a conviction for draft-card burning, it was stated:

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96. 418 U.S. at 410.

97. Maynard v. Wooley, 406 F. Supp. 1381, 1386 n.10 (D.N.H. 1976). Actually, the mottos of a number of other states do bear at least as much ideological content as that of New Hampshire. A representative sampling includes the following: Alabama ("We Dare Defend Our Rights"); Arizona ("*Ditat Deus*," or, "God Enriches"); Colorado ("*Nil Sine Numine*," or, "Nothing without the Deity"); Florida ("In God we Trust"); Hawaii ("*Ua Mau Ke Ea O Ka Aina I Ka Pono*," or, "The Life of the land is Perpetuated in Righteousness"); Iowa ("Our Liberties We Prize and Our Rights We Will Maintain"); Mississippi ("*Virtute et Armis*," or, "By valor and arms"); Missouri ("*Salus Populi Suprema Lex Esto*," or, "Let the welfare of the people be the supreme law"); Nebraska ("Equality Before the Law"); Nevada ("All For Our Country"); North Dakota ("Liberty and Union, Now and Forever, One and Inseparable"); South Dakota ("Under God the People Rule"); Virginia ("*Sic Semper Tyrannis*," or, "Thus ever to tyrants"); West Virginia ("*Montani Semper Liberi*," or, "Mountaineers are always freemen"); and Wyoming ("Equal Rights").

98. Maynard v. Wooley, 406 F. Supp. 1381, 1387 (D.N.H. 1976)

99. *Id.* at 1387 n.11.

100. *Id.* at 1386.

101. 391 U.S. 367 (1968). *See generally* Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 SUP. CT. REV. 1.

> This court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a wide variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[102]

The district court found that the defacement statute failed to meet two of the four components of the *O'Brien* test. The interest in promoting state pride was said to be related directly to the suppression of speech.[103] The court cited *Spence* for the lesson that the governmental interest in preventing individuals from interfering with the communication of a state-sponsored message by engaging in symbolic speech is not an interest that meets the third part of the *O'Brien* standard.[104] Thus,

> [i]n *Spence* the Court indicated that the state interest in preventing interruption of the set of messages conveyed by the flag was directly related to the suppression of free expression . . . . The fact that plaintiffs' act, unlike that of the defendant in *Spence*, is the only practical alternative to displaying the motto indicates that the statute and the suppression of freedom of expression are even more closely related in the present case than in *Spence*.[105]

As for the state's interest in identifying passenger vehicles, it was said that this concern flouted the fourth component of the *O'Brien* test, because New Hampshire had alternative means that would "more precisely and narrowly" facilitate vehicle identification.[106] Moreover, the district court indicated that this asserted justification may have been a spurious one, since only noncommercial passenger vehicles were required to bear the state's motto.[107]

There are two problems with the trial court's analysis of symbolic speech. First, while it is undeniably true that the Maynards intended to communicate an idea by reason of their conduct, there seemed to be

102. 391 U.S. at 376-77 (footnotes omitted).

103. Maynard v. Wooley, 406 F. Supp. 1381, 1388 (D.N.H. 1976).

104. *Id. See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1506-08 (1975).

105. Maynard v. Wooley, 406 F. Supp. 1381, 1388 (D.N.H. 1976).

106. *Id.*

107. *Id.*

insufficient proof that others would perceive them as engaging in such communication. The court cited evidence that ever since the 1972 decision by the state supreme court upholding section 262:27-c against a similar challenge as that presented by the Maynards,[108] New Hampshire residents were aware that some persons like the plaintiffs were concealing the state's motto on their license plates as an act of ideological protest.[109] Nowhere is it stated how many residents were the beneficiaries of such an awareness or how many had even heard of the state court's ruling on the validity of the defacement statute. Certainly, that ruling would not seem to be as publicized an event as the Cambodian invasion or the Kent State University killings were said to be in *Spence*.[110] Hence, one wonders exactly to what extent citizens of New Hampshire were aware of how the Jehovah's Witnesses felt about the motto "Live Free or Die." Even if one assumes otherwise and concedes that the citizenry knew that some classes of persons objected to the motto on philosophical grounds, how could they possibly know that the Maynards were members of such a class? An average bystander might have equally well assumed that George Maynard taped over the motto on his registration plate as a whimsical act or because he liked the decorative properities of red reflective tape. The context of Maynard's conduct was not clear enough to eradicate all the ambiguity inherent in his action. Unlike *Spence*, the situation was not one where it "would have been difficult for the great majority of citizens to miss the drift of [the communicator's] point at the time that he made it."[111]

The district court appeared to recognize this fact, because it placed its primary emphasis on the point that "Live Free or Die" is an aphorism possessing inherent political and philosophical significance. Abstractly, this may be true. This case, however, is not one where abstractions are relevant; the issue is what those witnessing the symbolic conduct in question actually perceived.[112] It could be argued, as the state did, that the importance of the words "Live Free or Die" was not that they expressed a specific *Weltanschauung*, but rather that they were uttered by General John Stark, one of the state's heroes during the Revolutionary War.[113] Thus, the import of this motto to many citizens of New Hampshire may have been primarily historical, rather than ideological; they may have viewed the words solely as a reminder of the state's origins rather than as an expression of a particular

108. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).
109. Maynard v. Wooley, 406 F. Supp. 1381, 1387 n.11 (D.N.H. 1976).
110. *See* Spence v. Washington, 418 U.S. 405, 410, 414 n.10 (1974).
111. *Id.* at 410.
112. *See* note 93 *supra*.
113. *See* note 7 *supra*.

philosophical viewpoint.[114] If so, it seems unlikely that they would perceive the Maynards' conduct as a political or religious protest and thus that conduct might be extremely difficult to classify as symbolic speech. The district court ignored these problems by assuming that the motto expressed an ideology of which everyone was aware. In so doing, it substituted a presumption for actual evidence, something neither *O'Brien* nor *Spence* authorizes.

There is also a problem with the district court's analysis of New Hampshire's asserted justification that it desired to foster state pride. The court relied on *Spence* for the proposition that the governmental interest in precluding interference with one of its own promotional messages suppresses free speech and thus violates one of the *O'Brien* criteria. In *Spence*, however, the State of Washington asserted an interest in preserving the national flag as an unalloyed symbol of the country.[115] The Supreme Court said

> [i]f this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien* . . . is inapplicable.[116]

Although in *Wooley* the separate interest of registration identification was advanced, it could not be supported on the record; in light of this fact, the district court probably erred in applying the *O'Brien* test in the first place. As a matter of fact, it noted that *O'Brien* was not necessarily dispositive of the statute's invalidity. It found implicit in its discussion of *O'Brien*, however, the assumption that neither interest asserted by New Hampshire was "sufficiently weighty" to justify an infringement of the Maynards' First Amendment rights.[117] Thus, the disposition of the First Amendment issue by the district court in *Wooley* was quite cursory. In *Spence*, although the Court did not apply *O'Brien*, it did scrutinize a variety of factors, including the fact that Spence was prosecuted for displaying his own flag on his own property, that no breach of the peace occurred and that Washington, unlike New Hampshire, had conceded that the communication of an idea was taking place.[118] By contrast, the district court in *Wooley*, after admit-

114. Indeed, the state actually made such a contention. *See* Maynard v. Wooley, 406 F. Supp. 1381, 1386 n.10 (D.N.H. 1976).

115. *See* State v. Spence, 81 Wash. 2d 788, 799, 506 P.2d 293, 300 (1973).

116. Spence v. Washington, 418 U.S. 405, 414 n.8 (1974). *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-97 (1975).

117. Maynard v. Wooley, 406 F. Supp. 1381, 1389 n.14 (D.N.H. 1976).

118. Spence v. Washington, 418 U.S. 405, 408-09 (1974).

ting that *O'Brien* may have been inapposite, simply deemed that point irrelevant and rendered a judgment unfavorable to the state without further analysis. Thus, the district court's opinion in *Wooley* construes the teachings of *Spence* rather loosely.

In sum, there is much to criticize about that portion of the district court's opinion dealing with the concept of symbolic speech. The Supreme Court, however, managed to avoid the entire issue. It said:

> We note that appellees' claim of symbolic expression is substantially undermined by their prayer in District Court for issuance of special license plates not bearing the state motto . . . . This is hardly consistent with the stated intent to communicate affirmative opposition to the motto. Whether or not we view appellees' present practice of covering the motto with tape as sufficiently communicative to sustain a claim of symbolic expression, display of the "expurgated" plates requested by appellees would surely not satisfy that standard.[119]

This observation adds something new to the symbolic speech doctrine. George Maynard asserted that a federal court should intervene and bar enforcement of section 262:27-c because he intended to continue taping over the state motto and thus would be subject to future prosecutions. The district court rightly considered only what Maynard intended to say and what his audience would perceive him as saying in order to define whether or not his conduct constituted symbolic speech. The Supreme Court said a third factor had to be considered, the type of relief requested. Because Maynard also asked for the issuance of plates to him not bearing the state's motto, his claim of symbolic speech was said to be destroyed, even though the district court specifically declined to grant this request. This is a novel addition to the symbolic speech doctrine; neither *Spence* nor *O'Brien* adverted to such a requirement and it is therefore an innovation espoused unilaterally by the majority in *Wooley*. As such, it offers a warning to plaintiffs making symbolic speech claims that they must exercise great care in framing their prayers for relief because the content of those prayers may have a hitherto unsuspected estoppel effect that will cause their underlying claim to be repudiated. In so doing, the Court obfuscates the very concept of symbolic speech. Conduct that should be determined solely by reference to the intent of the communicator and the perceptions of his audience in a given context may now be determined with reference to the content of a prayer for relief unconnected with and appearing long after the occurrence of the allegedly communicative act.

119. 430 U.S. at 713 n.10.

(3) The Right to Refrain from Speaking

In lieu of the symbolic speech doctrine, the majority in *Wooley* relied on the concept of a constitutional right to refrain from speaking. It cited only one case to support this basis for its opinion: *West Virginia State Board of Education v. Barnette*.[120] That case involved a challenge by Jehovah's Witnesses to an administrative regulation that required schoolchildren on each day that they attended school to salute the flag by "[keeping] the right hand raised with palm turned up while the following is repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.' "[121] The Jehovah's Witnesses claimed that it violated the precepts of their religion to pay homage to any "graven image," which they deemed to include the flag.[122] The Court found the regulation unconstitutional, saying:

> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppresion of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[123]

This the Court declined to do.

The majority in *Wooley* said that the difference between being compelled to salute a flag and utter an oath of allegiance and being compelled to display a registration plate bearing the motto "Live Free or Die" is "essentially one of degree."[124] This is simply untrue. The Maynards were never compelled to *affirm* the philosophy expressed on their license plates; they were merely deprived of the right to evince their disagreement with whatever appeared on those plates by means of defacement. Thus, Maynard could affix a bumper sticker to his car expressing his disagreement with the state's

120. 319 U.S. 624 (1943).
121. *Id.* at 628-29.
122. *Id.* at 629.
123. *Id.* at 633-34.
124. 430 U.S. at 715.

motto, or he could even express his sentiments by attaching a message to the plate itself, so long as no words or letters were thereby obscured. The fallacy committed by the Court in *Wooley* was its assumption that compulsory display of a registration tag bearing a motto may be equated with affirmance of that motto. This presumption incorrectly suggests that others will perceive the display of a license plate on one's vehicle to be an endorsement of the sentiments embossed on that plate. As the New Hampshire Supreme Court had noted, the opposite is true:

> [W]e think that viewers do not regard the uniform words or devices upon registration plates as the craftsmanship of the registrants. They are known to be offically designed and required by the State of origin. The hard fact that a registrant must display the plates which the State furnished to him if he would operate his vehicle is common knowledge. Nothing in the statutes of this State preclude him from displaying his disagreement with what appears thereon provided the methods used do not obscure the number plates.[125]

This situation may be usefully contrasted with that in *Barnette*. A casual observer watching a schoolchild salute the flag could not know whether that child sincerely believed what he or she was uttering. Nevertheless, the child's act is one of affirmance and ostensibily, at least, can only be construed as such. Moreover, during the commission of that act, the pupil has no opportunity to express his or her disagreement; failure to comply fully with the requirements of the ceremony imposed was insubordination punishable by expulsion from school.[126] In *Wooley*, however, the act of displaying license plates is ambiguous; the observer cannot know whether

125. State v. Hoskin, 112 N.H. 332, 336-37, 295 A.2d 454, 457 (1972). *Cf.* Lathrop v. Donohue, 367 U.S. 820, 858-59 (1961) (Harlan, J., concurring). *Lathrop* involved a challenge to the bylaws of the Wisconsin State Bar that authorized compulsory annual dues of fifteen dollars. The petitioner argued that because the bar could use such funds to subsidize activities of which the payor disapproved, this practice amounted to the type of compulsory affirmation prohibited by *Barnette*. Justice Harlan disagreed:

> In *Barnette* there was a governmental purpose of requiring expression of a view in order to encourage adoption of that view, much the same as when a school teacher requires a student to write a message of self-correction on the blackboard one hundred times. In the present case there is no indication of a governmental purpose to further the expression of any particular views. More than that, the State Bar's purpose of furthering expression of views is unconnected with any desire to induce belief or conviction by the device of forcing a person to identify himself with the expression of such views. True, purpose may not be controlling when the identification is intimate between the person who wishes to remain silent and the beliefs foisted upon him. But no such situation exists here where the connection between the payment of an individual's dues and the views to which he objects is factually so remote. Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that "everyone understands or should understand" that the views expressed are those "of the State Bar as an entity separate and distinct from each individual."

Id. (quoting *In re* Integration of the Bar, 5 Wis. 2d 618, 623, 93 N.W.2d 601, 603 (1958)).

126. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).

the owner of a vehicle bearing such plates believes in the sentiments expressed on them. More importantly, that act does not even ostensibly appear to be one of affirmation. Furthermore, in *Wooley*, unlike *Barnette*, during the very act of display, the owner has the option of advertising his disagreement with the state's motto so as to apprise observers of what he really believes and thus correct any misconstructions that might be derived from his compliance with the motor vehicle registration laws of the state. Thus, *Barnette* in no way requires or supports the doctrine espoused in *Wooley*.

The implications of the *Wooley* doctrine are disturbing. If the state cannot compel a person to display anything bearing an offensive motto, serious anomalies will result. For instance, as Justice Rehnquist noted, there is a federal law that says:

> Whoever mutilates, cuts, defaces, disfigures, or perforates, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt issued by any national banking association, or Federal Reserve bank, or the Federal Reserve System, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued, shall be fined not more than $100 or imprisoned not more than six months, or both.[127]

Under this law one could prosecute an atheist who mutilated federal currency by, for example, scissoring the words "In God We Trust."[128] *Wooley* would seem to require that such a person be exempted from criminal sanctions because he is engaging in protected conduct. The majority tried to distinguish this situation, saying that money passes from hand to hand, and is not associated with its owner as are automobiles. It also said currency is usually carried in one's purse or pocket and thus is not displayed publicly.[129] That the Court needs to make such feeble distinctions suggests the problems that will arise. One can always retort that conceptual difficulties will exist where a Jehovah's Witness tapes over the motto on the license plate of a car he has rented from a commercial agency. One can also point out that money, like an automobile, is displayed only when it is used for its intended purpose. In the case of an automobile, that purpose is conveyance from place to place; in the case of money, that purpose is use as a means of payment in commercial transactions. Thus, merely because one stores

127. 18 U.S.C. § 33 (1970).

128. Courts have noted that references to the Deity on currency, or on public buildings or in an anthem do not offend the First Amendment's establishment clause. *See, e.g.*, Abingdon School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring); Lincoln v. Page, 109 N.H. 30, 32, 241 A.2d 799, 800 (1968); Opinion of the Justices, 108 N.H. 97, 102, 228 A.2d 161, 164 (1967).

129. 430 U.S. at 717 n.15.

money in one's purse or pocket where it is out of sight is immaterial; the same can be said when one stores one's car in a garage. When currency is being used for its intended purpose, it is displayed and, furthermore, it is associated with its possessor to the extent that he exhibits it to others and thereby disseminates whatever message is printed upon it. Thus, the majority is simply making a distinction without a difference, and the fact that it was compelled to do so augurs the conceptual problems likely to flow from *Wooley*.

The doctrine announced by *Wooley* was, however, subjected to certain substantive limitations. First, the Court found that the right to refrain from speaking, like that of speech itself, will be balanced against countervailing governmental interests.[130] Consequently, the majority cited *United States v. O'Brien*[131] and its fourfold criteria for identifying a compelling justification for regulating speech combined with nonspeech elements. The Court thus appeared to conclude that the justifying interests asserted by New Hampshire vehicle identification and tourist promotions, did not meet the fourth part of the *O'Brien* test because they could have been achieved by less drastic means.[132] Second, the majority observed that:

> Some states require that certain documents bear the seal of the State or some other official stamp for purposes of recordation. Such seal might contain, albeit obscurely, a symbol or motto having political or philosophical implications. The purpose of such seal, however, is not to advertise the message it bears but simply to authenticate the document by showing the authority of its origin.[133]

Implicit in this statement is the concept that the Court will scrutinize the purpose for which display of a purportedly objectionable motto is required. If that purpose is one of authentication or some other neutral, routinized procedure, it may pass consitutional muster. If, however, the purpose is one of promotion or advertisement, it is unlikely to be permitted, absent some compelling governmental justification. Applying this thesis, if the New

130. *Id.* at 716.

131. 391 U.S. 367, 376-77 (1968). *See* notes 101-02 and accompanying text *supra*.

132. 430 U.S. at 716-17. *See also* Davis v. Norman, 555 F.2d 189, 191 n.3 (8th Cir. 1977). In *Davis*, the plaintiff kept a wrecked car in his front yard as a symbolic means of protesting police brutality. He was served with notice to remove that wreck, pursuant to a county ordinance prohibiting the unenclosed storage of inoperable motor vehicles for longer than fifteen days. The court of appeals distinguished *Wooley* by pointing out that

> [t]he ordinance in question neither requires an individual to endorse a particular belief nor represses his freedom of expression. In addition, the interests advanced by New Hampshire in support of its statue could be achieved by less restrictive means, whereas the interests furthered by the ordinance cannot be achieved by less restrictive means than enclosed storage.

Id.

133. 430 U.S. at 715 n.11.

Hampshire seal with the words "Live Free or Die" were embossed on all license plates solely in order to authenticate their issuance by the state's commissioner of Motor Vehicles, that purpose might be deemed sufficient to permit application of criminal sanctions for defacement of those plates to all persons, including Jehovah's Witnesses.

Thus, the teaching of *Wooley* is that the constitutional right to refrain from speaking encompasses those situations where the state is not compelling an individual to make an affirmation. That new constitutional right may well prove to be a source of continuing difficulty for the United States Supreme Court. It will require the Court to draw nebulous distinctions in hard cases, such as the one involving defacement of federal currency. More significantly, the substantive limitation relating to consideration of the reason for which display of an ideological statement is mandated will compel the Court to extend the technique of scrutiny of legislative purpose to types of cases where it has heretofore not been required.

2. *Speech and Public Employees*

a. First Amendment Rights and the Exclusivity Doctrine: *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*

In the case of *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,[1] the Supreme Court was confronted with a difficult question: to what extent is the exclusivity doctrine,[2] that is, the concept that a duly elected collective bargaining representative is to be the exclusive agent for the members of the collective bargaining unit, limited by the First Amendment's guarantees of free speech and equal access to public forums? The Court avoided direct consideration of this problem. Nevertheless, its apotheosis of the rights of free speech and fair access to a public forum suggests, at least with respect to public employees, that states may be restricted in the extent to which they can fashion regulatory policies intended to further the exclusivity rule that also impinge upon First Amendment freedoms.

1. 429 U.S. 167 (1976).

2. For discussions of the exclusivity doctrine, *see generally* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 331-32 (1951); Craver, *Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 HASTINGS L.J. 1, 33-39 (1974); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1242-48 (1967); Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672, 678-80 (1967); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?* 123 U. PA. L. REV. 897, 897-919 (1975); Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1098-1106 (1941); Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 556-64 (1945).

(1) The Decision

The facts of the case are comparatively complex.[3] Madison Teachers Incorporated (MTI) is a labor organization that was, at all relevant times, the exclusive collective bargaining agent of public school teachers practicing their profession within the geographical boundaries of Joint School District No. 8, which is comprised of the City of Madison, Wisconsin and various contiguous villages and towns.[4] The district operated the educational facilities in those localities through its agent, the Board of Education (Board). The Board and MTI concluded a collective bargaining agreement for the calendar year of 1971 that covered wages, hours and conditions of employment for all constituents of the bargaining unit, including teachers. The agreement was due to expire on December 31, 1971. Accordingly, on January 25, 1971, MTI submitted for the Board's consideration a proposed contract, which was to take effect on January 1, 1972. Included in this proposal was a "fair share" provision, that is, a requirement that all teachers pay full union dues even though they were not members of MTI. The theory underlying such a provision is that since a union bargains on behalf of all employees within the represented unit, those employees not affiliated with the union but nevertheless acquiring benefits because of its efforts ought to pay their "fair share" of the costs of collective bargaining.[5] A similar clause had been proposed by MTI during negotiations preceding the signing of the 1971 agreement, but had been rejected by the Board. The Board's initial response to the January 25th proposal was to object strenuously to the fair share clause on the ground that it was illegal.

On November 11, 1971, however, the Wisconsin legislature enacted a statute permitting inclusion of a fair share provision in collective bargaining agreements involving municipal employees.[6] MTI once more submitted a

3. Except where otherwise noted, this summary of facts is taken from the opinion of the state supreme court. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 203-09, 231 N.W.2d 206, 208-11 (1975).

4. MTI was certified as the majority collective bargaining representative of all teachers in the district on July 6, 1966. 429 U.S. at 169 n.1.

5. A fair share provision typifies that type of arrangement known as an "agency shop," under which all employees are required as a condition of employment to pay dues to the union and possibly even a union initiation fee, but need not become union members. This arrangement is distinguishable from that of the "closed shop," in which the employee, as a prerequisite to obtaining a position, must join a union. For discussion of the concept of the agency shop, *see* Hopfl, *The Agency Shop Question*, 49 CORNELL L.Q. 478, 478-92 (1964); Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 WIS. L. REV. 53, 57-64; Comment, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547, 549-54 (1970).

6. WIS. STAT. ANN. § 111.70(1)(h) (West 1974).

fair share proposal conforming to the new law; again, the Board rejected it. In addition to this controversy, the Board and MTI also disagreed about one other major issue: whether to include a clause providing binding arbitration for nonrenewal of teacher contracts and teacher dismissals. Throughout negotiations, the official stance of the Board had been one of adamant opposition to the inclusion of such a provision in the 1972 contract. In order to avoid a stalemate, the chairman of the Board's negotiators decided to offer a compromise. In October or November of 1971, he unofficially informed MTI negotiators that the Board would accept a fair share clause if the union desisted in demanding a compulsory arbitration provision. This offer placed the union in a difficult position. As subsequent testimony disclosed, the hierarchy of MTI did not really desire a fair share clause; it had included such a clause in its proposals solely in order to secure a bargaining chip useful in trading for what it actually wanted, an arbitration provision.

On November 14, 1971, Ralph Reed and Albert Holmquist, teachers employed by Joint School District No 8, but not affiliated with MTI, issued a communiqué opposing the fair share clause. The substance of this letter was that the authors opposed the creation of an agency shop as contemplated by the fair share proposal, and wished the addressees to express their viewpoints on the issue. Two hundred responses, most of them opposing the fair share clause, were received. A meeting of some of these teachers occurred on December 2, 1971. Fourteen instructors attended, half of whom were union members. Those attending prepared a form letter accompanied by a petition supporting a one year deferral of any consideration of the fair share proposal.[7] On December 6, 1971, this letter and petition were cir-

7. The text of the form letter was as follows:

Dear Fellow Madisonian Educator,

E.C.—O.L.O.G.Y.

*E*ducator's *C*hoice—*O*bligatory *L*eadership *O*r *G*over[n]ance by *Y*ou

SAVE FREEDOM OF CHOICE

A Closed Shop (agency shop) Removes This Freedom

1. Does an organization which represents the best interests of teachers and pupils NEED mandatory membership deductions?
2. Need relationships between administrators and teachers be further strained by LEGALLY providing for mandatory adversary camps?
3. Should minority voices be mandatorily SILENCED?
4. Could elimination of outside dissent produce NON-RESPONSIVENESS to change?
5. And . . .
   isn't this lack of FREEDOM OF CHOICE undemocratic?

SUPPORT FREEDOM OF CHOICE—
OPPOSE AGENCY SHOP

I wish to maintain freedom of choice:

culated in various schools within the district. Reed and Holmquist intended to present the results of the petition to both MTI and the Board at the latter's regular public meeting on the evening of December 6th. Pursuant to state law, this meeting was open to all who wished to attend.[8]

By December 6th, the negotiations between MTI and the Board had reached an impasse. The union had arranged to have the meeting hall surrounded by pickets that evening and to have three to four hundred teachers in attendance at the auditorium. John Mathews, a member of MTI's negotiating team, accosted Reed and Holmquist before they reached the auditorium and twice attempted to dissuade them from presenting their petition to the Board, claiming that the negotiations were at a delicate stage and that their conduct might cause the union "to lose the whole ball game." Neither of his attempts met with success. Mathews then spoke with a person named Yelinek, who was one of the Board's members, and asked him to intercede with Reed and Holmquist. Yelinek promised that he "would take care of it." In fact, he did nothing. Once within the auditorium, Holmquist

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I oppose agency shop on principle _____
I oppose agency shop and would sign a petition stating so _____
I oppose agency shop and would work actively to maintain freedom of choice _____

Let us hear from YOU

Al Holmquist /s/ E.C.—O.L.O.G.Y.
Al Holmquist P.O. Box 5184
Ralph Reed /s/ Madison, WI 53705
Ralph Reed
Teacher co-chairmen

The text of the petition was as follows:

To: Madison Board of Education December 6, 1971
Madison Teachers, Incorporated

We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following:

1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.
2) The findings of this study be made public.
3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.
4) The results of this written ballot be made public.

8. WIS. STAT. ANN. § 19.81(2) (West Supp. 1977-1978). One exception to this law was found by the state's attorney general, who ruled that bargaining on wages could be conducted in closed sessions, so long as the final action was taken in public. 54 OP. WIS. ATTY. GEN. vi (1965). The state supreme court subsequently adopted this position. Board of School Directors v. Wisconsin Employment Relations Comm'n, 42 Wis. 2d 637, 653, 168 N.W.2d 92, 99-100 (1969).

filled out a registration form indicating his desire to address the assembly. He did not specify the topic of his address.

After a number of persons, including the president of MTI, made speeches, Holmquist was allowed to speak. He claimed to represent "an informal committee" of seventy-two teachers in forty-nine schools. After reading the contents of the petition that had been circulated earlier that day, he then said:

> We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc., which speaks euphemistically about the 'whole package' and therefore is not issue specific . . . Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.
>
> For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools . . . who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation.[9]

The president of the Board asked Holmquist if he intended to communicate the petitions to the Board. Although he indicated that he did so intend, no further communications between the two ever occurred.

After the public meeting, the Board went into executive session and adopted the following resolution: "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary and *not* including agency shop; if the MTI does not accept this as a total package, the offer of arbitration is withdrawn."[10] The following day, the Board's representatives opened a negotiating session by reading the above-quoted resolution and saying "[T]his is the deal." After some discussion, MTI capitulated. An agreement containing only an arbitration clause was signed on December 14, 1971.

In January 1972, MTI filed a complaint with the Wisconsin Employment Relations Commission (Commission), an administrative body entrusted with the responsibilty of implementing statutory policy with respect to public and private employees. The union alleged that the Board had committed an unfair labor practice in violation of section 111.70 of the state's Municipal Employment Relations Act by negotiating with someone

9. City of Madison Joint School. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 207, 231 N.W.2d 206, 210 (1975).

10. *Id.* (emphasis in original).

other than the exclusive collective bargaining representative, MTI.[11] The Commission concluded that the Board had violated its duty to bargain in good faith with MTI and thus had interfered with the rights of workers represented by that organization to bargain collectively through intermediaries of their own choosing. As part of its judgment, the Commission ordered that the Board "[s]hall immediately cease and desist from permitting employes, other than representatives from Madison Teachers, Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers, Inc."[12] The Board petitioned the circuit court of Dane County for review; that court upheld the Commission's order. The Wisconsin Supreme Court affirmed. It found that Holmquist and the Board had been negotiating with each other[13] and that the abridgement of their speech was necessary to "avoid the dangers attendant upon relative chaos in labor management relations."[14] The state supreme court also found that the Commission's order was not unconstitutionally vague.[15]

The United States Supreme Court reversed. Chief Justice Burger, writing for a majority consisting of himself and Justices White, Blackmun, Powell, Rehnquist and Stevens, disagreed with the lower court's finding that the record presented evidence of a "clear and present danger" justifying the curtailment of speech. First, he noted that:

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11. WIS. STAT. ANN. § 111.70(3)(a) (West 1974):

It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub.(2). [One of these being the right to bargain collectively through representatives of their own choosing]. . . .

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement.

12. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 209, 231 N.W.2d 206, 211 (1975). The Commission previously had been held to have substantial powers to fashion remedies to effectuate the purpose of peaceful negotiation and settlement of municipal labor disputes. Board of Educ. v. Wisconsin Employment Relations Comm'n, 52 Wis. 2d 625, 635, 191 N.W.2d 242, 247 (1971); General Drivers & Helpers Union, Local 662 v. Wisconsin Employment Relations Bd., 21 Wis. 2d 242, 249-50, 124 N.W.2d 123, 127 (1963); Dunphy Boat Corp. v. Wisconsin Employment Relations Bd., 267 Wis. 316, 326, 64 N.W.2d 866, 870 (1954). Thus, the order was well within its delegated authority.

13. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 215, 231 N.W.2d 206, 214 (1975).

14. *Id.* at 212, 231 N.W.2d at 213.

15. *Id.* at 216, 231 N.W.2d at 215.

> Holmquist did not seek to bargain or offer to enter into any bargain with the board, nor does it appear that he was authorized by any other teachers to enter into any agreement on their behalf. Although his views were not consistent with those of MTI, communicating such views to the employer could not change the fact that MTI alone was authorized to negotiate and to enter into a contract with the board.[16]

Moreover, the Chief Justice pointed out that Holmquist addressed the Board as a concerned citizen.[17] Any member of the public could presumably have uttered with impunity statements identical to those made by Holmquist. Thus, he was being denied the right to speak because of his status as a public employee. The Court found this denial unacceptable; it cited *Pickering v. Board of Education*[18] for the proposition that teachers may not be "compelled to relinquish the First Amendment right they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[19] Finally, the Court observed that to allow one side in a public debate monopolistic access to a particular forum is the antithesis of the guarantee of free speech afforded by the First Amendment.[20] The effect of the Commission's order was to discriminate among speakers on the basis of their employment and the content of their speech. This effect the Court deemed impermissible:

> Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views

16. 429 U.S. at 174.

17. *Id.* at 175.

18. 391 U.S. 563 (1968). For a further discussion of this case, *see* notes 29-40 and accompanying text *infra*.

19. *Id.* at 568, *quoted in* 429 U.S. at 175. For similar expressions regarding public employees in general, *see, e.g.*, Elrod v. Burns, 427 U.S. 347, 357-59 (1976); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Epperson v. Arkansas, 393 U.S. 97, 107 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947). The question raised at this juncture was whether the Board could assert Holmquist's right. The Court disposed of this question by pointing out that the right of Holmquist to speak was inextricably intertwined with the right of the Board to hear and, in that context, there was no issue of lack of standing. 429 U.S. at 175 n.7 (citing Procunier v. Martinez, 416 U.S. 396, 409 (1974)). But *Procunier* established the proposition that the potential listener could assert that his own rights were bring infringed. Thus, the argument in that case that censorship of prisoners' letters to their wives and others could be justified by certain assumptions about the legal status of inmates was rejected because the interests of those addressee spouses were also being impinged upon. In contrast, in *Madison* the Court used *Procunier* to support the argument that the Board could assert, at least in part, Holmquist's rights in his behalf. In so doing, it avoided a rather perplexing *jus tertii* problem.

20. 429 U.S. at 175-76.

> directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands.[21]

The Court also deemed the Commission's order to be unconstitutionally vague. That order prohibited speech by teachers "on matters subject to collective bargaining."[22] The effect of this language was said to preclude speech by teachers on virtually every subject concerning the operation of a school system; not only would it unduly hamper the Board's governance of that system, but because it proscribed future conduct, its terms constituted "the essence of prior restraint."[23] Therefore, the judgment of the Wisconsin Supreme Court was reversed.

Justice Brennan, joined by Justice Marshall, concurred. He noted that the Court had left open the issue of the extent to which true contract negotiations could be regulated.[24] Examining a number of decisions unrelated to the field of labor negotiations,[25] Justice Brennan concluded that the state supreme court "was correct in stating that there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond only to the designated representatives of a union selected by the majority of its employees."[26] But in this case, the meeting was open to the public by statutory command. The effect of the Commission's order was to exclude persons from a public forum primarily on the basis of the content of their speech. Thus,

> [o]bedience to that order requires that the board, regardless of any other circumstances, not allow Holmquist or other citizens to speak at a meeting required . . . to be open and dedicated to expressions of views by citizens generally on such subjects, even though the subject upon which they wish to speak may be ad-

21. *Id.* at 176 n.10.

22. *See* note 12 and accompanying text *supra*.

23. 429 U.S. at 177.

24. *Id.* at 177 (Brennan, J., concurring, joined by Marshall, J.).

25. Justice Brennan cited the cases of Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (case involving the refusal of newsmen to disclose their sources of information to grand juries; dictum to the effect that the Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be constitutionally closed to the public); Adderley v. Florida, 385 U.S. 39, 48 (1966) (case involving student demonstration on jailhouse grounds; held, First Amendment does not command "that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please"); Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (case involving action of administrative agency increasing property tax valuations without an individual notice and hearing; held, "the Constitution does not require all public acts to be done in town meeting or an assembly of the whole").

26. 429 U.S. at 178. Actually, the majority did not dispute the proposition that the bargaining sessions could be closed to the public and limited to certain speakers on certain subjects. *See id.* at 175 n.8, 176 n.9.

> dressed by union representatives, and even though they are part of the "public" to which the forum is otherwise open. The order is therefore wholly void. The State could no more prevent Holmquist from speaking at this public forum than it could prevent him from publishing the same views in a newspaper or proclaiming them from a soapbox.[27]

Justice Stewart's brief concurrence made two points. He asserted, first, that mere expression of ideas concerning a matter subject to collective bargaining posed no threat to the doctrine of exclusivity, and second, that the majority's opinion offered no consideration of what constitutional limitations may be imposed upon a governmental unit's authority to structure discussion at public meetings.[28]

(2) Analysis

For purposes of convenience, the analysis of this case will be bisected. The first section will scrutinize the First Amendment principles applied by the Supreme Court; the second will deal with the impact of that opinion on the exclusivity doctrine.

(a) Speech Issues

The Supreme Court based its holding on a number of grounds, each of which merits examination. The first ground was that the Commission denied Holmquist and his colleagues the right to speak freely because of their status as public employees. This was said to be impermissible because a person does not trade his constitutional rights for municipal employment. The Court supported this statement with a citation to *Pickering v. Board of Education*.[29] But a closer examination of *Pickering* reveals some problems.

27. *Id.* at 179. *See* Ayers v. Western Line Consolidated School Dist., 555 F.2d 1309, 1317-18 (5th Cir. 1977). The Fifth Circuit therein read Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977) (accepted a trial court's judgment that a teacher's criticism of a school board was protected by the First Amendment because that latter entity's "reaction to his communications to the radio station was [nothing] more than an *ad hoc* response to Doyle's action in making [his critical] memorandum public"); Perry v. Sindermann, 408 U.S. 593, 598 (1972) ("For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment"); and Pickering v. Board of Educ., 391 U.S. 563, 573 (1968) ("the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public") as establishing the proposition that *private* expression by a public employee is not constitutionally protected. The circuit court also cited the quoted language from Justice Brennan's concurrence in *Madison* to corroborate this assertion. 555 F.2d at 1318.

28. 429 U.S. at 180 (Stewart, J., concurring).

29. 391 U.S. 563 (1968).

Pickering involved a situation where a teacher wrote a letter to a local paper criticizing the manner in which his employer, the school district, had handled a bond issue for the erection of two new schools and had allocated its financial resources between educational and athletic programs in the schools.[30] The letter contained clear falsehoods.[31] Pickering was promptly dismissed for publishing this document and an administrative hearing approved the dismissal.[32] The Illinois Supreme Court rejected his First Amendment claim by concluding that his acceptance of a teaching position obliged him to refrain from uttering statements "which in the absence of such position he would have an undoubted right to engage in."[33] The Supreme Court reversed, holding that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[34] The Court did, however, surround this general rule with six qualifications. First, it observed that Pickering's statements were not directed against anyone with whom he would be in daily contact as a result of his job. "Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here."[35] Second, the Court remarked that the petitioner's dealings with the members of the board of education did not constitute "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."[36] Third, the Court cautioned that it was not being asked to deal with a

30. *Id.* at 566.

31. *Id.* at 570.

32. *Id.* at 566-67.

33. Pickering v. Board of Educ., 36 Ill. 2d 568, 577, 225 N.E.2d 1, 6 (1967).

34. 391 U.S. at 574. More recently, the Court has held that a dismissed public employee must show that his conduct was constitutionally protected, and that it constituted the "motivating factor" in the decision to dismiss him. If that burden is met, then his former employer must show by a preponderance of the evidence that it would have discharged him anyway, without regard to the protected conduct. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). *See also* Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 578 (7th Cir. 1975); Adams v. Campbell County School Dist., 511 F.2d 1242, 1245 (10th Cir. 1975); Abeyta v. Town of Taos, 499 F.2d 323, 328 (10th Cir. 1974); Endicott v. Van Petten, 330 F. Supp. 878, 882 (D. Kan. 1971).

35. 391 U.S. at 570. For cases distinguishing *Pickering* on this point, *see, e.g.*, Kannisto v. City & County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976); Roseman v. Indiana Univ. of Pennsylvania, 520 F.2d 1364, 1368-69 (3d Cir. 1975); Knarr v. Board of School Trustees, 452 F.2d 649, 650 (7th Cir. 1971); Schmidt v. Fremont County School Dist., 406 F. Supp. 781, 787 (D. Wyo. 1976); Bowles v. Robbins, 359 F. Supp. 249, 255 (D. Vt. 1973); Bean v. Darr, 354 F. Supp. 1157, 1161 (M.D.N.C. 1973); Birdwell v. Hazelwood School Dist., 352 F. Supp. 613, 621 (E.D. Mo. 1972); Tygrett v. Washington, 346 F. Supp. 1247, 1250-51 (D.D.C. 1972).

36. 391 U.S. at 570. For cases distinguishing *Pickering* on this point, *see, e.g.*, Fuentes v. Roher, 519 F.2d 379, 389 (2d Cir. 1975); Simard v. Board of Educ., 473 F.2d 988, 992 (2d Cir. 1973); Fisher v. Walker, 464 F.2d 1147, 1152-53 (10th Cir. 1972); Gould v. Walker, 356 F. Supp. 421, 425-26 (N.D. Ill. 1973).

situation where the position from which the petitioner was discharged was such that "the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal."[37] Fourth, it was noted that Pickering had not communicated falsehoods "about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts."[38] Fifth, the school system had no existing grievance procedures requiring complaints about its operations to be submitted to superiors for consideration before they could be disclosed to the general public.[39] Sixth, and finally, the Court said the case did not present a situation where the misleading statements uttered were so egregiously false as to call into question the utterer's competence to perform his assigned duties.[40] Thus, the doctrine of *Pickering* is one that any court must apply with great care and with careful attention to the facts of the case before it.[41]

The Court in *Madison* did not exercise this caution. It simply assumed that the teachings of *Pickering* could be applied, *mutatis mutandis*, to the case before it. None of the six qualifications adverted to earlier were ever mentioned by Chief Justice Burger. After citing *Pickering*, he merely observed that the Commission was improperly discriminating against speakers on the basis of their status as public employees.[42] It is therefore arguable that the Court's assumption concerning the applicability of *Pickering* is not justified.

Several of the six qualifications mentioned in *Pickering* obviously had no bearing on what occurred in *Madison*. Holmquist's position as a teacher was not cloaked with an aura of confidentiality, the breach of which would automatically subject him to the deprivation of the right of access to a public forum. His speech before the Board contained no egregious falsehoods, but was merely a statement of opinion, which cannot be labelled true or false.[43]

37. 391 U.S. at 570 n.3.

38. *Id.* at 572. *Cf.* Clark v. Holmes, 474 F.2d 928, 931-32 (7th Cir. 1973) (criticism of course counseling and course content not a matter of ongoing public concern meriting First Amendment protection); Long v. Board of Educ., 456 F.2d 1058, 1059-60 (8th Cir. 1972) (dismissal upheld where a teacher, without being authorized, issued a statement falsely appearing to have the support of the local board of education).

39. *See* 391 U.S. at 572 n.4.

40. *Id.* at 573 n.5.

41. One might argue that *Pickering* should be applied only in dismissal cases and that therefore it has no bearing in a situation like *Madison*, in which Holmquist and his colleagues were never discharged for their conduct. This is a valid reason for distinguishing *Pickering* from *Madison*, but the Court in the latter case apparently elected not to do so.

42. 429 U.S. at 175.

43. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

Moreover, the contents of that speech had no bearing on his competence to be allowed future access to Board meetings to discuss subjects relating to collective bargaining. Similarly, there was no problem about the possibility that his statements might impair the operations of the school system because of the error inherent in them. Thus, three of the caveats in *Pickering* may be summarily disposed of as inapplicable to *Madison*.

The others, however, present difficulties. Holmquist was publicly criticizing the bargaining strategies of both the Board and the Union. Since he was not a member of the latter, it is doubtful that he would have been allowed to air his grievances before representatives of the union hierarchy prior to engaging in public attacks. Those whom he represented certainly included persons affiliated with MTI, however, and some of them could have attempted to meet with union officials before proceeding unilaterally. Moreover, if Holmquist objected as a teacher to the Board's conduct during contract negotiations, he could easily have filed a grievance and advised the agents of the Board of his position before publicizing it. By not doing so and by airing publicly the dissension and discontent among the ranks of the district's teachers, he only succeeded in embarrassing the union, showing lack of confidence in the Board and further complicating negotiations that were already quite complex. In addition, while it may well be that Holmquist had no close working relationship with members of the Board, the same could not be assumed of members of the union. The Court in *Madison* never concerned itself with whether Holmquist's immediate superiors were staunch unionists who might view his conduct as an act of betrayal and disloyalty and whether daily operations within the facility where Holmquist worked might thereby be disrupted. Finally, one might argue that the same problem could arise with coworkers of Holmquist who were also members of MTI; they, too, might feel so angered by the threat he had created to union solidarity that the result would be disharmony among employees sufficient to require, if not dismissal, at least quick action to ensure that further disunifying speeches at Board meetings would not take place. Obviously, the foregoing criticisms are based on speculation; the record was silent on the repercussions of Holmquist's act on his co-workers and superiors. The point, however, is that a conscientious application of the principles of *Pickering* to *Madison* would have attempted to take into account the caveats mentioned in the former opinion. As it stands, the Court in *Madison* simply cited *Pickering*'s language on the First Amendment rights of public workers, ruled that those rights were being violated in this case because the Commission's order denied access to a public forum on the basis of an employee's status and never mentioned *Pickering*'s numerous qualifications concerning the extent to which the free speech of municipal workers could be properly impinged upon.

An independent ground for the Court's ruling in *Madison* was that the Commission's order discriminated on the basis of content. The one case cited in support of this proposition was *Police Department v. Mosley*,[44] which held that a municipal ordinance permitting peaceful picketing relating to school labor-management disputes but disallowing all other types of peaceful picketing,[45] violated the First Amendment because it distinguished permissible from impermissible speech solely on the basis of the message appearing on the picket sign. In the course of so holding, the following statement was made:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use of it to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[46]

The very language of this statement indicates how *Mosley* can be differentiated from *Madison*. In the former case, exclusion from a forum was based solely on content. Any picketer intending to communicate a message unrelated to a dispute between labor and management in schools was denied access to the sidewalks in front of educational facilities. By contrast, in the *Madison* case, the Commission did not prohibit all speakers from talking about collective bargaining subjects at Board meetings; only municipal employees were barred. Thus, *Madison*, unlike *Mosley*, does not represent

44. 408 U.S. 92 (1972).

45. The ordinance prohibited all picketing within 150 feet of any primary or secondary school building while the school was in session, one-half hour before it opened or one-half hour after it closed. *Id.* at 92-93.

46. *Id.* at 96. *Accord*, Cohen v. California, 403 U.S. 15, 24 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Wood v. Georgia, 370 U.S. 375, 388-89 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937). Professor Kalven has observed that:

> [The equal protection clause] is likely to provide a second line of defense for vigorous users of the public forum. If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached. The objection can then no longer be keyed to interferences with other uses of the public places, but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place, and circumstance into a concern about content. The result is that equal-protection analysis in the area of speech issues would merge with considerations of censorship.

Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29.

a situation where exclusions "are based on content alone." The focus of the Commission's order was primarily on the status of the speaker, not the substance of the message he sought to convey.

Even if one assumes otherwise, however, the *Mosley* doctrine has subsequently been limited by the Court. The key case in this respect is *Young v. American Mini Theaters, Inc.*,[47] which upheld a Detroit zoning ordinance placing geographic limitations on the location of adult cinemas. The plurality opinion[48] in that case said of the language from *Mosley* quoted above:

> This statement, and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached. When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case with the stated principle that there may be no restriction whatever on expressive activity because of its content.[49]

As examples corroborating this statement, the plurality pointed out that the distinction between lawful advocacy and incitment to crime often depends upon exactly what the speaker had to say,[50] that the content of an epithet is what the Court will rely upon in order to determine whether it constitutes unprotected "fighting words,"[51] and that the publication of the sailing dates of troop transports or the number and location of soldiers could always be restricted solely on the basis of content.[52] Similarly, it observed that the content of a libelous statement would determine the standard of proof to be utilized in determining the extent of liability arising from publication of that statement,[53] that commercial speech could be regulated on the basis of its

47. 427 U.S. 50 (1976).

48. The plurality consisted of Justice Stevens, joined by Chief Justice Burger, Justice White and Justice Rehnquist. *Id.* at 52.

49. *Id.* at 65-66. Justice Powell, in his separate concurrence, also said that content-based discrimination against speech could be justified where it is necessary to achieve an overriding governmental interest; such an interest was not involved in *Mosley*. *Id.* at 82 n.6 (Powell, J., concurring). *Cf.* DeGregory v. Giesing, 427 F. Supp. 910, 913-14 (D. Conn. 1977) (*Mosley* and *Young* permit classifications based on content if precisely tailored to serve a substantial state interest).

50. 427 U.S. at 66 n.23 (citing Bond v. Floyd, 385 U.S. 116, 133-34 (1966); Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952); Musser v. Utah, 333 U.S. 95, 99-101 (1948)).

51. *Id.* at 66 n.24 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

52. *Id.* at 66 (citing Near v. Minnesota, 283 U.S. 697, 716 (1931)).

53. *Id.* at 66 & n.25. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (considering whether a publication concerns matters of general interest to determine if the actual

substance[54] and that sexually oriented materials purveyed to minors that are not legally obscene could be subject to more stringent controls because of the message, or lack of it, conveyed therein.[55] Thus, even if the Commission's order did discriminate on the basis of content, the Court in *Madison* erred by assuming that such a finding terminated its inquiry. The next step should have been a canvassing of the relevant precedent cited by *Young* to see whether the directive of the Commission could fall within any potential classification where discriminatory treatment on the basis of content has been permitted. Consequently, on this issue also, the Court in *Madison* gave too cursory an analysis to what was a somewhat perplexing problem.

The third issue raised by the Court was that of vagueness. The Wisconsin Supreme Court had claimed that the Commission's order was not impermissibly vague because the appellant's conduct fell squarely within the "hard core" of the proscription contained in that order,[56] citing *Broadrick v. Oklahoma*.[57] The United States Supreme Court repudiated this analysis on two separate grounds. First, it observed that the doctrine of *Broadrick* was not apt because that case had involved a challenge to a law proscribing past conduct, whereas the order in *Madison* was directed at future action.[58] Second, it observed that the language of the order regarding "matters of collective bargaining" was so nebulous that it could not be defined with any useful precision.[59]

It is certainly true that *Broadrick* is distinguishable on its facts. But the Wisconsin court did not rely primarily on that case. It also made two related points. First, it observed that the phrase "subjects of collective bargaining" had traditionally been defined as "wages, hours and conditions of employment."[60] While this phrase is not entirely self-explanatory, it has been used

malice standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), applies in private defamation cases).

54. 427 U.S. at 68. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (product advertising accepted on public transit vehicles although political cards were not); NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (in labor election, employer can communicate with employees so long as the communication contains no threat); Jacob Siegel Co. v. FTC, 327 U.S. 608, 611-12 (1946) (FTC can regulate false advertising).

55. 429 U.S. at 69 (citing Ginsberg v. New York, 390 U.S. 629, 643 (1968)).

56. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 216, 231 N.W.2d 206, 214 (1975).

57. 413 U.S. 601 (1973). *Broadrick* upheld a charge by the Oklahoma State Personnel Board against public employees who had engaged in partisan political activities on behalf of their superior. The Court found that the law on which the charge was based was not overbroad. *Id.* at 618.

58. 429 U.S. at 177.

59. *Id.* at 176-77.

60. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 215, 231 N.W.2d 206, 215 (1975).

in the National Labor Relations Act to describe the matters about which bargaining may take place.[61] Thus, the state court's construction of that language would seem to have provided a sufficiently limiting interpretation to avoid the proscription of vagueness. The state court also relied on the case of *United States Civil Service Commission v. National Association of Letter Carriers*.[62] The *Letter Carriers* decision involved a constitutional challenge to a provision of the Hatch Act, which prohibits public employees from taking part in political campaigns.[63] Among the objections raised to this legislation were that certain key phrases or words utilized in regulations implementing it,[64] such as "active part in managing," "actively participating in . . . fund-raising" or "partisan" candidate, were inherently vague. In response to this challenge, the United States Supreme Court replied,

> There might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck as vague, even though marginal cases could be put down where doubts might arise."[65]

One can only wonder why the same type of analysis was not used in dealing with the vagueness challenge in *Madison*. Certainly the language of

61. *See* 29 U.S.C. §§ 152(9), 159(a) (1970).

62. 413 U.S. 548 (1973).

63. 5 U.S.C. § 7324(a)(2) (1970).

64. 5 C.F.R. § 733.122 (1977):

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to —

. . . .

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate in a partisan election . . .;

(5) Taking an active part in managing the political campaign of a candidate for public office [or] for political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office in a partisan election.

65. 413 U.S. at 577-79 (quoting United States v. Harriss, 347 U.S. 612, 618 (1954)). *Letter Carriers* has since been characterized as a case where subordination of First Amendment activity was necessary to safeguard individual belief and association. Elrod v. Burns, 427 U.S. 347, 371 (1976). Those interests are arguably at stake in *Madison* because the Commission's order was purportedly issued to protect the associational interests of those who had chosen MTI as their union.

the Commission's order was no more vague than that of the challenged words and phrases in the regulations implementing the Hatch Act. Moreover, the latter law imposed at least as significant a burden on First Amendment rights as did the directive of the Commission in *Madison*. Yet the Court in *Madison* never even considered the potential applicability of *Letter Carriers*, even though that case also involved the issue of the extent to which the government may permissibly abridge First Amendment freedoms.

Thus, the net effect of the decision in *Madison* is to foster a far more protective attitude toward the First Amendment rights of public employees than was evinced by previous decisions of the Court. The opinion of the majority suggests that the Court is more likely in such cases to presume an abridgement of constitutional guarantees, especially when the state regulation in question appears to constitute a prior restraint. Perhaps most surprising is the majority's failure to balance carefully the interests of Holmquist and those similarly situated with those of the state of Wisconsin. This failure is especially interesting in light of the countervailing concern asserted by the state, the exclusivity doctrine.[66]

(b) The First Amendment and the Exclusivity Doctrine

In the context of federal labor legislation, the importance of the exclusivity doctrine has been consistently recognized by federal courts. Thus, in *Virginian Railway Co. v. System Federation No. 40*,[67] the Supreme Court, construing an exclusivity principle embodied in the Railway Labor Act of 1926,[68] found that an employer has two legal duties: to negotiate with the majority collective bargaining representative of his employees and to refrain from negotiating with anyone else.[69] The Court accorded a similar construction to the exclusivity language located in section 9(a) of the National Labor Relations Act[70] in the case of *Medo Photo Supply Corp. v.*

66. *See* note 2 and accompanying text *supra*.

67. 300 U.S. 515 (1937).

68. 45 U.S.C. §§ 151-188 (1970). *See id.* at § 152.

69. 300 U.S. at 548-49. *Accord*, Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

70. U.S.C. § 159(a) (1970):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representatives, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

NLRB,[71] wherein it was said:

> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions [has been] recognized by this Court. . . . The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or a majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. . . . There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation . . . . But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation.[72]

Of course, the rights of the minority employee are not completely foreclosed. Under section 9(a), a minority employee can independently adjust grievances with his employer, provided that the result of such an adjustment is consistent with the existing collective bargaining agreement and that the bargaining representative is afforded an opportunity to be present at the adjustment.[73] An even more potent protective mechanism is the doctrine of fair representation.[74] As early as 1944, in *Steele v. Louisville & Nashville Railroad Co.*,[75] the Court, in construing the Railway Labor Act's principle of exclusivity, claimed that principle imposed a correlative duty on the collective bargaining agent to represent fairly all employees within its unit.[76] In a companion decision, *Wallace Corp. v. NLRB*,[77] the

71. 321 U.S. 678 (1944).

72. *Id.* at 684-85. *Accord*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62-64 (1975); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

73. *See* note 70 *supra*. *See generally* Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731, 751-54 (1950).

74. *See generally* Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 39-42 (1961); Blumrosen, *Legal Protection Against Exclusion From Union Activities*, 22 OHIO ST. L.J. 21, 22-26 (1961); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1119-22 (1973); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 151-59 (1957); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373, 373-90 (1965); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 395-409 (1964); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1331-39 (1958).

75. 232 U.S. 192 (1944).

76. *Id.* at 200.

77. 323 U.S. 248 (1944).

same policy was adopted with respect to section 8(3) of the National Labor Relations Act.[78] It has since been applied rather extensively by the National Labor Relations Board to remedy racial and other types of discrimination within the bargaining unit's ranks.[79] Nevertheless, even this duty has its limitations. Thus, in *Vaca v. Sipes*,[80] it was held that the duty of fair representation was not breached because a union settled an employee's grievance short of arbitration.[81] In *Vaca*, the Court reaffirmed the principle that

> [t]he federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining . . . . The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.[82]

In the context of bargaining between an employer and a representative, the leading cases applying the exclusivity principle are *International Envelope Corp.*[83] and *National Labor Relations Board v. Draper Corp.*[84] In *International Envelope*, employees included within the coverage of a collective bargaining agreement left their assigned positions during working hours to request their employer to make certain changes in wage schedules. This conduct was done without the sanction of the union. As a result, the employees in question were discharged. The National Labor Relations Board said:

> When the Union was unable to effectuate their desires, the discharged employees decided to take matters into their own hands. The Union, as the authorized representative of all the employees, disapproved of the action of the minority group . . . . Under such circumstances, when a dissident minority group takes action contrary to the terms of an existing contract and contrary to the wishes of the duly designated representative . . . disciplinary action by the employer . . . is clearly justified. To rule otherwise

78. *Id.* at 255. *See* 29 U.S.C. § 158(3) (1970).

79. *See, e.g.*, NLRB v. Local 1581, Int'l Longshoremen's Ass'n, 489 F.2d 635, 637 (5th Cir. 1974); Truck Drivers & Helpers Local 568 v. NLRB, 379 F.2d 137, 141 (D.C. Cir. 1967); Local 12, United Rubber Workers, 150 N.L.R.B. 312, 314-15 (1964), *enf'd*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Local 1367, Int'l Longshoremen's Ass'n, 148 N.L.R.B. 897, 899 (1964), *enf'd*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Local 1, Independent Metal Workers, 147 N.L.R.B. 1573, 1575 (1964); Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enf't denied on other grounds*, 326 F.2d 172 (2d Cir. 1965). All of these decisions except *Miranda Fuel* involved racial discrimination.

80. 386 U.S. 171 (1967).

81. *Id.* at 192. *See* Note, *Individual Control Over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559 (1968).

82. 386 U.S. at 182.

83. 34 N.L.R.B. 1277 (1941).

84. 145 F.2d 199 (4th Cir. 1944).

> would be to permit self-appointed dissenting ggroups within a union to ignore or to defy the legally designated representative, to take matters into their own hands, to destroy the collective agreements negotiated by majority organizations, and to undermine the process of collective bargaining itself.[85]

In *Draper*, the employer appeared to be deliberately delaying the negotiating process. As a result, a group of employees, acting without the knowledge of the bargaining representative, engaged in a peaceful work stoppage to compel their employer to begin negotiating seriously. The court sustained their consequent discharges, saying:

> Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority.[86]

The *Draper* rule, which has been followed by other circuits,[87] supports a doctrine of non-intervention even where minority action is meant to *support* the position of the union. Some courts have attempted to limit the logic of that case to situations where dissident action is antipathetic to the wishes of the collective bargaining representative's hierarchy,[88] but this limiting construction has been questioned[89] and certainly is not a majority view. At least in the context of federal labor legislation, *Draper* and *International Envelope* represent the governing law.

The situation in Wisconsin is similar. Section 111.70 of the Wisconsin statutes,[90] which concerns generally the right of municipal employees to organize and join labor unions, does not mention the concept of exclusivity. But that requirement was read into the statute by the state supreme court in *Board of School Directors of the City of Milwaukee v. Wisconsin Employ-*

85. 34 N.L.R.B. at 1283.

86. 145 F.2d at 203.

87. *See* Lee A. Consaul Co. v. NLRB, 469 F.2d 84, 85 (9th Cir. 1972); NLRB v. Tanner Motor Livery, Ltd. 419 F.2d 216, 218 (9th Cir. 1969); First Nat'l Bank of Omaha v. NLRB, 413 F.2d 921, 926 (8th Cir. 1969); NLRB v. Cactus Petroleum, Inc., 355 F.2d 755, 761 (5th Cir. 1966); NLRB v. Sunbeam Lighting Co., 318 F.2d 661, 662 (7th Cir. 1963); Plasti-Line, Inc. v. NLRB, 278 F.2d 482, 486 (6th Cir. 1960); NLRB v. Sunset Minerals, Inc., 211 F.2d 224, 226 (9th Cir. 1954); Harnischfeger Corp. v. NLRB, 207 F.2d 575, 579 (7th Cir. 1953).

88. *See* NLRB v. R.C. Can Co., 328 F.2d 974, 979 (5th Cir. 1964); Western Contracting Corp. v. NLRB, 322 F.2d 893, 896-98 (10th Cir. 1963).

89. *See* Food Fair Stores, Inc. v. NLRB, 491 F.2d 388, 394 (3d Cir. 1974); Western Addition Community Organization v. NLRB, 485 F.2d 917, 926 (D.C. Cir. 1973), *rev'd on other grounds sub nom.* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); Lee A. Consaul Co. v. NLRB, 469 F.2d 84, 85 (9th Cir. 1972); NLRB v. Shop Rite Foods, Inc., 430 F.2d 786, 790-91 (5th Cir. 1970); NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 221 (9th Cir. 1969).

90. WIS. STAT. ANN. § 111.70 (West 1974).

ment Relations Commission.[91] Thus, when the Wisconsin court in *Madison* came to consider the problem, it had a body of federal and state precedent on which to rely. The court began its analysis by saying that any abridgement of free speech must be justified by the assertion of a compelling state interest.[92] It then cited its decision in *Milwaukee*,[93] acknowledging that state laws relating to municipal employees incorporate the principle of exclusivity. The considerations inherent in that principle were explained[94] by citations to the language of *Vaca v. Sipes*[95] and *Medo Photo Supply Corp.v. National Labor Relations Board*,[96] quoted earlier.[97] Having thus stated the general doctrine, the question that then needed to be answered was whether Holmquist and his colleagues had attempted to negotiate with the Board. In *Milwaukee*, the state court had defined "negotiating" as " 'to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms [especially] in state matters by meetings and discussions.' "[98] In that case, the school board and a majority union were also in the midst of negotiations. At a public meeting of the Board, a minority union representative sought to speak on subjects of collective bargaining; the Board denied him permission to do so. The state supreme court upheld this denial, placing emphasis on the statutory requirement that no final action should be taken in employment negotiations until the negotiated matters are discussed in a public meeting.[99] Thus, the court in *Milwaukee* said that such an "open meeting is the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union."[100] In light of this language, one could argue that Holmquist had also been engaged in negotiation when he delivered his statement before the Board. The court in *Milwaukee* had, however, made one remark that undermined the viability of such an argument; it had said "[i]f this case

91. 42 Wis. 2d 637, 645-46, 168 N.W.2d 92, 96-97 (1969). *Accord*, Board of Educ. v. Wisconsin Employment Relations Comm'n, 52 Wis. 2d 625, 633, 191 N.W.2d 242, 246 (1971); LaCrosse County Institution Employees Local 227 v. Wisconsin Employment Relations Comm'n, 52 Wis. 2d 295, 300, 190 N.W.2d 204, 207 (1971).

92. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 211, 231 N.W.2d 206, 212 (1975).

93. *Id.* at 208-09, 231 N.W.2d at 212.

94. *Id.* at 212, 231 N.W.2d at 213.

95. 321 U.S. 678, 684-85 (1944).

96. 386 U.S. 171, 182 (1967).

97. *See* notes 72, 82 and accompanying text *supra*.

98. Board of School Directors of Milwaukee v. Wisconsin Employment Relations Comm'n, 42 Wis. 2d 637, 652, 168 N.W.2d 92, 99 (1969) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1961)).

99. *See* note 8 and accompanying text *supra*.

100. Board of School Directors of Milwaukee v. Wisconsin Employment Relations Comm'n, 42 Wis. 2d 637, 653, 168 N.W.2d 92, 100 (1969).

involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.' "[101] One reply to this contention is that the convocation of the Board was not an "ordinary meeting" but a step in the negotiation process. But the state supreme court in *Madison* went even further in explaining why the statement in *Milwaukee* had no application to the instant case:

> We agree with the trial court that this was in fact negotiating and one need only read the Holmquist statement to see that the "information" that was being imparted was a request that the whole fair-share issue be deferred along with a counter proposal as to how the issue should be handled for possible future consideration. It also criticized MTI's handling of the negotiations in this respect.
>
> The statement given by Mr. Holmquist was more than a mere statement of a position; it was an argument for it. Furthermore, though Mr. Holmquist was not speaking for a minority union, as in the case of [*Milwaukee*], it is obvious he was speaking for an *ad hoc* group which was opposed to including a fair-share agreement in any contract being negotiated at that time.[102]

Thus, the state court did find that negotiation had occurred, and this finding triggered its application of the exclusivity doctrine. The United States Supreme Court noted the lower tribunal's holdings on this point,[103] but did not deal with them. It never discussed the exclusivity doctrine, but simply asserted that the state had established no compelling justification for its abridgement of speech. In so doing, it appeared to suggest that the exclusivity doctrine, deemed compelling in cases like *Medo Photo, Vaca* and *Draper*, where employment dismissals for engaging in a free speech were condoned, would not control in a case like *Madison*, where the effect of engaging in free speech was solely a denial of further access to speak at one particular forum on a set of given subjects. If this is an accurate assessment of *Madison*, one then confronts a further question: how is that ruling to be reconciled with the Court's other key opinion handed down this term on the First Amendment rights of municipal employees, *Abood v. Detroit Board of Education*?[104]

b. First Amendment Rights and the Agency Shop in the Public Sector: *Abood v. Detroit Board of Education*

In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,[105] the Court seemed to imply that the First

101. *Id.* at 652, 168 N.W.2d at 99.

102. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis.2d 200, 215, 231 N.W.2d 206, 214 (1975).

103. 429 U.S. at 173-74.

104. 431 U.S. 209 (1977).

105. 429 U.S. 167 (1976). *See* notes 1-104 and accompanying text *supra*.

Amendment protections afforded public employees might be greater than those accorded to workers in the private sector. Soon after that ruling, however, the Court decided *Abood v. Detroit Board of Education*,[106] which indicated that five of the justices would be willing to place both classes of employees on an equal footing, at least with respect to the potential remedies available to them for incursions upon their constitutional rights caused by an agency shop.

(1) The Decision

Under the National Labor Relations Act,[107] regulation of municipal or state employees is left to the states themselves.[108] Michigan adopted a regulatory scheme quite similar in some respects to the federal model.[109] Under that scheme, employees of local governmental units are permitted to organize themselves,[110] to elect their negotiating representative by secret ballot[111] and to bargain collectively.[112] An elected bargaining agent who has obtained the support of a majority of employees within a bargaining unit is statutorily deemed to be the exclusive representative of all such employees[113] and owes each of them a correlative duty of fair representation.[114] It is

106. 431 U.S. 209 (1977).

107. 29 U.S.C. §§ 151-187 (1970 & Supp. V 1975).

108. *See* 29 U.S.C. § 152(2) (1970).

109. *See, e.g.*, Rockwell v. Board of Educ., 393 Mich. 616, 635-36, 227 N.W.2d 736, 744-45 (1975), *appeal dismissed sub nom.* Crestwood Educ. Ass'n v. Board of Educ., 427 U.S. 901 (1976); Michigan Employment Relations Comm'n v. Reeths-Puffer School Dist., 391 Mich. 253, 260 & n.11, 215 N.W.2d 672, 675 & n.11 (1974); Detroit Police Officers Ass'n v. Detroit, 391 Mich. 44, 53, 214 N.W.2d 803, 807-08 (1974). Nevertheless, there are some differences, the most notable being that Michigan public employees are forbidden from striking. MICH. COMP. LAWS ANN. § 423.202 (1970). The National Labor Relations Act contains no similar prohibition.

110. MICH. COMP. LAWS ANN. § 423.209 (1970). For federal analogues, see 29 U.S.C. § 157 (1970); 45 U.S.C. § 152, Fourth (1970).

111. MICH. COMP. LAWS § 423.215 (1970). For federal analogues, see 29 U.S.C. § 157 (1970); 45 U.S.C. § 152, Fourth (1970).

112. MICH. COMP. LAWS ANN. § 423.212 (1970). For federal analogues, see 29 U.S.C. § 159(e)(1) (1970); 45 U.S.C. § 152, Ninth (1970).

113. MICH. COMP. LAWS ANN. § 423.211 (1970):

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

For a federal analogue, see 29 U.S.C. § 159(a) (1970). For consideration of the exclusivity doctrine by the Supreme Court, see notes 67-104 and accompanying text *supra*.

114. *See, e.g.*, Lowe v. Hotel & Restaurant Employees Local 705, 389 Mich. 123, 145-52,

in light of this general background that the *Abood* case arose.[115]

In 1967, the Detroit Federation of Teachers (Union) was certified as the exclusive bargaining representative of all instructors employed by the Detroit Board of Education (Board). Thereafter, the Union and the Board entered into a contract effective from July 1, 1969 to July 1, 1971. Among the provisions of that contract was an agency shop clause, which required every teacher who had not joined the Union within either sixty days after being hired or sixty days after January 26, 1970, the effective date of the clause, to remit to that organization a "service charge" equivalent to the regular dues paid by union members. Failure to make such a remittance was a ground for dismissal. Nothing in the contract required the teacher either to join the union or to participate in its affairs.

On November 7, 1969, Christine Warczak and other teachers filed a class action in state court against the Board, the Union and certain officers of the latter. The plaintiffs were either unwilling or had refused to pay dues and objected to collective bargaining in the public sector. They further alleged that the union engaged:

> in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board, and that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of defraying the cost of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board.[116]

The complaint requested that the agency shop clause be declared invalid under state law and under the federal Constitution. A Michigan trial court granted the defendants' motion for summary judgment,[117] and an appeal was promptly taken.

During this period, a number of independent but relevant occurrences took place. A second action instituted by D. Louis Abood was filed in the same trial court; the substance of the complaint was identical to that presented in *Warczak*, and similar relief was requested. This suit was held

205 N.W.2d 167, 177-80 (1973); Wayne County Community College Fed'n of Teachers Local 2000 v. Poe, 1976 Mich. Emp. Relations Comm'n 347, 350-53; AFSCME Local 836 v. Solomon, 1976 Mich. Emp. Relations Comm'n 84, 89.

115. The following factual narrative is taken from the Supreme Court's opinion, 431 U.S. at 211-16, except where otherwise noted.

116. *Id.* at 213 (footnote omitted).

117. Warsczak v. Detroit Bd. of Educ., 73 L.R.R.M. 2237 (Mich. Cir. Ct. 1970).

in abeyance pending disposition of the *Warczak* case on appeal. Moreover, although a number of Michigan trial courts in this period had upheld agency shops in the public sector,[118] the state's supreme court ruled in one of these cases, *Smigel v. Southgate Community School District*,[119] that such arrangements violated Michigan law.[120] Accordingly, the judgment in Warczak's case was vacated and remanded for reconsideration in light of *Smigel*. On remand, it was consolidated with Abood's action. At this juncture, the state legislature enacted section 423.210(1)(c) of the Michigan laws[121] which in effect overruled *Smigel* and permitted the inclusion of agency shop provisions in contracts involving public employees. Consequently, when the trial judge in the newly-consolidated *Abood* and *Warczak* cases was again asked to render a summary judgment for the defendants he did so, applying retroactively the principle announced in section 423.210(1)(c). A Michigan appellate court reversed this ruling. Although the court of appeals concluded that compulsory contribution of service fees to a collective bargaining representative might abridge First Amendment freedoms, it found that the appellants had no legitimate claim because they had never made their objections to specific expenditures known to the Union.[122] Nevertheless, the appellate court reversed the judgment against Abood and Warczak, finding that the trial judge had erred in giving retrospective application to section 423.210(1)(c).[123]

The United States Supreme Court vacated the ruling of the state's appellate court.[124] Justice Stewart's majority opinion, in which Justices

118. *See, e.g.*, Grand Rapids v. AFSCME Local 1061, 72 L.R.R.M. 2257, 2259-61 (Mich. Cir. Ct. 1969); Nagy v. Detroit, 71 L.R.R.M. 2362, 2364 (Mich. Cir. Ct. 1969) (endorsed validity of agency shop, but only if agency fee reflected a prorated share of the costs of collective bargaining); Smigel v. Southgate Community School Dist., 70 L.R.R.M. 2042, 2043 (Mich. Cir. Ct. 1968); City of Warren v. Firefighters Local 1383, 68 L.R.R.M. 2977, 2978 (Mich. Cir. Ct. 1968). *See generally* Note, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547, 653-65 (1970) [hereinafter cited as *Impact of Agency Shop*].

119. 388 Mich. 531, 202 N.W.2d 305 (1972).

120. *Id.* at 543, 202 N.W.2d at 308.

121. MICH. COMP. LAWS ANN. § 423.210(1)(c) (1973):

> [N]othing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

122. Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 102, 230 N.W.2d 322, 327 (1975).

123. *Id.*

124. The Michigan Supreme Court had denied appellants any review and they had appealed to the United States Supreme Court, pursuant to 28 U.S.C. § 1257(2) (1970), which authorizes direct appeal whenever the constitutionality of a state law is in question. The Court noted that the appellate tribunal's remand could only have been "for a ministerial purpose, such as the correction of language in the trial court's judgment." 431 U.S. at 216 n.8. In light of this fact, the ruling of the court of appeals could be deemed "final" for purposes of section 1257(2). *Id.*

Brennan, White, Marshall, Rehnquist and Stevens joined, said that the disposition of the case was, to a great extent, governed by two prior rulings of the Court: *Railway Employes' Department v. Hanson*[125] and *International Association of Machinists v. Street*.[126] Both these cases involved challenges to section 152, Eleventh, of Title forty-five of the United States Code,[127] a provision of the Railway Labor Act of 1926,[128] which authorizes railway carriers to enter into contracts with railway workers' unions containing agency shop clauses almost identical to the one at issue in *Abood*. In *Hanson*, a group of employees sought to enjoin enforcement of a union shop clause[129] inserted in a collective bargaining agreement pursuant to section 152, Eleventh. The Nebraska Supreme Court held that the enforcement of

See, e.g., Pope v. Atlantic Coast Line R.R. Co., 345 U.S. 379, 382 (1953); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67-68 (1948); Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 72-74 (1946). There was also a mootness problem, since the contract which both Warczak and Abood complained of expired on July 1, 1971, well before the case reached the Supreme Court. But the Court observed that a successor agreement reached between the Union and the Board in 1973 also contained an agency shop clause and that the constitutional claims of the appellants were such that they survived the expiration of the original contract. 431 U.S. at 216 n.9.

125. 351 U.S. 225 (1956).

126. 367 U.S. 740 (1961).

127. 45 U.S.C. § 152, Eleventh (1970):

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the latter, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

For a similar provision in the National Labor Relations Act, see 29 U.S.C. § 158(a)(3) (1970).

128. 45 U.S.C. §§ 151-188 (1970).

129. A union shop is one wherein an employee must both pay dues *and* become a full union member. *Impact of Agency Shop*, *supra* note 13, at 547 n.2. In the federal context, the distinction is minimized: "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). Nevertheless, in some contexts the distinction would seem to be meaningful. *See id.* at 744. *See also* Lathrop v. Donohue, 367 U.S. 820, 828 (1961). This would seemingly be true in a case like *Abood* where compulsory membership, to the extent that it requires full participation in union affairs, would seem to present an even more egregious infringement of freedom of association than the requirements of agency shop.

the clause should be enjoined because employees who disagreed with the purposes to which their dues payments were put were thus being deprived of the right of association guaranteed them by the First Amendment.[130] The United States Supreme Court reversed. While it acknowledged the presence of constitutional issues,[131] it found that nothing in the record indicated that assessments were being used for any purpose other than the defrayment of collective bargaining costs.[132] Absent such evidence that the imposition of union dues resulted in a situation where persons are compelled to support political, ideological or religious causes which they disagree with, the Court in *Hanson* held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First Amendmen[t]."[133] Indeed, the Court therein found that section 152, Eleventh, could be fully justified as an effort by Congress to promote peaceful labor relations between interstate carriers and their workers.[134] In *Street*, the record did contain findings that dues exacted under a union shop clause were being expended for political and ideological objectives.[135] The Court construed the relevant legislative history as signifying that Congress only intended to permit such assessments to the extent that they were utilized to defray the costs of bargaining.[136] Thus, use of compulsory union dues to finance political campaigns and the like was said to violate the Railway Labor Act itself.[137] The Court in *Abood* noted that both *Hanson* and *Street* thus recognized the compelling need for the doctrine of exclusivity in the field of labor representation.[138] If a bargaining unit is

130. Hanson v. Union Pacific Ry. Co., 160 Neb. 669, 671, 71 N.W.2d 526, 545-46 (1955). Section 152, Eleventh is permissive, not mandatory. But the United States Supreme Court in *Hanson* held that if a private contract entered into between a carrier and a collective-bargaining representative incorporated a union shop clause, any inconsistent state law would fall by the wayside. Railway Employes' Dep't v. Hanson, 351 U.S. 225, 232 (1956). In contrast, the parallel provision of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1970), has been held to be limited by section 14(b) of that act, 29 U.S.C. § 164(b) (1970), and thus does not supersede conflicting state law. Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746, 757 (1963). *See* Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10th Cir. 1971).

131. 351 U.S. at 231-32.

132. *See id.* at 238.

133. *Id.*

134. *See id.* at 235.

135. Specific findings of fact to this effect were made by the trial court. *See* 367 U.S. at 744-45 n.2. That court therefore issued a decree enjoining enforcement of the union shop clause in question; the Georgia Supreme Court affirmed the decree. International Ass'n of Machinists v. Street, 215 Ga. 27, 47, 108 S.E.2d 796, 809 (1959).

136. *See* 367 U.S. at 750-64.

137. *See id.* at 768-69.

138. *Accord*, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62-63 (1975); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684-85 (1944); Virginian Ry. Co. v. System Fed'n No. 40,

served by only one agent elected by a majority of the constituents of that unit, then employees are saved from the confusion resulting from an attempt to enforce two different contracts, employers can avoid having to confront contrasting and perhaps conflicting demands presented by two distinct representatives and the possibility of inter-union rivalries endangering both the administration of negotiated contracts and the very advantages conferred by employee collectivization in the first place are minimized.[139] But since the duties of an exclusive representative are so great, the costs attendant to the performance of those duties are also substantial. In light of this fact, both *Street* and *Hanson* were said to have acknowledged the desirability of counteracting the incentive of employees to become "free riders," individuals who reaped the benefits of union representation but refused to contribute their fair share of the expenses attendant to such representation.[140] Justice Stewart admitted that "[t]o be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."[141] Nevertheless, he claimed that both *Street* and *Hanson* had deemed such an infringement "constitutionally justified" by the determination of Congress that the union shop was vitally necessary to a stable system of labor-management relations.[142]

The majority then declared that similar considerations had prompted the Michigan legislature to enact section 423.210(1)(c) in 1973:

> The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid.[143]

Under this logic, the service charge imposed by the union in *Abood* could be upheld as long as the sums thereby accrued were used to finance disbursements by the union concerning collective bargaining, contract administration and grievance adjustment. But the appellants sought to distin-

300 U.S. 515, 545-49 (1937). For further discussion of this doctrine, see notes 67-104 and accompanying text *supra*.

139. 431 U.S. at 220-21. *See* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62-63 (1975).

140. 431 U.S. at 221-22. *See* Oil, Chemical & Atomic Workers v. Mobil Oil Corp., 426 U.S. 407, 415-16 (1976); NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740, 761-63 (1961); Railway Employes' Dep't v. Hanson, 351 U.S. 225, 231 (1956); Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954).

141. 431 U.S. at 222 (footnote omitted).

142. *Id.*

143. *Id.* at 224

guish their case from *Hanson* and *Street* on two grounds. First, they asserted that their suit involved a situation where the state rather than a private firm served as the employer, thus implicating directly certain constitutional guarantees that were involved only tangentially in the Court's prior decisions; and second, they argued that collective bargaining in the public sector is itself inherently "political," so that compulsory financial support of such a goal necessarily yields the imposed "ideological conformity" found missing in *Hanson*.[144]

Justice Stewart rejected both contentions. He found the argument premised on the fact of state employment irrelevant. The union shop upheld in *Hanson* had also been found to be the product of governmental action, so the claims of the plaintiff in that case had been repudiated not for lack of official sanction, but rather for lack of any violation of the First Amendment.[145] As for the second contention, Justice Stewart admitted that differences exist between the private and public employer.[146] A private employer is guided by the profit motive and the dictates of the market system and is more likely to evince great discretion in bargaining with unions over items to be included in a contemplated contract. Such an employer makes decisions in collective-bargaining situations that are governed by the precept of self-interest. Conversely, a public employer renders unpriced services that are price inelastic because they fall into the category of necessities. He is less likely to act as a cohesive unit with other such employers because the public sector consists of a bureaucratic hierarchy that limits severely both the range of options available in negotiations with unions and the scope of

144. *Id.* at 226.

145. The Court in *Hanson* had noted that "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." Railway Employes' Dept. v. Hanson, 351 U.S. 225, 232 (1956). With respect to the parallel provision of the National Labor Relations Act, *see* note 127 *supra*, there is a division of opinion on the issue of state action. *Compare* Linscott v. Millers Falls Co., 440 F.2d 14, 16-17 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971) *and* Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1002-03 (9th Cir. 1970) (finding state action) *with* Buckley v. American Fed'n of Television & Radio Artists, 496 F.2d 305, 309-10 (2d Cir.), *cert denied*, 419 U.S. 1093 (1974) *and* Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410-11 (10th Cir. 1971) (finding no state action or declining to rule on the issue). *See also* Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L. J. 345, 354-59 (1961).

146. 431 U.S. at 227-28. For discussion of these differences, *see, e.g.*, H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 117-64 (1971); Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 U.C.L.A. L. REV. 867, 868-83 (1972); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 898-929 (1969); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. J. 1156, 1172-99 (1974); Project, *Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A. L. REV. 887, 963-1009 (1972).

authority of the one negotiating on behalf of the employer. He makes decisions that, because of his ultimate accountability to the electorate, are inherently "political," that is, gauged with reference to voters' sentiments about unionism, tax increases and the quality and importance of the service that is the subject of negotiations.[147] Thus, unions dealing with public employers do confront strategic and tactical problems quite distinguishable from those of unions dealing with private employers. One can therefore legitimately question the appropriateness of applying a model of labor law developed in the private sector to the public bargaining situation. But Justice Stewart reasoned that the Court need not concern itself with questions of appropriateness; the Michigan legislature had already performed that task.[148] Thus, the only constitutional inquiry left was "whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation."[149]

To this question, the majority provided a negative response. It noted that workers in the private and public sectors possess similar skills, have similar needs and seek similar advantages. " 'The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer.' "[150] A worker who disagrees with the policies espoused by his union can always express his dissatisfaction through the manner in which he casts his ballot in a union election or through expressions of opinion communicated either through the media or at forums dedicated to the public.[151] The majority admitted that unions of public employees engage in political activities to the extent that they attempt to influence governmental decisionmaking.[152] However,it also observed that political speech is fully protected by the First Amendment, so that affixing the label "political" to a given act of expression in no way predetermines the outcome of the basic constitutional inquiry.[153] The Court

147. 431 U.S. at 227-29.

148. *Id.* at 229. *See id.* at 224-25 & n.20.

149. *Id.* at 229.

150. *Id.* at 230 (quoting Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975) (emphasis added) [hereinafter cited as Summers]).

151. *Id.* at 230 (citing City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174 (1976)).

152. *Id.* at 231.

153. *Id.* at 232. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) (the First Amendment "secures the right to proselytize religious, political, and ideological causes"); Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (recognizing that the First Amendment protects society's greater interest in "untrammeled political debate"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters"); Board of Educ. v.

therefore held that *Hanson* and *Street* were fully applicable to the facts presented in *Abood*, at least to the extent the sums exacted were used to pay the costs of collective bargaining.[154]

The Michigan court of appeals had ruled that state law "sanctions the use of nonunion members' fees for purposes other than collective bargaining."[155] Thus, the Court in *Abood* was compelled to do something not done in *Street*: discuss the constitutional, as opposed to statutory, permissibility of such a practice. Justice Stewart recognized two basic principles:[156] first, that the First and Fourteenth Amendments protect the right to associate for the purposes of advancing beliefs and ideas[157] and second, that public employment may not be conditioned upon the surrender of a constitutional right.[158] Included among such rights is the freedom to contribute to an organization advancing a cause in which one believes; any limitations upon such a freedom "implicate fundamental First Amendment interests."[159] In *Abood*, however, individuals were compelled to contribute, rather than prohibited from doing so. Nevertheless, the Court observed that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state."[160] This principle was said to prohibit the appellees from requiring a person, as a condition of public employment, to contribute to the support of causes that he opposes.[161] Thus, the Court said:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not

Barnette, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

154. 431 U.S. at 232.

155. Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 99, 230 N.W.2d 322, 326 (1975).

156. 431 U.S. at 233-34.

157. *Accord*, Elrod v. Burns, 427 U.S. 347, 355-57 (1976); Cousins v. Wigoda, 419 U.S. 477, 487 (1975);Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); NAACP v. Button, 371 U.S. 415, 430 (1963); Bates v. Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

158. *Accord*, Elrod v. Burns, 427 U.S. 347, 357-60 (1976); Perry v. Sinderman, 408 U.S. 593, 597 (1972); Epperson v. Arkansas, 393 U.S. 97, 107 (1968); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

159. 431 U.S. at 234 (quoting Buckley v. Valeo, 424 U.S. 1, 23 (1976)).

160. *Id.* at 234-35. *See* Elrod v. Burns, 427 U.S. 347, 356-57 (1976); Stanley v. Georgia, 394 U.S. 557, 565 (1969); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

161. 431 U.S. at 235.

> coerced into doing so against their will by the threat of loss of governmental employment.[162]

The word "germane" admittedly presented some difficulties because the line between unrelated and related activities in the public sector might be rather difficult to draw. "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgeting and appropriations decisions might be seen as an integral part of the bargaining process."[163] The Court declined to address this problem, however, because the case came before it by way of a judgment on the pleadings, so that the underlying evidentiary record was inadequate.[164]

The Court next proceeded to consider the problem of an appropriate remedy. In *Street*, the relief of an injunction prohibiting the union from expending any dues for political purposes had been deemed improper;[165] conversely, the Michigan appellate court's denial of any redress whatsoever in *Abood* was "unduly restrictive."[166] *Street* had sketched two potential remedies: "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget"[167] or restitution of a prorated share of dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee.[168] In *Brotherhood of Railway and Steamship Clerks v. Allen*,[169] the Court had suggested a

162. *Id.* at 235-36 (footnote omitted).

163. *Id.* at 236.

164. *Id.*

165. International Ass'n of Machinists v. Street, 367 U.S. 740, 771-73 (1961). The Court relied on the policy of the Norris-La Guardia Act, 29 U.S.C. §§101-115 (1970), which is against the use of labor injunctions. Ordering the union to make political expenditures only out of those sums paid by a nondissenter would also not suffice:

> But even if all collections from nonmembers must be directly committed to paying bargaining costs, this fact is of bookkeeping significance only rather than a matter of real substance. It must be remembered that the service fee is admittedly the exact equal of membership initiation fees and monthly dues. . . . If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses.

Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746, 753-54 (1963).

166. 431 U.S. at 240

167. International Ass'n of Machinists v. Street, 367 U.S. 740, 774-75 (1961).

168. *Id.* at 775.

169. 373 U.S. 113 (1963).

practical remedial decree consisting of "(1) the refund to [the employee] of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion."[170] Justice Stewart found that such a decree could, if necessary,[171] be utilized in *Abood*.[172] As for the fact that the appellants had not objected to specific expenditures, the Court simply remarked that *Allen* obviated the necessity for such a requirement.[173] It thus vacated the judgment of the Michigan court of appeals.

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, issued an elaborate concurrence. The essence of his argument was that the majority opinion did not go far enough in protecting the rights of public employees. He first contended that *Hanson* and *Street* were inapplicable.[174] He noted that both decisions explicitly rested on the construction of the Railway Labor Act, not on analysis of constitutional issues.[175] Because of the narrowness of the holdings in these cases, Justice Powell found that they left three issues undecided: first, whether the withholding of financial support from a union's political activities is speech protected by the First Amendment;[176] second, whether, assuming constitutional interests were implicated, "Congress might go further in approving private arrangements that would interfere with those interests than it could in commanding such arrangements";[177] third, whether, assuming infringement of First Amendment rights had occurred, that infringement could be justified by a compelling governmental interest.[178]

According to Justice Powell, the misplaced reliance by the majority on *Hanson* and *Street* necessitated the erroneous conclusion that a state can

170. *Id.* at 122.

171. The union had adopted a plan whereby a dissenter who gave notice at the beginning of each school year would be refunded a prorated share of his service charge to reflect that portion of the charge spent for political purposes. 431 U.S. at 240 n.41. Similar intra-union schemes have been held to satisfy the requirements of *Street* and *Allen*. *See, e.g.*, Reid v. United Auto Workers Lodge 1093, 479 F.2d 517, 520 (10th Cir.),*cert. denied*, 414 U.S. 1076 (1973); Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 763 (C.D. Cal. 1973), *rev'd on this point*, 533 F.2d 1126, 1132 (9th Cir. 1976). The Ninth Circuit in *Seay* ruled that the plaintiffs had presented legitimate issues about the suitability of the intra-union remedy being offered. They had contended that the remedy required them personally to challenge the amount the union claims it spends on political activities and that the union would not fairly and honestly determine the amount of the rebate to which they were entitled. 533 F.2d at 1131-32.

172. 431 U.S. at 240.

173. *Id.* at 241.

174. *Id.* at 245 (Powell J., concurring, joined by Burger, C.J., and Blackmun, J.).

175. *Id.* at 246-48.

176. *Id.* at 248.

177. *Id.*

178. *Id.* at 249-50.

require of its own employees exactly what it can permit private employers to demand.[179] He believed that the converse is true, that the state is required to present a greater justification for its impingements upon constitutional rights. Thus,

> [t]he state in this case has not merely authorized agency-shop agreements between willing parties; it has negotiated and adopted such an agreement itself. Acting through the Detroit Board of Education, the state has undertaken to compel employees to pay full fees to a union as a condition of employment. Accordingly, the Board's collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation.[180]

The majority's approach, on the other hand, led to the conclusion that compulsory financing of a union's ideological activities unrelated to collective bargaining is violative per se of that First Amendment regardless of any asserted governmental justification, whereas involuntary subsidization of union activity related to bargaining is permissible per se, because it is presumptively relevant to a compelling state concern. Moreover, under the majority's approach, the burden of proof of distinguishing between the two fell squarely on the shoulders of the aggrieved employee.

Justice Powell noted that *Buckley v. Valeo*[181] had held that making a contribution is part and parcel of the general right of association protected by the First Amendment.[182] Like the majority, he drew the same conclusion with respect to the refusal to contribute.[183] The only question left was whether the fact that the case arose in the public sector required different considerations. Justice Powell concluded that it did not. A public employee union, like a political party, is primarily concerned with influencing "public decisionmaking in accordance with the views and perceived interests of its membership."[184] While he admitted that the Detroit Federation of Teachers, unlike a political party, was composed of individuals sharing similar economic interests and possibly similar professional perspectives on a certain range of policy issues, he found no reason for this consensus to be the basis on which such individuals could be denied constitutional protections

179. *Id.* at 250.

180. *Id.* at 253. *See also* Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 482-83 (1959); Summers, *supra* note 150, at 670; Symposium, *Individual Rights in Industrial Self-Government—A "State Action" Analysis*, 63 NW. U.L. REV. 4, 19-30 (1968).

181. 424 U.S. 1 (1976). *Buckley* invalidated various provisions of the amended Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), one of which limited the amounts that individual could contribute to federal election campaigns.

182. 424 U.S. at 22.

183. 431 U.S. at 256.

184. *Id.*

afforded to other citizens.[185] Nor could he find any ground on which to distinguish "collective bargaining activities" from "political activities"; in the public sector the two simply merge.[186]

In order to apply the usual First Amendment analysis, it thus became necessary to identify the allegedly compelling state interests asserted by Michigan in this case. There were three: the exclusivity doctrine, the deterrence of "free riders" and the promotion of stable labor relations. Of these, Justice Powell said, "[w]hile these interests may well justify encouraging agency-shop arrangements in the private sector, there is far less reason to believe they justify the intrusion upon First Amendment rights that results from compelled support for a union as a condition of government employment."[187] He noted that in the *Madison* case[188] the Court had reserved judgment on the constitutional validity of the exclusivity doctrine in the public sector, but in *Abood* that very doctrine was used by the majority to justify infringement of a First Amendment right.[189] As a result, the dissident employee "is excluded in theory only from engaging in a meaningful dialogue with his employer on the subjects of collective bargaining, a dialogue that is reserved to the union."[190] Justice Powell admitted that the state might have proven the necessity for such a limitation on the speech of dissenters; but it had not done so in the context of this case, where no evidentiary record had ever been compiled.[191] Thus, by presuming the existence of a sufficient justification, the majority ignored "the importance of avoiding unnecessary decisions of constitutional questions."[192] The same criticism was levelled at the "free rider" and "promotion of labor harmony" rationales.[193] The concurring justices saw no reason to replace the state's usual burden of proof with presumptions having no foundation in the record.

Justice Rehnquist's concurrence also noted the discrepancy alluded to by Justice Powell, but he claimed that Michigan's asserted interests fell within the category of those sufficiently important to justify impingements

185. *Id.* at 256-57.

186. *Id.* at 257.

187. *Id.* at 260-61.

188. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). *See* notes 67-104 and accompanying text *supra*.

189. *See* 431 U.S. at 262.

190. *Id.*

191. *Id.*

192. *Id.* (quoting the majority opinion, 431 U.S. at 236-37). *See* Poe v. Ullman, 367 U.S. 497, 503 (1961); Parker v. County of Los Angeles, 338 U.S. 327, 333 (1949); Electric Bond & Share Co. v. Securities & Exchange Comm'n, 303 U.S. 419, 443 (1938); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

193. 431 U.S. at 262-63.

on constitutional rights. He thus joined the opinion of the majority.[194] So did Justice Stevens; in his separate concurrence, he merely noted that any decision regarding the appropriate remedy would have to await the full development of the facts at trial.[195]

(2) Analysis

Consideration of the problems raised by *Abood* may best proceed by analyzing the issues broached explicitly or implicitly by Justice Powell's concurrence. These issues may be categorized under three broad headings: (1) the applicability of *Hanson* and *Street*, (2) the applicability of the remedy devised in *Allen* and (3) the implications of the majority's decision with regard to the First Amendment analysis to be used in cases involving public employees.

(a) Applicability of *Hanson* and *Street*

The majority, as Justice Powell points out, misused the doctrines enunciated in these two decisions. This conclusion is borne out by a consideration of those cases. *Hanson* analyzed briefly the relevant legislative history of section 152, Eleventh.[196] The Court noted that, prior to 1951, the Railway Labor Act prohibited union shop provisions, ostensibly because such clauses were used by employers to establish and maintain company unions. But by 1950, this practice had disappeared and, as a result, there was a significant "free rider" problem that Congress sought to eliminate. The Court observed that the federal government "has authority to adopt all appropriate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.' "[197] Thus, the statute was a legitimate exercise of the power of

194. *Id.* at 424-44 (Rehnquist, J., concurring). As Justice Rehnquist pointedly observes, the position taken by Justice Powell in his concurrence in *Abood* seems to conflict with that taken in his dissent in Elrod v. Burns, 427 U.S. 347 (1976). *Elrod* invalidated the system of patronage politics practiced in Cook County, Illinois, where a non-civil service public employee had to join the political party of his superior in order to retain his job. Justice Powell's dissent in that case observed that because the patronage system stabilizes political parties, stimulates partisan activity and ensures that the party organization will function meaningfully on the local level, it thus served sufficiently important governmental interests to withstand a constitutional challange. *Id.* at 87 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) One can only question why, if these interests are deemed vital to the state, furtherance of the exclusivity doctrine is not. But this may be reading too much into Justice Powell's concurrence in *Abood*. He may be suggesting that, given a sufficiently detailed record, he would be willing to uphold the Michigan law in question.

195. 431 U.S. at 244 (Stevens, J., concurring).

196. *See* Railway Employes' Dep't v. Hanson, 351 U.S. 225, 231 (1956).

197. *Id.* at 233 (quoting Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 570 (1930)).

Congress over interstate commerce. The Court in *Hanson* admitted that there might be better alternatives for achieving stability in labor relations than the union shop, but it concluded that it was not the function of the judiciary to make such basic policy choices.[198] As for First Amendment considerations, the Court found none. On the basis of the record presented, no impairment of freedom of speech or freedom of association could be discerned.[199] But it warned that:

> Congress endeavored to safeguard against [the possibility of such impairment] by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, or assessments." If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.[200]

Implicit in this language was the suggestion that a future case involving more egregious facts would be judged under usual First Amendment standards rather than on the basis of a construction of the Railway Labor Act.

Street, however, confounded one's expectations in this respect. In that case, there were findings of fact by the trial court that assessments had been used to finance partisan political campaigns and to propagate political and economic doctrines with which the appellees disagreed.[201] The Court admitted that the case was thus distinguishable from *Hanson*, but concluded that its reading of the relevant statute precluded any necessity for reviewing the "correctness of the constitutional determinations" made by the lower courts.[202] It then conducted a detailed exegesis of the history underlying the enactment of section 152, Eleventh.[203] This retrospective analysis yielded certain important facts. The railroad industry had a tradition of voluntary unionism. In 1934, when the issue of railway union security was first presented to Congress, only the Brotherhood of Railroad Trainmen maintained "percentage" contracts, requiring that in certain categories of represented workers, a specific percentage of them had to be union members.[204] The unions asked Congress for the right to include security clauses in

198. Railway Employes' Dept. v. Hanson, 351 U.S. 225, 233-34 (1956).

199. *Id.* at 238.

200. *Id.*

201. International Ass'n of Machinists v. Street, 367 U.S. 740, 744 n.2 (1961).

202. *Id.* at 750. The Georgia Supreme Court in *Street* had held that "[o]ne who is compelled to contribute the fruits of his labor to support or promote political or economic programs or candidates for public office is just as much deprived of his freedom of speech as if he were compelled to give his vocal support to doctrines he opposes." International Ass'n of Machinists v. Street, 215 Ga. 27, 46, 108 S.E.2d 796, 808 (1959).

203. International Ass'n of Machinists v. Street, 367 U.S. 740, 750-68 (1961).

204. *Id.* at 751.

contracts if they so wished; while the House deferred to this request, the Senate refused to do so.[205] The resulting legislation, section 152, Fifth, prohibited both the closed shop and the "yellow dog" contract.[206] Renewed agitation for the right to draft security clauses was undertaken by nonoperating unions during World War II. A Presidential Emergency Board denied a request for permission to include such clauses in contracts, relying on an opinion by the Attorney General ruling that the Railway Labor Act precluded the creation of the closed shop.[207] The issue was again placed before Congress in 1950. That body acknowledged that in the railway industry, the federal government "consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship";[208] indeed, the Railway Labor Act of 1926 was virtually written by labor and management and subsequently endorsed by Congress.[209] The 1934 amendments were said to have been enacted solely in order to further this policy of self-adjustment.[210] Thus,

> [i]n sum, in prescribing collective bargaining as the method of settling railway disputes, in conferring upon the unions the status of exclusive representatives in the negotiation and administration of collective agreements, and in giving them representation on the statutory board to adjudicate grievances, Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions, and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies . . . . The assumption as well as the aim of that Act [of 1934] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other."[211]

205. *Id.* at 752-53.

206. 45 U.S.C. § 152, Fifth (1970):

> No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

207. International Ass'n of Machinists v. Street, 367 U.S. 740, 754 (1961). *See* 40 OP. ATTY. GEN. 254 (1942).

208. International Ass'n of Machinists v. Street, 367 U.S. 740, 757 (1961).

209. *Id.* at 758.

210. *Id.* at 759.

211. *Id.* at 760 (quoting Elgin, Joliet & Eastern Ry. Co. v. Burley, 352 U.S. 711, 752 (1945) (Frankfurter, J., dissenting)).

This unique role for railway laborers' unions caused them to incur great expenses. Because of this fact, those unions sought the right to bargain for closed shop clauses, in order to avoid having to benefit "free riders." Congress accepted this argument and enacted section 152, Eleventh, in 1951.[212] Those who voted for the legislation were aware that its provisions might be abused in order to impair free speech. To counteract this objection, the unions had proposed a proviso that employees could not be discharged for lack of union membership if they lost such membership for any reason other than failure to pay dues or fees.[213] The final version enacted by Congress incorporated both the language of this proviso and further amendments indicating that "fees" meant "initiation fees" and that failure to remit did not encompass nonpayment of fines and penalties.[214] A Presidential Emergency Board said of the result:

> Indeed, Congress gave very concrete evidence that it carefully considered the claims of the individual to be free of arbitrary or unreasonable restrictions resulting from compulsory unionism. It did not give a blanket approval to union-shop agreements. Instead it enacted a precise and carefully drawn limitation on the kind of union-shop agreements which might be made. The obvious purpose of this careful prescription was to strike a balance between the interests pressed by the unions and the considerations which the Carriers have urged. By providing that a worker should not be discharged if he was denied or if he lost his union membership for any reason other than nonpayment of dues, initiation fees, or assessments, Congress definitely indicated that it had weighed carefully and given effect to the policy of the arguments against the union shop.[215]

Thus, the plurality in *Street* disposed of the speech issue on statutory, not constitutional grounds. It did so in stark contrast to Justice Douglas' separate concurrence, which dealt with the constitutional issues raised[216] and Justice Black's dissent, which found a clear-cut denial of First Amendment rights.[217]

The holding in *Street* was therefore based upon: (1) the precise legislative history underlying the enactment of section 152, Eleventh, (2) the policy evinced by Congress toward the efforts at self-adjustment engaged in

212. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 761-62 (1961).

213. *Proposed Amendments to the Railway Labor Act: Hearings on H.R. 7789 Before the House Comm. on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 247 (1950).

214. *Id.* at 257.

215. REPORT OF PRESIDENTIAL EMERGENCY BD. NO. 98 at 6 (1951), *quoted in* International Ass'n of Machinists v. Street, 367 U.S. 740, 767-68 (1961).

216. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 775-79 (1961) (Douglas, J., concurring).

217. *Id.* at 788-91 (Black, J., dissenting).

by labor and management within the railway industry, and (3) the historical circumstances that caused railroad laborers' unions to acquire a great degree of responsibility with regard to bargaining and negotiation within the industry. One could argue that these factors militate against applying the doctrine of *Street* to other contexts. In fact, however, courts have shown little hesitancy in doing so. Thus, a number of federal decisions have indicated that *Street* might be applied by analogy to cases arising under the union shop provision of the National Labor Relations Act.[218] Similarly, in *Lathrop v. Donohue*,[219] four justices of the Supreme Court believed that the doctrine of *Hanson* could be extended to uphold a Wisconsin statute creating an integrated bar to which all practicing attorneys within the state must pay dues; they never reached the applicability of *Street* because of the absence of a sufficiently detailed factual record.[220] But here, Justice Douglas, the "swing vote" in *Street*, broke ranks, describing *Hanson* "as a narrow exception to be closely confined."[221] Actually, this restrictive view, which appears to coincide with that of Justice Powell in *Abood*,[222] is too narrow. The doctrines of *Street* are susceptible to extension, but surely they ought to be extended only if factual circumstances similar to those present in that case are shown to exist.

Such a showing was not made in *Abood*. The Court noted that Michigan law was, to some extent, cut from the federal template,[223] but it neither demonstrated that the responsibilities of municipal employees' unions are as

218. *See, e.g.*, Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1128 n.3 (9th Cir. 1976); Evans v. American Fed'n of Television & Radio Artists, 496 F.2d 305, 309 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 411, 412-13 (10th Cir. 1971). Linscott v. Millers Falls Co., 440 F.2d 14, 16-17 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003 (9th Cir. 1970). Indeed, the logic of *Street* has been utilized to defeat claims arising in unrelated statutory contexts. *See, e.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 403-04 (9th Cir. 1974) (cited *Street* to reject a religious discrimination claim under the Civil Rights Act of 1964); Marker v. Schultz, 485 F.2d 1003, 1004-05 (D.C. Cir. 1973), *aff'g* Marker v. Connally, 337 F. Supp. 1301, 1303-04 (D.D.C. 1972) (relied on *Street* to reject a constitutional challenge to provisions of the Internal Revenue Code granting tax exemptions to labor unions using dues to finance partisan political campaigns); Jensen v. Yonamine, 437 F. Supp. 368, 374-76 (D. Hawaii 1977) (relied on *Abood* and *Street* to reject a constitutional challenge to state municipal employees regulatory laws); Lohr v. Association of Catholic Teachers, Local 1776, 416 F. Supp. 619, 622-23 (E.D. Pa. 1976) (used *Street* to reject a claim based on 42 U.S.C. § 1985(3) (1970)).

219. 367 U.S. 820 (1961).

220. *Id.* at 843.

221. *Id.* at 884 (Douglas, J., dissenting). The other four justices also reached the merits of the constitutional issue presented. Three of them would have upheld the validity of the statute. *See id.* at 848 (Harlan J., concurring, joined by Frankfurter, J.); *id.* at 865 (Whittaker, J., concurring). The other justice would not. *See id.* at 865 (Black, J., dissenting).

222. *See* 431 U.S. at 245-50 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.)

223. *See id.* at 223-24. *See* notes 109-114 and accompanying text *supra*.

extensive as those of railway laborers' bargaining representatives, nor did it show that such unions and municipalities have historically worked in behalf of a policy of self-adjustment. More importantly, the legislative history of section 423.210(1)(c) was never even discussed. Rather, it was said that "[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue."[224] The Court in *Street* did not rely upon presumptions; it occupied eighteen pages with an analysis of the history preceeding the enactment of section 152, Eleventh,[225] before arriving at any conclusions. By failing to engage in any similar scrutiny, the Court in *Abood* endorsed an irresponsible extension of *Street*.

As for the defendants' feeble attempts to distinguish *Abood* from *Hanson* and *Street*, the Court's abrupt rejection of them is understandable. As noted earlier,[226] governmental action was clearly involved in *Hanson*, so the prior case may not be differentiated on that ground. As for the argument that collective bargaining in the public sector is inherently "political," this is a legitimate contention, but it is one more relevant to the objection against applying the remedy advanced by *Street* rather than to that against establishing the applicability *vel non* of *Street*'s limited recognition of the union shop.

(b) Applicability of the *Street* Remedy

The Michigan court of appeals in *Abood* declined to apply the doctrine of *Street*, saying "[i]n the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore the plaintiffs are not entitled to relief on this basis."[227] This sentiment seems to be supported by language in *Street* itself:

> Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of [section 152], Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities. From these considerations, it follows that the present action is not a true class

224. *Id.* at 225.

225. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 750-68 (1961).

226. *See* note 145 and accompanying text *supra*.

227. Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 102, 230 N.W.2d 322, 327 (1975).

> action, for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes . . . . Thus we think that only those who have identified themselves as opposed to political uses of their funds are entitled to relief in this action.[228]

Under this logic, two requirements would seem necessary: a showing that the plaintiffs put the union on notice about their objections to its use of their contributions and a showing that they objected to specific expenditures for political purposes.

But this thesis is undermined by *Brotherhood of Railway & Steamship Clerks v. Allen*.[229] There, it was said:

> Respondents' amended complaint alleges that sums exacted under the [union shop clause in question] "have been and are and will be regularly and continually used by the defendant unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs." This allegation sufficiently states a cause of action. It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to any political expenditures by the union. But we made clear in *Street* that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." . . . At trial, only 14 of the respondents testified that they objected to the use of exacted sums for political causes. No respondent who does not in the course of the further proceedings in this case prove that he objects to such use will be entitled to relief. This is not and cannot be a class action.[230]

Allen liberalized considerably the rule of *Street*.[231] Under *Allen*, specific allegations need not be made; mere general objections would suffice. Moreover, as the *Allen* Court observed in a footnote, a dissident's protests would be adequate if the union was first informed of them in the plaintiffs' complaint.[232] The appellants in *Abood* could certainly claim the benefits of *Allen*'s relaxation of the doctrine of *Street*. Thus, though they failed to

228. International Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961). *Accord*, Hosteller v. Brotherhood of R.R. Trainmen, 294 F.2d 666, 667 (4th Cir. 1961), *cert. denied*, 368 U.S. 955 (1962).

229. 373 U.S. 113 (1963).

230. *Id.* at 118-19.

231. There is, however, a question about the extent to which the doctrine of *Allen* applies outside its statutory context. Thus, in Lathrop v. Donohue, 367 U.S. 820 (1961), *see* notes 219-221 and accompanying text *supra*, the plurality applying *Street* and *Hanson* said the issues raised by those cases were not ripe for decision because "[n]owhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position . . . ." *Id.* at 845-46. The Court in *Allen* dismissed this statement, saying it "was made in the context of *constitutional* adjudication, not statutory as here." 373 U.S. at 119 n.5 (emphasis in original). In *Abood*, the Court simply ignored this definite qualification placed upon the doctrine of *Street*.

232. 373 U.S. at 119 n.6.

specify the expenditures they disliked, Warczak and Abood could always cure that deficiency during further trial proceedings. Similarly, while at least some of the appellants communicated their displeasure to the union prior to instituting the lawsuit in question,[233] those that failed to do so would not, under *Allen*, be precluded from obtaining redress as long as their protests were incorporated in the language of the complaint. There was, however, one other problem. Warczak lodged a class action in the state court. When the Michigan trial court granted a summary judgment against her, it never addressed the propriety of her attempt to seek class relief. The Supreme Court noted this fact, but said it had "no occasion to address the question whether an individual employee who is not a named plaintiff but merely a member of the plaintiff class is, without more, entitled to relief under *Street* and *Allen* as a matter of federal law."[234] But after *Street* and *Allen*, there would not seem to be any question left on this subject. Both cases indicate that these types of suits, by their very nature, cannot be class actions, at least to the extent that relief is sought for persons, other than the named plaintiffs, who had not objected generally to the use to which the union put the compulsory assessments in question. By characterizing the problem as something left undecided by *Street* and *Allen*, the Court suggests that the remedial aspects of those two decisions might be broadened even further.

But the discussion in *Abood* implies an even more profound problem. Is the type of practical decree endorsed by *Street* and *Allen* useful in cases involving public employee unions? Implementation of such a decree would require a court to do what was not done in *Abood*, that is, draw the line between "political" and "nonpolitical" expenditures. The Supreme Court admitted that in the public sector such a line may be "somewhat hazy."[235] One notable effort at line-drawing in a case arising in the private sector has been made by Judge Harry Pregerson in *Seay v. McDonnell Douglas Corp.*:[236]

> Now, based upon my consideration of [the union security provision in the National Labor Relations Act] and of *Street* and *Allen* and of other relevant court decisions, this is where I am thinking of drawing the line. Dissenting employees in an agency fee situation should not be required to support financially union expenditures as follows:
>
> One, for payments to or on behalf of any candidate for public office in connection with his campaign for election to such public office, or

233. *See* 431 U.S. at 212 n.2.

234. *Id.* at 242 n.43.

235. *Id.* at 236.

236. 371 F. Supp. 754 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976).

> Two, for payments to or on behalf of any political party or organization, or
>
> Three, for the holding of any meeting or the printing or distribution of any literature or documents in support of any such candidate or political party or organization.
>
> . . . .
>
> Now, as to expenditures for other purposes, regardless of their political nature, if that is the proper characterization, I feel that they are sufficiently germane to collective bargaining to require dissenting employees who are subject to union shop or agency fee agreements to bear their share of that burden.[237]

Judge Pregerson's statement illustrates the practical difficulties in applying the *Street* doctrine. He acknowledges that some "political" expenditures are so relevant to collective bargaining that a dissident may be compelled to support them, but he says that subsidies to candidates or parties are simply too political or ideological for the purposes of compulsory assessments from non-affiliated members of an agency shop. However, the distinction falls apart when a particular candidate endorses changes in labor laws beneficial to the union's bargaining position but his opponent does not, or where a particular political party is identified with the interests of organized labor but others espouse platforms or policies inimical to those interests. Justice Frankfurter states the point forcefully in his dissent in *Street*:

> When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, it seems rather naive for a court to conclude—as did the trial court—that the union expenditures were "not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents." The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. And the Court accepts briefs as *amici* from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor. It disrespects the wise, hard-headed men who were the authors of our Constitution and our Bill of Rights to conclude that their scheme of government requires what the facts of life reject. As Mr. Justice Rutledge stated: "To say that labor unions as such have nothing of value to contribute to that process [the electoral process] and no vital or legitmate interest in it is to ignore the obvious facts of political and economic life and of their increasing inter-relationship in modern society." *United States v. CIO*, 335 U.S. 106, 129, 144 [1948] (concurring opinion joined in by Black,

237. 371 F. Supp. at 761 n.7 (quoting statement from the bench, June 9, 1972).

> Douglas, and Murphy, J.J.) . . . . Is it any more consonant with the facts of life today . . . to say that the tax policies of the National Government—the scheme of rates and exemptions—have no close relation to the wages of workers; that legislative developments like the Tennessee Valley Authority do not intimately touch the lives of workers within their respective regions; that national measures furthering health and education do not directly bear on the lives of industrial workers; that candidates who support these movements do not stand in different relation to labor's narrowest economic interests than avowed opponents of these measures? Is it respectful to the modes of thought of Madison and Jefferson projected into our day to attribute to them the view that the First Amendment must be construed to bar unions from concluding, by due procedural steps, that civil-rights legislation conduces to their interest, thereby prohibiting union funds to be expended to promote passage of such measures?[238]

Justice Frankfurter's basic point is sound: in today's society, one cannot readily distinguish between political and apolitical expenditures. One cannot say that the costs of collective bargaining do not include those expenses necessary to ensure that the candidate more congenial to the interests of labor is elected to office or that a particular piece of legislation favoring unionism is enacted. The ideological, political and economic interests of labor in industrialized nations are inseparable and any attempt to cut the Gordian knot binding them requires a return to a pre-Victorian concept of society that courts cannot afford to make.

Justice Frankfurter's comments about private-sector unions are even more accurate with respect to the collective bargaining representatives of public employees. These representatives have to deal with elected or appointed officials entrusted with the task of making political decisions, with officials accountable to the electorate for any decision actually made. Hence, it may be vital for collective bargaining purposes to ensure that an official hostile to the union is not re-elected or that a party that opposes the withdrawal of the right to strike from public employees has its candidates voted into office. Because the employer is the state, the costs of fostering pro-union public sentiment or ensuring that the elected level of the bureaucratic hierarchy is composed of persons amenable to granting public employees contractual benefits similar to those enjoyed by workers in the private sector may be even more necessary than the costs associated with negotiating or administering a collective bargaining agreement. Both the majority and Justice Powell's concurrence in *Abood* admit that such bargaining in the public sector is inherently political or ideological.[239] The

238. International Ass'n of Machinists v. Street, 367 U.S. 740, 814-16 (1961) (Frankfurter, J., dissenting) (footnotes omitted).

239. *See* 431 U.S. 266-28; *id.* at 257-58 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.). The majority in *Abood* did note that constitutional inquiry does not turn on the

problem with the former's analysis is that if the line is to be drawn between what is and what is not "germane" to collective bargaining before an appropriate remedy can be devised, courts may be compelled to accomplish that task by resorting to the type of unsatisfactorily conclusory distinctions used by Judge Pregerson in the *Seay* case.

Of course, one could avoid such problems by circumscribing the scope of the adjective "germane" so that it encompasses only those expenses directly related to negotiation and administration of a given contract. But the majority evinced no inclination to define the term so restrictively. Although it refused to engage in the task of line-drawing on the basis of the scanty record before it, it did assert that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process."[240] The net effect of *Abood* is to complicate severely the judicial task of line-drawing and thus make the fashioning of an appropriate remedy based on the results achieved by engaging in that task all the more difficult. As a consequence of this complication, the Court suggests that perhaps the more optimal resolution of the entire problem will emanate from the unions themselves rather than from the judiciary. Indeed, the majority in *Abood* rather sanguinely observed that it could avoid anticipating constitutional questions in the case because the Detroit Federation of Teachers had adopted its own internal remedy, which might possibly eliminate further controversy.[241] This optimism is premature. As the Court also noted, if dissidents

label "political." *Id.* at 231-32. It did so despite the fact that *Street*, which it relied on, does focus on that label. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 & n.17. (1961). Instead, the majority in *Abood* substitutes for the adjective "political" the more nebulous concept of "ideological." *See* 431 U.S. at 236. Although Justice Powell would disagree, *see id.* at 254 n.9 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.), the semantic alteration does not appear to have effected any great change in the doctrine of *Street*.

240. 431 U.S. at 236.

241. *Id.* at 240 n.41. *See* note 171 *supra*. There is the distinct possibility that the Court in *Abood* is interpolating into the *Street* type of case the requirement heretofore recognized generally in suits involving claims of denial of fair representation by a union, that all internal union remedies must be exhausted before a complainant can sue in federal court. *See, e.g.*, Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213-14 (1944); Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969); Foy v. Norfolk & Western Ry. Co., 377 F.2d 243, 246 (4th Cir. 1967); Neal v. System Bd. of Adjustment, 348 F. 2d 722, 726 (8th Cir. 1965); Detroy v. American Guild of Variety Artists, 286 F.2d 75, 78 (2d Cir.), *cert. denied*, 366 U.S. 929 (1960); Fingar v. Seaboard Air Line R.R. Co., 277 F.2d 698, 700-701 (5th Cir. 1960); Gainey v. Brotherhood of Ry. & S.S. Clerks, 275 F.2d 342, 345 (3d Cir.), *cert. denied*, 363 U.S. 811 (1960). If so, this would be a significant development, for limitations on the doctrine of fair representation have heretofore been thought not

found the union's remedy constitutionally deficient, they could always raise a challenge to it through the judicial system.[242] Thus, it is probably accurate to predict that unless judges totally abdicate their duties and defer to the union's judgment about the propriety of its own means of redress, they will soon find themselves lost in the thorny constitutional thicket sown by the decision in *Abood*.

(c) First Amendment Implications

As Justice Powell noted, the majority, by applying *Hanson* and *Street*, eschewed any attempt to utilize the analysis traditionally applied to public employees' claims that retention of their jobs is contingent upon acquiescing to an abridgment of their First Amendment rights. The traditional analysis was stated succinctly by the plurality opinion in *Elrod v. Burns*,[243] which held that the First Amendment was violated when a non-civil service employee of a county sheriff's office was discharged for refusing to affiliate himself with the newly-elected sheriff's political party:

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . ." *Buckley v. Valeo*, [424 U.S. 1], at 65. Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes*, 414 U.S. [51, 58 (1973)]. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. . . . The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights . . . and the Government must "emplo[y] means closely drawn to avoid unnecessary abridgement. . . ." *Buckley v. Valeo*, *supra*, at 25. "[A] State may not choose means that unnecessarily restrict constitutionally protect-

to apply in the *Street* type of case. *See* Browne v. Milwaukee Bd. of School Directors, 69 Wis. 2d 169, 180-81, 230 N.W.2d 704, 710 (1975). It should be noted that the union's adoption of an internal remedy after litigation had begun did not make the case moot. *See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1130 (9th Cir. 1976).

242. 431 U.S. at 242 n.45. This has happened. *See* note 171 *supra*.

243. 427 U.S. 347 (1976). The plurality in this case consisted of Justices Brennan, White and Marshall. The decisive votes were provided by the separate concurrence of Justice Stewart, joined by Justice Blackmun, who said: "[t]he single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot." *Id.* at 375 (Stewart, J, concurring, joined by Blackmun, J.)

> ed liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, *supra*, at 59 (citations omitted).[244]

By not following such an analysis in *Abood*, the majority did several important things. First, as Justice Powell observed,[245] the burden of proof was shifted from the state to the complainant. By *presuming* that Michigan intended to preserve stable labor relations and further the doctrine of exclusivity when its legislature enacted section 423.210(1)(c), the majority obviated any necessity for the state to assert an interest of vital importance. Thus, the burden of proof usually imposed upon the government to justify its infringement of a First Amendment right disappears. In lieu of it, the plaintiff, pursuant to *Street* and *Allen*, must not only prove that he objects to use of the sums exacted from him for political or ideological purposes, but he must also prove that the union in fact expended some monies for reasons unrelated to collective bargaining, although he need not demonstrate that his specific payments were part of those monies.[246] This shift of the burden of proof is not as dramatic as Justice Powell implies. He suggests that it is novel for the nonunion employee to have to initiate a lawsuit to vindicate his rights,[247] but even under the usual First Amendment analysis, it is the aggrieved individual who generally files a complaint to which the state raises a defense. Moreover, as *Allen* indicates, the complainant objecting to compulsory assessments by a union can avoid stringent problems of proof if he drafts his pleadings with even minimal care.[248] Second, under the majority's analysis, the state can pass a law authorizing contractual provisions for the closed shop without having to concern itself about establishing justifiably compelling interests in the legislative record. This is so because the Court in *Abood* indicates that it is willing, of its own accord, to conclude that the doctrine of exclusivity is, by definition, a paramount

244. *Id.* at 362-63. On the need to show the existence of a compelling state interest in First Amendment cases, *see* Williams v. Rhodes, 393 U.S. 23, 31-33 (1968); NAACP v. Button, 371 U.S. 415, 438, 444 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464-66 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945). On the need for the state to choose the least restrictive alternative in regulating speech, *see* United States v. Robel, 389 U.S. 258, 268 (1967); Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See generally* Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464 (1969).

245. 431 U.S. at 263-64 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.)

246. *Id.* at 241. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961).

247. *See* 431 U.S. at 263-64 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.)

248. *See* Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 118-19 (1963).

interest.[249] This alacrity demonstrated by the majority in *Abood* contrasts sharply with the Court's reluctance in *Madison*[250] to find that the exclusivity principle cannot be used to justify the denial to a public employee of the right to speak on a certain subject at a public forum.[251] Thus, as Justice Powell observes, there is a distinct tension between the two decisions that is simply not acknowledged by the majority in *Abood*.[252] Third, and most problematic, is the majority's conclusion that a dissident employee is not barred from engaging in a meaningful dialogue with his employer on the subjects of collective bargaining through other means, such as the franchise, or politics or statements to the public. In light of the broad doctrine in *Elrod*, it seems anomalous to conclude that it is permissible to infringe the freedom of speech of an individual in one respect because that individual has alternative channels of communication available to him.[253] Indeed, if this argument is controlling in *Abood*, one wonders why it failed to prove decisive in *Madison*, where the employees denied access to a public forum could have sought to express their views through letters to newspapers, or through public service statements on radio or the like. The clear implication of *Madison* is that a claimed abridgement of constitutional rights may not be dismissed by saying that the abridgement was less than absolute and did not foreclose all opportunities to exercise those rights.

One is thus left with a basic question: how can *Madison* and *Abood* be reconciled with respect to their differing concepts of how the principle of exclusivity limits the guarantees of the First Amendment? One approach may be to consider the level of abridgement involved in each case. *Madison* concerned what was essentially a prior restraint on speech;[254] *Abood* in-

249. *See* 431 U.S. at 225.

250. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

251. *See* notes 67-104 and accompanying text *supra*.

252. *See* 431 U.S. at 261 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.)

253. Indeed, some abridgements justified by reference to the logic of *Street* may be characterized as involving situations where the employee has no meaningful alternative. This is particularly true where courts have refused to accept claims that union shops permitted by federal labor legislation violate the rights of employees whose religious scruples prevent them from either joining or paying fees to unions. *See, e.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 404 (9th Cir. 1974); Hammond v. United Papermakers & Paper-Workers Union, 462 F.2d 174, 175 (6th Cir. 1972), *cert. denied*, 409 U.S. 1028 (1973); Linscott v. Millers Falls Co., 440 F.2d 14, 18 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1064, 1071-72 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); CIBA-Giegy Corp. v. Local No. 2548, United Textile Workers, 391 F. Supp. 287, 300 (D.R.I. 1975). In these cases, the alternatives for a minority employee are few indeed. Either he must find employment where no union shop exists, which may often be impossible, or he must surrender his right to practice his religion freely as a condition of retaining his job.

254. *See* City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 177 (1976).

volved a far less drastic infringement. Moreover, the Court in *Abood* was able to arrive at the very decision it reached because of *Madison*. It reasoned that since *Madison* assured dissident members of a union access to public forums, the relatively lesser restriction involved in *Abood* could be accepted in the interests of preserving stable labor conditions, since the dissident would never be totally deprived of a platform from which to state his views.[255] In conclusion, the effect of *Abood* is to extend further the exception to the traditional First Amendment analysis created by *Street* and to suggest very definite limits to the libertarian philosophy espoused in *Madison*.

3. *Commercial Speech*

a. The First Amendment and Self-Regulation of Professions: *Bates v. State Bar of Arizona*

In 1976, the Supreme Court unveiled a new doctrine[1] when it held, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[2] that commercial speech was entitled to some protection under the First Amendment. The exact scope of the rule announced in that case was not well-defined; indeed, the Court surrounded the rule with many qualifica-

255. 431 U.S. at 230.

1. This innovation had been adumbrated by the Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975). That decision struck down a Virginia law proscribing the advertisement of abortions. VA. CODE ANN. § 18.1-63 (1960). In so holding, the Court said:

> We conclude, therefore, that the Virginia courts erred in their assumption that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.

421 U.S. at 825. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973) (ordinance prohibiting newspapers from carrying help-wanted advertisements in gender-designated columns except where based on a bona fide occupational exemption upheld; Court noted that any "First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity"); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (advertisement containing factually erroneous defamatory content held entitled to the same degree of protection as that accorded ordinary speech; the fact "[t]hat the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold").

2. 425 U.S. 748 (1976). *See generally* Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761, 792-97 (1976) [hereinafter cited as *Constitutional Status*]; Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 215-22 (1976) [hereinafter cited as *New Constitutional Doctrine*].

tions, acknowledging that commercial speech is distinguishable from other types of expression. But in its decision in *Bates v. State Bar of Arizona*,[3] the Court added a number of refinements to the doctrine of *Virginia Pharmacy Board* which may have the distinct effect of expanding that doctrine considerably.

(1) The Decision

John Bates and Van O'Steen are attorneys licensed to practice law in the State of Arizona. Consequently, they are members of the integrated bar of that state.[4] From 1972 to mid-1974, they worked as counsel for the Maricopa County Legal Aid Society. In March of the latter year, however, they left the Society and opened their own legal clinic in Phoenix. Their stated aim was to "provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid."[5] In order to effectuate this aim, they decided to accept only "routine" legal matters, such as uncontested divorces, uncontested adoptions, formal filings of bankruptcy and proceedings to legally change one's name. They deliberately set their rates at a level at which they would not earn much return per individual case. Therefore, the success of their clinic depended both upon a low overhead, maintained by the extensive use of paralegals, automatic typewriters and standardized forms and office procedure, and their ability to attract a volume business. After two years, the appellants concluded that their practice could not survive unless they resorted to advertising. Consequently, on February 22, 1976, they placed an advertisement in the *Arizona Republic*, a daily newspaper of general circulation in the Phoenix metropolitan area. That commercial solicitation promised legal services at "very reasonable fees" and included the following price schedule:

> • Divorce or legal separation—uncontested [both spouses sign papers]
> $175.00 plus $20.00 court filing fee

3. 97 S. Ct. 2691 (1977).

4. *See* ARIZ. SUP. CT. R. 27(a), 17A ARIZ. REV. STAT. 84-85 (1973):

> 1. In order to advance the administration of justice according to law, . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this Court an organization known as the State Bar of Arizona, and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this Court. . . .
>
> . . . .
>
> 3. No person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the bar.

5. 97 S. Ct. at 2694.

- Preparation of all court papers and instructions on how to do your own simple uncontested divorce
$100.00
- Adoption—uncontested severance proceeding
$225.00 plus approximately $10.00 publication cost
- Bankruptcy—non-business, no contested proceedings
Individual
$250.00 plus $55.00 court filing fee
Wife and Husband
$300.00 plus $110.00 court filing fee
- Change of name
$95.00 plus $20.00 court filing fee
Information regarding other types of cases furnished on request.[6]

This act by appellants concededly violated the American Bar Association Rule 2-101(B),[7] which had been adopted by the Supreme Court of Arizona.[8] That rule prohibits an attorney from publicizing or authorizing another to publicize himself or other lawyers. The president of the state bar promptly filed a complaint. A hearing was held before a three-member Special Local Administrative Committee, which recommended that each of the appellants be suspended from practice for six months or more.[9] On review, the Board of Governors of the State Bar, convinced that Bates and

6. *Id.* at 2710. After the appearance of this advertisement, business did increase, although it is unclear whether this was due to the advertisement itself or the news stories generated by it. *Id.* at 2694 n.4.

7. ABA DISCIPLINARY RULE NO. 2-101(B) (1976):

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(6) In communications by a qualified legal assistance program, along with the biographical information permitted under DR 2-102(A)(6) [*see* note 25 *infra*] directed to a member or beneficiary of such organization.

8. ARIZ. SUP. CT. R. 29(a), 17A ARIZ. REV. STAT. 84-85 (1973).

9. 97 S. Ct. at 2695.

O'Steen undertook "an earnest challenge to the validity of a rule they conscientiously believed to be invalid,"[10] reduced the potential sanction to a one-week suspension for each man, the penalties to run consecutively. On appeal, three of the five justices on the state supreme court rejected antitrust, First Amendment, equal protection, vagueness and due process challenges to the rule in question.[11]

The United States Supreme Court reversed in part. Speaking for the majority, Justice Blackmun, joined by Justices Brennan, White, Marshall and Stevens first rejected the contention that any justiciable antitrust claim was presented by this case.[12] He then went on to analyze the First Amendment issues at stake. In this regard, Justice Blackmun asserted that "the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori*"[13] from the Court's previous decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[14]

That case had involved a state law declaring that a pharmacist was guilty of "unprofessional conduct" if he advertised prescription drug prices.[15] A federal district court struck down the law on First Amendment

10. Matter of Bates, 113 Ariz. 394, 396, 555 P.2d 640, 642 (1976).

11. *See id.* at 397-400, 555 P.2d at 643-46 (Cameron, C.J., joined by Struckmeyer, V.C.J.); *id.* at 401-02, 555 P.2d at 647-48 (Gordon, J., concurring).

12. The plurality opinion in the state supreme court had found that the rule in question was "an activity of the state of Arizona acting as sovereign." *Id.* at 397, 555 P.2d at 643. The plurality therefore applied the rule laid down by the Supreme Court in Parker v. Brown, 317 U.S. 341, 352 (1943), which held that restraints on trade imposed by an act of government are exempt from regulation under the Sherman Act, 15 U.S.C. §§ 1, 2 (1970). On appeal, the United States Supreme Court also applied *Parker*. In doing so, however, it had to distinguish two prior rulings. The first was Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which had held that a minimum attorney fee schedule implemented by two county bar associations violated section one of the Sherman Act. The Court in *Goldfarb* never reached the exemption problem, noting that it did not need to "inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent." *Id.* at 790. The Court in *Bates* noted that the same was obviously not true in the case of Arizona. 97 S. Ct. at 2697. *See* note 8 and accompanying text *supra*. The second distinguished case was Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). There, an electric utility distributed free light bulbs to its residential customers and included the costs of this service in its state-regulated utility rates. The Court held that a private entity in such circumstances could not rely on the exemption of *Parker*. *Id.* at 594-95. But, unlike *Bates*, the Court in *Cantor* emphasized (1) that the claim was directed against a private party, not the state, *id.* at 585-92, 600-01, and (2) that the state had no independent regulatory interest in the market for light bulbs, *id.* at 584-85. Neither of these factors were said to be present in *Bates*. 97 S. Ct. at 2697-98. *See generally* Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475 (1977); Note, *The State Anti-trust Exemption: The Confinement of the Parker Doctrine within the Emerging Cantor Formula*, 29 HASTINGS L.J. 211 (1977).

13. 97 S. Ct. at 2700.

14. 425 U.S. 748 (1976).

15. VA. CODE ANN. § 54-524.35 (1974).

grounds, concluding that it infringed the consumer's right to receive information necessary to decisions concerning how to preserve his health.[16] On appeal, the Supreme Court affirmed. Discrediting prior cases that had suggested that commercial speech was not protected by the First Amendment,[17] the Court ruled that the guarantee of freedom of speech does safeguard the right to advertise drug prices.[18] Merely because an advertisement proposed a mundane commercial transaction did not mean that it was unprotected. Not only had previous decisions indicated that such expressions were shielded by the Constitution,[19] but also the consumer's interest in receiving such a communication and thus being able to make those intelligent decisions necessary to the functioning of a free enterprise economy required the extension of First Amendment safeguards to such speech.[20] In response to this argument, the State of Virginia proffered a number of

16. Virginia Citizens Consumer Council v. Virginia State Bd. of Pharmacy, 373 F. Supp. 683, 686 (E.D. Va. 1974). The case was thus distinguished from an earlier decision in a suit brought by a drug company where the statute had been upheld against a constitutional challenge. Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969). Indeed, later decisions applying the new commercial speech doctrine have relied extensively on the public's right to be informed. *See, e.g.*, Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977); Louisiana Consumer's League v. Louisiana State Bd. of Optometry Examiners, 557 F.2d 473, 475 (5th Cir. 1977); Consumers Union of United States v. American Bar Ass'n, 427 F. Supp. 506, 520 (E.D. Va. 1976); American Meat Institute v. Ball, 424 F. Supp. 758, 768-69 (W.D. Mich. 1976); Health Sys. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 267, 272 (E.D. Va. 1976); Terminal-Hudson Electronics, Inc. v. Department of Consumer Affairs, 407 F. Supp. 1075, 1079 (C.D. Cal. 1976); Jacoby v. State Bar, 19 Cal. 3d 359, 368-69, 562 P.2d 1327, 1337, 138 Cal. Rptr. 77, 83-84 (1977).

17. The most important case in this respect is Valentine v. Chrestensen, 316 U.S. 52 (1942). There, the Court sustained a municipal ordinance that had been interpreted to ban the dissemination of a handbill advertising the exhibition of a submarine. It noted that while the First Amendment restricts abridgement of expression of opinion, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial speech." *Id.* at 54. *See also* Breard v. Alexandria, 341 U.S. 622, 642-44 (1951); Jamison v. Texas, 318 U.S. 413, 417 (1943); Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 29 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); United States v. Hunter, 459 F.2d 205, 211 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); New York State Broadcasters Ass'n, Inc. v. United States, 414 F.2d 990, 998-99 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Banzhaf v. FCC, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969); Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 132 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974); Jenness v. Forbes, 351 F. Supp. 88, 96-97 (D.R.I. 1972); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972). *See generally Constitutional Status, supra* note 1, at 763-92; *New Constitutional Doctrine, supra* note 1, at 207-13.

18. 425 U.S. at 773.

19. *See* note 1 *supra*. *See* 425 U.S. at 759-60.

20. *Id.* at 763-65. For discussions on the right to receive information in this context, *see generally* Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); Comment, *Advertising of Professional Fees: Does the Consumer Have a Right to Know?* 21 S.D.L. REV. 310 (1976).

justifications for its policy. It argued that advertising would foster a competitiveness that might cause pharmacists to delete those extra professional services, such as quality-controlled packaging or supplemental prescriptive advice, as an economizing measure. The state also asserted that advertising would induce consumers to shop around, thus precluding them from patronizing one pharmacist who would be familiar with their normal intake of drugs and their possible allergic reactions to certain chemicals. Finally, the state urged that advertising would undermine the profession's prestige.[21] The Court deemed these justifications inadequate. High professional standards were assured by the totality of the state's regulatory scheme, and the Virginia legislature's belief that citizens could be best protected by ensuring their ignorance was said to represent a far too "paternalistic" approach at odds with the logic of the First Amendment.[22]

Having summarized *Virginia Pharmacy Board* in such a fashion, the Court in *Bates* catalogued those issues not presented by the case. First, it noted that no questions were presented relating to the quality of legal services. Justice Blackmun admitted that "[s]uch claims are not susceptible to precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."[23] Second, the Court observed that no issue was tendered with respect to in-person solicitation of clients. "Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising."[24] Third, Justice Blackmun remarked that the appellee's criticism of attorney advertising did not apply to the publicizing of basic factual information in reputable law lists or legal directories, as is permitted by the American Bar Association's disciplinary rule 2-102(A)(6).[25]

21. 425 U.S. at 766-68.
22. *Id.* at 768-70.
23. 97 S. Ct. at 2700.
24. *Id.*
25. *Id.* The rule in question states that the following information is permitted:
The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates, to the extent not prohibited by the authority having jurisdiction under state law over the subject; a statement that practice is limited to one or more fields of law, to the extent not prohibited by the authority having jurisdiction under state law over the subject of limitation of practice by lawyers; a statement that the lawyer or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject of specialization by lawyers and in accordance with rules prescribed by that authority; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees and other scholastic distinctions; public or quasi-public offices; military service; posts of

Thus, the crux of the problem confronting the Court was that of the permissibility of price advertising. The state offered six justifications for its regulatory scheme, all of which the majority in *Bates* rejected. The first proffered justification was that advertising would lead to commercialization of the legal profession, which in turn would undermine an attorney's sense of dignity and self-esteem. But Justice Blackmun observed that the public is undoubtedly well aware that lawyers are not altruistic, that they offer their services for payment.[26] Indeed, in light of the fact that the American Bar Association advises an attorney to settle financial arrangements with a new client as soon as possible,[27] one could hardly expect that the public would be ignorant of the commercial aspects of the practice of law.[28] As for the argument that advertising would reduce an attorney's self-esteem, the Court noted that other professions advertise,[29] and that "cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients."[30] In sum, the ban on attorney advertising was dismissed "as a rule of etiquette and not as a rule of ethics."[31]

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honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references and, with their consent, names of clients regularly represented; whether credit cards or other credit arrangements are accepted; offices and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject. This proviso is not applicable in any state unless and until it is implemented by such authority in that state.

ABA DISCIPLINARY RULE NO. 2-102(A)(6) (1976).

26. 97 S. Ct. at 2701. *See also* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 152-53 (1970) [hereinafter cited as CHRISTENSEN].

27. ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION NO. 2-19 (1976).

28. 97 S. Ct. at 2701.

29. *Id. See also* CHRISTENSEN, *supra* note 26, at 151-52; Note, *Advertising Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1190 (1972) [hereinafter cited as *Profession's Duty*].

30. 97 S. Ct. at 2702. Indeed, the Court noted that many people do not obtain counsel because of the feared price of services, *see* ABA REVISED HANDBOOK ON PREPAID LEGAL SERVICES 26 (1972) [hereinafter cited as ABA HANDBOOK]; E. KOOS, THE FAMILY & THE LAW 7 (1948); P. MURPHY & S. WALKOWSKI, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES 2-3 (1973) [hereinafter cited as MURPHY & WALKOWSKI], or because they believe they will not obtain competent services, *see* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 96 (1974). 97 S. Ct. at 2702 & nn.22 & 23.

31. 97 S. Ct. at 2702.

Second, Arizona argued that advertising by lawyers is inherently misleading (a) because legal services are so individualized as to prevent meaningful comparison by reference to an advertisement, (b) because the consumer of such services is unable to predetermine his needs and (c) because such advertising will highlight everything but the relevant factor of skill. Justice Blackmun retorted that only routine services would ever be publicized.[32] "Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price."[33] Indeed, until 1975, the Maricopa County Bar Association and the state bar's legal service program maintained schedules of standardized rates.[34] As for the diagnostic aspect of the state's argument, the Court observed tartly that most people visit attorneys in order to have a specific legal task done, not to merely "ascertain if they have a clean bill of legal health."[35] Finally, with respect to the contention that advertising provides an incomplete foundation on which to select an attorney, the Court concluded that preclusion of any dissemination of price information only exacerbates consumer ignorance and that the public is intelligent enough to recognize the limitations of advertising.[36]

Third, the state claimed that publicity would have the undesirable effect of fomenting litigation. To counter this contention, the majority pointed out that advertising would prevent the underutilization of lawyers and ensure that more people would have greater access to the courts.[37] This

32. Indeed, unique services would probably never be advertised at fixed prices. *See generally* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 741 (1977); *Profession's Duty*, *supra* note 29, at 1203.

33. 97 S. Ct. at 2703.

34. *Id.*

35. *Id.* at 2704.

36. *Id.* The Court also rejected the contention that advertising provides an unwholesome substitute for reputational information. It said that such "word of mouth" referrals simply do not provide a basis for selection in today's heterogeneous, urbanized cities. *Id.* n.31. *See also* CHRISTENSEN, *supra* note 26, at 128-35; Note, *Bar Restrictions on Dissemination of Information about Legal Services*, 22 U.C.L.A. L. REV. 483, 500 (1974); Note, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 VA. L. REV. 1135, 1156-57 (1976).

37. For evidence that many Americans never utilize attorneys, see ABA HANDBOOK, *supra* note 30, at 2; MURPHY & WALKOWSKI, *supra* note 30, at 1; Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A.J. 1092, 1092-95 (1971). Indeed, the Court had previously held that collective activity undertaken to facilitate access to the courts is protected by the First Amendment. *See* United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971) (First and Fourteenth Amendment permit a union to solicit damage suits from members); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217, 222-24 (1967) (First and Fourteenth Amendments give unions the right to hire attorneys on a salaried basis to assist union members in asserting their legal rights); Brotherhood of Ry. Trainmen v. Virginia State

underutilization was said to be due mainly to an inability to locate a suitable attorney.[38] Consequently,

> [a]dvertising can help solve this acknowledged problem: advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist is [*sic*] making legal services fully available."[39]

Fourth, Arizona argued that advertising would increase overhead costs, which in turn would be passed on to the consumer. Moreover, these additional costs were said to create another barrier to entry for young attorneys. The Court responded by arguing that the published evidence, inconclusive as it was, suggested that advertising would reduce prices.[40] Moreover, to the extent that publicizing price information furthers competition, it might cause prices to fall, yet there would be no resultant loss of

Bar, 377 U.S. 1, 7 (1964) (First and Fourteenth Amendments protect the right of union members, through their brotherhood, to operate a program for advising injured members to obtain legal advice from recommended attorneys); NAACP v. Button, 371 U.S. 415, 438-40 (1963) (First and Fourteenth Amendments protect NAACP's solicitation of civil rights suits for its attorneys, who were paid solely by the Association). From these cases one commentator has derived the conclusion that the Court focused:

> not on the right of attorneys to advertise and solicit but rather on the importance of assuring that those aggrieved receive information regarding their legal rights and the appropriate means of effectuating them. . . . Viewed in such a context, advertising and solicitation conducted by private attorneys deserves, if anything, *more* protection than that by attorneys affiliated with organizations like the NAACP or the United Mine Workers. Potential clients who are so dispersed, disorganized, and powerless that they cannot organize their own litigation programs would seem to be in even greater need of information regarding their legal rights than those who at least possess the strength required to generate their own litigation activities.

Profession's Duty, *supra* note 29, at 1186. *See* Freeman & Bass, P.A. v. State of New Jersey Comm'n of Investigation, 359 F. Supp. 1053, 1057 (D.N.J.), *vacated on other grounds*, 486 F.2d 176 (3d Cir. 1973); Jacoby v. State Bar, 19 Cal. 3d 359, 375, 562 P.2d 1326, 1337, 138 Cal. Rptr. 77, 87-88 (1977). *See also* Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. CIV. RIGHTS—C.R. C.L. REV. 77, 87 (1973).

38. *See* note 30 *supra*.

39. 97 S. Ct. at 2705 (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION NO. 2-1 (1976)).

40. 97 S. Ct. at 2706. *See* J. CADY, RESTRICTED ADVERTISING & COMPETITION: THE CASE OF RETAIL DRUGS (1976); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. L. & ECON. 337 (1972). *See also* Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); Nelson, *Advertising and Consumer Behavior*, 79 J. POL. ECON. 311 (1970). *But see* Comanor & Wilson, *Advertising Market Structure & Performance*, 49 REV. OF ECON. & STATISTICS 423, 437 (1967); Kaldor, *The Economic Aspects of Advertising*, 18 REV. OF ECON. STUDIES 1, 26 (1950) (both suggesting that advertising, to the extent it creates brand loyalties, encourages oligopoly profit-taking).

income to attorneys because the overall volume of business would increase.[41] As for the putative barrier to entry, Justice Blackmun noted that, absent advertising, an attorney must rely on communal contacts developed over time, a factor which would serve to perpetuate the predominant market position of established lawyers.[42]

Fifth, the state claimed that to the extent that advertising will detail a "package" of services at a set price, attorneys will be inclined to provide that package, regardless of a client's actual needs. But the Court said shoddy work could not be effectively deterred by restrictions on publicity.[43] Moreover, Justice Blackmun remarked that standardized services, such as those offered by Bates and O'Steen, might very well improve the quality of the legal services rendered by minimizing the likelihood of error.[44]

Finally, the state contended that enforcement of restrictions only against deceptive or misleading attorney advertising would be unfeasibly difficult. Ex post facto action by a consumer might not provide a pragmatic restraint because a layman might find it difficult to appraise the competency of the services rendered to him. However, the Court noted that this justification depended on the fallacious assumption that most attorneys would engage in overreaching. It adopted a contrary presumption and claimed that the majority of honest lawyers would be diligent in disciplining their less ethical colleagues.[45] Thus, none of the state's proffered justifications passed constitutional muster.

But the problem remained that the appellants had deliberately violated the law. Nevertheless, under the doctrine of overbreadth developed in other First Amendment cases, a plaintiff could challenge the validity of a law by demonstrating that it had a chilling effect on protected speech, even though his conduct was not protected.[46] The Court noted, however, that:

> the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was noted

41. *See* Frierson, *Legal Advertising*, 2 BARRISTER 6, 8 (1975); Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A.J. 586, 588 (1975).

42. 97 S. Ct. at 2706-07.

43. *Id.*

44. *Id.*

45. 97 S. Ct. at 2707. *Accord*, Consumers Union of United States v. American Bar Ass'n, 427 F. Supp. 506, 519-20 (E.D. Va. 1976).

46. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975); Grayned v. City of Rockford, 408 U.S. 104, 114-21 (1972); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); NAACP v. Button, 371 U.S. 415, 432 (1963). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847-48 (1970). As such, the doctrine represents a departure from the traditional rules of standing. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 59 n.17 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

> in *Virginia Pharmacy Board v. Virginia Consumer Council* . . . there are "commonsense differences" between commercial speech and other varieties. . . . Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. . . . Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. . . . Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," . . . we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective.[47]

Was, then, the appellants' advertisement outside the scope of First Amendment protection? The state contended that Bates and O'Steen had engaged in deceptive practices in three respects: (a) they never defined the term "legal clinic," (b) their "very reasonable price" for an uncontested divorce was, in fact, excessive and (c) the consumer was never informed that a name change could be obtained without the services of an attorney.[48] In reply, Justice Blackmun observed that the public probably knew what a "legal clinic" generally meant (*i.e.*, an operation geared to providing standardized services); that because the price of an uncontested divorce ranged between $150 and $300 in the Phoenix metropolitan area, the total quoted sum of $195 was reasonable; and that while most services performed by an attorney can be done by the layman himself, the latter may, in light of the procedural complexities involved, nevertheless desire expert assistance.[49] Thus, the Court concluded that the advertisement in question could not be suppressed.[50]

In so concluding, however, Justice Blackmun cautioned that attorney advertising could always be subject to some regulation. Thus, false or deceptive publicizations could be controlled.[51] So could advertising relating

47. 97 S. Ct. at 2707-08 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

48. *Id.* at 2708.

49. *Id.* On the last point, see Faretta v. California, 422 U.S. 806, 812-34 (1975) (reaffirming right of accused defendant in a criminal prosecution to represent himself); ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION NO. 3-7 (1976).

50. 97 S. Ct. at 2708.

51. *Id. Accord*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976). *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 758-60 (D.C. Cir. 1977) (upheld FTC order requiring makers of Listerine mouthwash to disclose in its advertisements that the product will not cure sore throats caused by the common cold); J.B. Williams Co. v. FTC, 381 F.2d 884, 891 (6th Cir. 1967) (upheld FTC order requiring manufacturers of Geritol to disclose that their product will relieve symptoms of weariness only in persons suffering from iron deficiency anemia, a relatively rare malady); Feil v. FTC, 285 F.2d 879, 896-98 (9th Cir. 1960) (upheld FTC order requiring makers of an anti-bedwetting device to disclose

to claims of quality, which are unverifiable, or in-person solicitation, where the potential for overreaching is more pronounced.[52] The Court even observed that the state might require that advertisements such as that prepared by Bates and O'Steen be supplemented by a disclaimer cautioning the unwary or unsophisticated.[53] Finally, it left open the possibilities for restraint with respect to time, place and manner;[54] to advertisements of illegal transactions;[55] and to advertisements disseminated through the electronic broadcast media.[56]

Chief Justice Burger dissented in part, claiming that the doctrine of *Virginia Pharmacy Board* should be limited to its factual context, the advertisement of a prepackaged, standardized product.[57] In contrast, he believed that "standardized" legal services are a fiction because a potential client can never gauge beforehand what assistance he will require.[58] Moreover, he concluded that the difficulties of enforcement created by the majority's ruling would unduly tax the resources of integrated bars.[59] Thus,

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that it would be of no value in cases caused by organic defects or diseases); Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 955 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960) (upheld FTC order requiring sellers of treatment for baldness to disclose that the treatment would be useless with respect to alopecia caused by heredity, age or endocrinal imbalances); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 23 (5th Cir. 1960) (same). *See generally* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477 (1971).

52. 97 S. Ct. at 2709.

53. *Id.*

54. *Id. Accord*, Carey v. Population Servs., Int'l, 431 U.S. 678, 700 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976). For the Court's most extensive discussion of the meaning of the time, place and manner exception, see Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 92-94 (1977). *See* notes 155-304 and accompanying text *infra*.

55. 97 S. Ct. at 2709. *Accord*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772-73 (1976). *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 121-22 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973) (upheld statute prohibiting blockbusting, *i.e.*, the initiation and encouragement of rumors that blacks are moving into a given area so that market values of residences in that area will decline); United States v. Hunter, 459 F.2d 205, 211 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (upheld statute prohibiting the publication of a racially discriminatory notice relating to the sale or rental of a dwelling).

56. 97 S. Ct. at 2709. *Accord*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 (1976). *See, e.g.*, Banzhaf v. FCC, 405 F.2d 1082, 1101-03 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969) (affirmed FCC ruling requiring cigarette advertisers on radio and television to disclose that smoking may be a health hazard); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972) (upheld federal law banning all cigarette advertising in the electronic media).

57. 97 S. Ct. at 2710 (Burger, C.J., concurring in part and dissenting in part).

58. *Id.* at 2711.

59. *Id.*

Chief Justice Burger said that the twin goals of informing the public and policing the profession "can best be served by permitting the organized bar to experiment with and perfect programs which would announce to the public the probable *range* of fees for specifically defined services and thus give putative clients some idea of potential cost liability when seeking out legal assistance."[60] Justice Rehnquist also dissented in part, reiterating his view, expressed previously in the *Virginia Pharmacy Board* case,[61] that commercial speech does not merit constitutional protection.[62]

The remaining and most elaborate partial dissent was that of Justice Powell, joined by Justice Stewart. He too argued that *Virginia Pharmacy Board* had left unresolved the constitutional permissibility of restraints on professional advertising. He further argued that, unlike product advertising, such publicization is far more susceptible to abuse and far more difficult to police.[63] Like the Chief Justice, Justice Powell said legal services are rarely "routine" or "standardized"; the type of advice and assistance rendered will usually vary with the needs of the client.[64] Moreover, he criticized the majority's view that the reasonableness of a fee is to be judged solely by reference to prices charged in the locality for similar services.[65] The American Bar Association does not employ such a simplistic analysis,[66] and its reluctance to do so is proper: $195 might be "reasonable" for one divorce, but not for another, depending upon the level of services actually rendered. Justice Powell also contended that the bar is ill-equipped to monitor attorney advertising in order to determine its truthfulness. He said that in view of the fact that there are 400,000 lawyers in this country, the most feasible means of policing the profession was that traditionally utilized, namely, "discipli-

60. *Id.* (emphasis in original).

61. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 781-90 (1976) (Rehnquist, J., dissenting).

62. 97 S. Ct. at 2719-20 (Rehnquist, J., concurring in part and dissenting in part).

63. *Id.* at 2713 (Powell, J., concurring in part and dissenting in part, joined by Stewart, J.).

64. *Id.* at 2713-14.

65. *Id.* at 2714-15.

66. *See* ABA DISCIPLINARY RULE No. 2-106(B) (1976), which lists the following factors to be taken into account when setting a fee:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly.

(2) The likelihood, if apparent to the Client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitation imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the service.

(8) Whether the fee is fixed or contingent.

nary proceedings conducted initially by voluntary bar committees subject to judicial review."[67] Moreover, the very concept of "misleading" professional advertising is not one capable of being tested empirically, as might be the case with false claims about a product:

> But there is simply no way to test "empirically" the claims made in appellants' advertisement of legal services. These are serious difficulties in determining whether the advertised services fall within the Court's undefined category of "routine services"; whether they are described accurately and understandably; and whether appellants' claim as to reasonableness of the fees is accurate. These are not factual questions for which there are "truthful" answers; in most instances, the answers would turn on relatively subjective judgments as to which there could be wide differences of opinion. These difficulties with appellants' advertisement will inhere in any comparable price advertisement of specific legal services. Even if public agencies were established to oversee professional price advertising, adequate protection of the public from deception, and of ethical lawyers from unfair competition, could prove to be a wholly intractable problem.[68]

Additionally, Justice Powell noted that integrated bars and the American Bar Association itself had not been deaf to pleas for relaxing regulations on attorney advertising. The integrated bars had introduced or endorsed a variety of programs to improve public access to capable lawyers, including group legal service plans, state-operated lawyer referral programs, bar-sponsored legal clinics, public service law firms and group insurance legal plans.[69] The American Bar Association had amended rule 2-102(A)(6) of the Code of Professional Responsibility to permit far more information to be printed in law directories.[70] In light of these difficulties, Justice Powell asserted that he would place great emphasis on the qualifications to the general ban against regulation of advertising announced by the majority.[71] Nevertheless, he concluded:

> In this context, the Court's imposition of hard and fast constitutional rules as to price advertising is neither required by precedent nor likely to serve the public interest. One of the great virtues of federalism is the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good. The constitutionalizing—indeed the affirmative encouraging—of

67. 97 S. Ct. at 2715.

68. *Id.* at 2716.

69. *Id.*

70. *Id.* at 2716-17. *See* note 25 *supra*. It should be noted that on August 10, 1977, the House of Delegates of the American Bar Association promulgated new rules permitting only that advertising allowed by 2-102(A)(6) and the sort of price publicity deemed protected by *Bates*. *See* 46 U.S.L.W. 1-12 (Aug. 23, 1977).

71. 97 S. Ct. at 2717-18.

> competitive price advertising of specified legal services will substantially inhibit the experimentation that has been underway and also will limit the control heretofore exercised over lawyers by the respective States.[72]

(2) Analysis

In order best to scrutinize some of the problems raised by *Bates*, it will be useful to bifurcate the analysis of that case. Thus, the first section that follows will discuss to what extent *Bates* is inconsistent with *Virginia Pharmacy Board*. The second section will deal with the problems created by *Bates* with respect to the commercial speech doctrine in general.

(a) **Consistency with Precedent**

The Arizona Supreme Court in *Bates* dealt with the First Amendment in an extremely cursory fashion. It did so because of its perception that the problem had been resolved by dicta in the United States Supreme Court's two leading decisions on commercial speech, *Bigelow v. Virginia*[73] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[74] In the former case, the Court observed that merely because it held that some advertising was constitutionally protected, "[o]ur decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity."[75] It then cited a series of rulings beginning with *Semler v. Oregon State Board of Dental Examiners*,[76] which affirmed the broad powers of the state to regulate professional activity, including professional advertising.[77] A simi-

72. *Id.* at 2718-19.

73. 421 U.S. 809 (1975). *See* note 1 *supra*.

74. 425 U.S. at 748 (1976). *See* notes 14-22 and accompanying text *supra*.

75. 421 U.S. at 825 n.10.

76. 294 U.S. 608 (1935). The Court in *Semler* upheld an Oregon statute which prohibited various types of advertising by dentists. In doing so, it said "[t]he legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement." *Id.* at 613.

77. *See, e.g.*, North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164-66 (1973) (state law requiring one who operates a pharmacy to be either a pharmacist in good standing or a corporation owned by pharmacists in good standing held not to violate the due process clause of the Fourteenth Amendment); Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 431-32 (1963) (right of a state to restrict advertising by optometrists through the electronic media upheld against a federal pre-emption challenge); Williamson v. Lee Optical Co., 348 U.S. 483, 487-91 (1955) (law prohibiting solicitation of the sale of optical appliances and requiring only licensed optometrists and ophthalmologists to fit or duplicate lenses sustained against due process and equal protection claims); Barsky v. Board of Regents, 347 U.S. 442, 456 (1954) (law requiring disciplinary action against a physician convicted for contempt of the House Committee on Un-American Activities, upheld, finding no due process

lar restraint seemed to be evinced by the Court in *Virginia Pharmacy Board*. The final footnote in the majority opinion of that case is as follows:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.[78]

Chief Justice Burger's concurrence in the *Virginia Pharmacy Board* case amplified this point:

> As the Court notes . . . quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " . . . Attorneys and physicians are engaged primarily in providing services in which professional judgment is a large component, a matter very different from the retail *sale* of labeled drugs already prepared by others.[79]

After quoting these passages, the Arizona court claimed it could find no constitutional violation in the rule in question.[80] This reliance was misplaced. While Chief Justice Burger was clearly willing, even in 1976, to permit regulation of attorney fee advertising, the language in the majority's footnote suggests that only specific subcategories of such advertising may be subject to restriction.[81] Thus, *Bates* does not exactly conflict with the letter of *Virginia Pharmacy Board*.

But it may conflict with the spirit of that prior case. As noted earlier, *Virginia Pharmacy Board* announced several exceptions to the generality that commercial speech is protected by the First Amendment.[82] One of these was contained in its assertion that governmental regulation of false or misleading publicization was always permissible.[83] The question then re-

violation). For per curiam decisions applying *Semler*, *see, e.g.*, Toole v. Michigan State Bd. of Dentistry, 316 U.S. 648 (1942); Orwitz v. Board of Dental Examiners, 313 U.S. 546 (1941), Brown v. Massachusetts, 308 U.S. 504 (1939).

78. 425 U.S. at 773 n.25 (emphasis in original).

79. *Id.* at 774 (Burger, C.J., concurring) (emphasis in original).

80. Matter of Bates, 113 Ariz. 394, 397-99, 555 P.2d 640, 643-45 (1976).

81. *Accord*, Consumers Union of the United States v. American Bar Ass'n, 427 F. Supp. 506, 518 (E.D. Va. 1976); Matter of Bates, 113 Ariz. 394, 403, 555 P.2d 640, 649 (1976) (Holohan, J., dissenting).

82. *See* notes 51-56 and accompanying text *supra*.

83. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 (1976).

mains, is the advertisement of Bates and O'Steen sufficiently deceptive to be subject to control? If so, then the state's attempt at suppression in this case might very well be justifiable under the teachings of *Virginia Pharmacy Board*. The evidence on this subject was inconclusive. The quoted total price of $195 for an uncontested divorce was not the lowest quotation possible, but it was also not so excessive as to be unreasonable.[84] The other items were more troublesome. One was the fact that the clinic's advertisement failed to advise the reader that he could legally change his name by himself. The Supreme Court did not find this fact troublesome, however; it noted that there was a possibility that the complexity of the necessary procedures might deter a layman from acting on his own, and that one of the appellants had claimed that in the simplest of cases, he frequently would send the client to effect the change himself.[85]

But these observations are largely irrelevant. While it may be true that an individual can perform many legal services himself without great difficulty, how many laymen realize this fact without being so informed? There is a great difference between what one can do and what one knows he can do. Justice Gordon, who concurred specially in the state court's decision in *Bates*, underscored this issue. As he pointed out, the appellants offered an uncontested adoption for $225 plus $10 in publication costs, but pursuant to Arizona law, the county attorney, upon application, is required to process such an adoption without expense to the petitioner.[86] The clinic's advertisement neglects to disclose this vital information. Indeed, the appellant quoted by Justice Blackmun in his opinion admitted candidly that "it's not my job to inform a prospective client that he needn't employ a lawyer to handle his work."[87] The cumulative effect of these nondisclosures is to raise a serious

84. 97 S. Ct. at 2708.

85. *Id.* Actually, the process of changing one's name in Arizona is relatively simple:

> A. When a person desires to change either his christian or surname or both, and to adopt another name, he may file an application in the superior court of the county of his residence, setting forth reasons for the change of name and the name he wishes to adopt. The court may enter judgment that the adopted name of the party be substituted for the original name.

ARIZ. REV. STAT. § 12-601(A) (West 1956).

86. Matter of Bates, 113 Ariz. 394, 401, 555 P.2d 640, 647 (1976) (Gordon, J., concurring). *See* ARIZ. REV. STAT. § 8-127 (West Cum. Supp. 1977-78):

> The county attorney of the county in which the petitioner resides, shall, upon application of the person or persons seeking adoption, prepare the petition therefore and act as attorney without expense to the petitioner, but in the event the petition is contested the county attorney may, with the consent of the court, withdraw from further representation of any party to the proceeding and the petitioner shall at his own expense employ counsel. A filing fee of twenty dollars shall be paid to the clerk of the court in adoption proceedings. Any person contesting any adoption proceeding shall pay a fee of ten dollars to the clerk of the court.

87. 97 S. Ct. at 2708 n.36.

issue about whether or not the advertisement in question was, if not false, at least misleading. As the Court noted, the misleading character of advertising is generally ascertained with references to the sophistication of the audience which it reaches.[88] The intended audience for Bates' and O'Steen's advertisement was that composed of middle-income laymen, the very group that the Court acknowledges all too rarely seeks legal advice.[89] How are such people to know that they do not need an attorney to effectuate a name change, or that the county will process an uncontested severance proceeding without charge? Obviously, they are not likely to know these facts of their own accord, and their ignorance in this respect accentuates the fact that the Court gave inadequate consideration to the argument that the advertisement in question fell within the deception exception stated in *Virginia Pharmacy Board*, because it failed to consider the many effects such publicity might have upon those who are exposed to it.

Beyond this narrow difficulty, there looms a larger problem, adverted to by both Chief Justice Burger and Justice Powell in *Bates*.[90] That problem may be summarized as follows: legal fee advertising is inherently deceptive, because it purports to present a fixed price for services that are, by necessity, variable in nature and dependent upon the particularized needs of the individual client. The majority in *Bates* sidesteps this criticism by saying that the only services capable of being advertised are routine ones, such as the uncontested divorce or bankruptcy.[91] But, again, the question remains, how routine is a routine service? As Justice Powell says,

> This definitional problem is well illustrated by appellants' advertised willingness to obtain uncontested divorces for $195 each. A potential client can be grievously misled if he reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property, tax refunds and tax liabilities; and the disposition of other property rights. The processing of the court papers—apparently the only service appellants provide for $195—is usually the most straightforward and least demanding aspect of the lawyer's responsibility in a divorce case. More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries

88. *See, e.g.*, FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937); Feil v. FTC, 285 F.2d 879, 897 (9th Cir. 1960); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944); Stanley Laboratories, Inc. v. FTC, 138 F.2d 388, 392-93 (9th Cir. 1943); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942); D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942); Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910).

89. *See* 97 S. Ct. at 2705.

90. *See id.* at 2711 (Burger, C.J., concurring and dissenting in part); *id.* at 2713-15 (Powell, J., concurring in part and dissenting in part, joined by Stewart, J.).

91. *Id.* at 2703.

> of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem. Although those professional functions are not included within appellants' packaged routine divorce, they frequently fall within the concept of "advice" with which the lay person properly is concerned when he or she seeks legal counsel. The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product. As a result, the type of advertisement before us inescapably will mislead many who respond to it.[92]

An equally pointed criticism is made by Judge Warriner in his dissent in *Consumers Union of the United States v. American Bar Association*.[93] The majority in that case, prior to the decision in *Bates*, struck down as overbroad a Virginia disciplinary provision also incorporating the proscriptions contained in the American Bar Association's rule 2-101(B).[94] Judge Warriner argued that fee schedules for anything other than an attorney's initial consultation were inherently deceptive.

> It is true that a standard residential deed ought to cost about $20. It is not true, however, that the client shopping for a lawyer on the basis of his fee necessarily knows what a "standard residential deed" is. Further, a lawyer doesn't know, in advertising his fee, whether the client will furnish the lawyer with the old deed so that he can sit at his desk and dictate the new deed, or whether the client is simply going to tell him that it was the house he inherited from his Uncle Josh Johnson who died in 1937—necessitating the lawyer going to the clerk's office to get the description and derivation of title. There should be a difference in the fee charged in the two instances and yet the product in each case is nothing but a "standard residential deed." I have drawn deeds where working out the derivation of title has taken hours. I added a surcharge for the time. Yet the product was a standard residential deed.
>
> Even when a lawyer painstakingly explains to a client the variables that will be considered in arriving at a fee but nevertheless gives him an approximation of what the lawyer thinks the fee will be, the thing the client remembers is the figure mentioned. The client generally does not remember that the lawyer told him

92. *Id.* at 2713-14 (footnotes omitted) (Powell, J., concurring in part and dissenting in part, joined by Stewart, J.).

93. 427 F. Supp. 506, 525-31 (E.D. Va. 1976).

94. *See* note 7 *supra*. Unlike *Bates*, however, the challenge in this case was initiated by a consumer organization interested in publishing a directory detailing, *inter alia*, the fees and billing practices of the attorneys of Arlington County. 427 F.Supp. at 509-10. The court, relying on *Virginia Pharmacy Board*, found the rule violative of First Amendment rights. *See id.* at 518-20. It therefore ordered that a ban on non-fee information, *i.e.*, data on professional reputation and expertise, would only rarely be justified. *Id.* at 521-22. As for fee information, the court noted that some items, *e.g.*, hourly rates, billing and credit practices, would not be inherently deceptive if publicized, although others, *e.g.*, fixed fees for unique work, might be. *Id.* at 522. But the provision containing 2-101(B) failed to distinguish between those two categories of information and thus was struck down as overbroad. *Id.* at 523.

> that it was an approximation and that he told him that the variables might increase the fee substantially. How much more will the client be misled and become distrustful of the law and lawyers when the lawyer charges more for his service than he advertised in black and white?
>
> If one can casually conjure up examples where the standard residential deed can't be standardized, how much more troublesome is the problem in the areas of uncontested divorce, change of name, uncontested adoption and the like? In my experience there simply isn't any such thing as a "standard" service. Even after a lawyer has heard a client's explanation of the service desired, most lawyers are hesitant in quoting a flat fee. Most prefer to quote a range within which the fee is likely to fall. They do this not to be obscure or to mislead, but because experience has taught them that *only* when you have performed the service can you know for sure what it is worth.[95]

Two related arguments are presented by Justice Powell and Judge Warriner. The first is that, unlike a prepackaged drug, legal services are not capable of being standardized; thus, any attempt to quote one fixed fee is likely to deceive the layman. This assertion is something of an overstatement. Apart from initial consultations or hourly fees, there would seem to be a variety of legal tasks that could be routinized to the extent that a specific sum will cover the costs incurred in servicing every client who is willing to accept minimal, standardized performance on the part of the attorney. In fact, the Supreme Court emphasized that it is limiting its discussion of fee advertising to this very type of routinized task.[96] But by doing so, it raises the second question advanced by Justice Powell and Judge Warriner: how does the consumer know what the advertiser means by a label like an "uncontested divorce?" The consumer might expect that the $195 divorce fee quoted in the *Arizona Republic* would include all those diagnostic and counselling services to which Justice Powell referred. But Bates and O'Steen defined the term more narrowly; they expected to do no more than the minimal paperwork and appearances necessary to have the divorce made final.[97] If a client desired more, he would be undoubtedly told to take his business elsewhere. The problem is that what the attorney means by the label used in his advertisement and what the client perceives that label to signify may very well be two entirely different things. As a result, it is easy to visualize how an attorney could take advantage of a potential client's misperception; he could advertise his services for a divorce at an extremely low sum, lure people into his office and then tell them that if they desired a full range of diagnostic services, there would have to be innumerable

95. 427 F. Supp. at 528 (Warriner, J., concurring in part and dissenting in part) (emphasis in original).

96. *See* 97 S. Ct. at 2703.

97. *Id.* at 2694.

surcharges added to the figure quoted in the advertisement. There is no suggestion that Bates and O'Steen committed such practices; nevertheless, one can only wonder how many people who responded to the advertisement in the *Arizona Republic* fully realized what level of services they would be getting for their money.

Justice Blackmun was not insensitive to this problem. But he suggested that the bar could always compel the advertiser to define the exact nature of the service being rendered.[98] Moreover, any misunderstanding would undoubtedly be exposed at the initial consultation, at which time the potential client could withdraw his patronage and be dunned only a nominal charge for the time spent, or accept a higher price after negotiating with the attorney.[99] But, as Judge Warriner suggests, how does this help the credibility of the profession? Either way, the client is likely to feel that a lawyer has used the power of advertising as a means to lull the former's suspicions, cajole him into the latter's office and present him with the Hobson's choice of no services at all, services unsuited to the client's needs or suitable services rendered at a cost above that which the advertisement led the client to expect. The potential result of any appreciable number of such transactions would probably be the exacerbation of the cynical assumption shared by many laymen that lawyering is a ruthlessly mercenary profession.

This analysis raises a related concern. In *Jacoby v. State Bar*,[100] the California Supreme Court was presented with a case where the petitioners opened a low cost legal clinic that attracted the attention of the news media.[101] Disciplinary proceedings were instituted against petitioners as a result of various interviews they gave to journalists, which had the predictable effect of publicizing their activities.[102] In rejecting the claim that the petitioners were guilty of solicitation,[103] and in finding that their activities were shielded by the First Amendment, the court said:

98. *Id.* at 2703-04 n.28.

99. *Id.* at 2704 n.28.

100. 19 Cal. 3d 359, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977).

101. Indeed, unlike the appellants in *Bates*, Jacoby and Meyers distributed leaflets describing their clinic as the source of "high quality," low cost legal services. *Id.* at 382, 562 P.2d at 1341, 138 Cal. Rptr. at 92. (Richardson, J., dissenting). Thus, their advertisement went beyond that authored by Bates and O'Steen. Nevertheless, the majority opinion in *Jacoby* never decided the advertising issue. *Id.* at 380, 562 P.2d at 1340, 138 Cal. Rptr. at 91.

102. These activities included interviews with journalists and an open house at the clinic, sponsored by a statewide consumer organization, to which members of the news media were invited. *Id.* at 363-65, 562 P.2d at 1329-30, 138 Cal. Rptr. at 80-81.

103. In so doing, the court gave a rather strained construction to its previous ruling in Belli v. State Bar, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974). In that case, disciplinary proceedings were instituted against Melvin Belli for endorsing a brand of liquor, disseminating

> It can readily be seen, however, that such concerns [the potential for inherently misleading advertising and deliberate exaggeration through commercial speech] relate at most to paid advertisements written by or at the direction of the attorney himself, and to direct solicitation of clients by the attorney. The danger is not necessarily inherent in an attorney's cooperation with the publication of a news story. In order for an attorney intentionally to mislead the public through a bona fide news article it would be necessary for him first to convince reporters and editors that he is newsworthy, then induce them to print what he relates without verification and hope the public accepts the tale at face value. To project this scenario as likely to occur requires a cynical view of both journalistic integrity and public gullibility.[104]

Jacoby suggests that a key criterion in cases involving attorney advertising should be identifying the author of the publicity at issue, and according more exacting scrutiny to those cases, like *Bates*, where the author is the attorney himself.

The Supreme Court never took this factor into account in weighing the merits of Arizona's claim regarding the "regulation of deceptive publicity" exception announced in *Virginia Pharmacy Board*. But the point would seem to be a vital one, both with respect to this exception and to the contention raised by the state regarding the unfeasibility of policing the profession. If the *content* of fee advertising is prescribed by the state itself or by an impartial third party, the dangers of self-aggrandizement by unscrupulous attorneys would be minimized, and the inherently misleading nature of such advertising could be efficaciously counteracted.[105] Indeed,

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publicity praising his own talents in fulsome terms, seeking lecture dates and television time and conducting the so-called "Belli seminars" for laymen. The court said in that case:

> when the bar seeks to discipline an attorney for a communication incident to protected speech, in addition to showing that the attorney intended by his communication to generate business for his law practice . . . it must demonstrate that the communication or a part thereof was principally directed toward this end. We [advance a] belief that the speech interest prevails over the desire of the bar to minimize solicitation of legal business both because the former is anchored in the federal constitution and because it is properly accorded a fundamental position within that document.

Id. at 833, 519 P.2d at 581-82, 112 Cal. Rptr. at 533-34 (footnote omitted). In *Jacoby*, the court redefined the *Belli* rule in light of the Supreme Court's commercial speech cases and thus said:

> we synthesize *Belli* and *Bigelow* [v. Virginia, 421 U.S. 809 (1975)] by concluding that a communication is not "primarily directed" toward solicitation unless, viewed in its entirety, it serves no discernible purpose other than the attraction of clients. If a legitimate purpose appears on the face of the publication or in the demonstrated motivation of the attorney, the publication must receive at least prima facie First Amendment protection.

19 Cal. 3d at 371, 562 P.2d at 1134, 138 Cal. Rptr. at 85. As Justice Richardson noted, this is a "precipitous retreat" from *Belli*. *Id.* at 387, 562 P.2d at 1344, 138 Cal. Rptr. at 95 (Richardson, J., dissenting).

104. 19 Cal. 3d at 378, 562 P.2d at 1339, 138 Cal. Rptr. at 90.

105. Courts have struck down restrictions on professional fee advertisements where the party raising the challenge is a disinterested, independent consumer organization. *See* Consum-

the majority in *Bates* seemed to be implying just such a possibility. It noted that the state could compel the attorney-advertiser to insert suitable disclaimers, the language of which would presumably be formulated by the state itself, in his advertising copy[106] or could itself generate definitions of standardized services to be used in all fee advertisements.[107] The import of these statements is that the Court recognized the difficulties of enforcement and the possibility of abuse when a lawyer is writing his own publicity and, in effect, invited the bar to intervene and propose model advertising copy that attorneys could use for themselves. In sum, the Court's answer to the contention that Bates' and O'Steen's item in the *Arizona Republic* constituted deceptive advertising within the meaning of the exception created by *Virginia Pharmacy Board* was to decline to probe deeply the problems presented and instead hint that state bars might be given considerable latitude to prescribe prophylactic measures that would curtail the potential for deception.

Another area of regulation mentioned in *Virginia Pharmacy Board* and acknowledged by *Bates* is the time, place and manner restriction. Such a restriction must meet three prerequisities. It must (a) be justified without reference to the content of the regulated expression, (b) serve a significant government interest and (c) allow ample opportunity for access to alternative channels of communication.[108] A very sound argument could be made that 2-101(B) falls within the ambit of this exception. To date, that argument has been best presented by Judge Warriner's dissent in *Consumers Union of United States v. American Bar Association*:[109]

> I believe that DR 2-101, insofar as it regulates the advertising of fees, is a time, manner and place restriction. Accordingly, the balancing process should focus on the reasonableness of the restrictions in this context. I gleaned earlier from [*Virginia Pharmacy Board*] that prohibiting of lawyers' fees (other than an initial consultation) in order to prevent confusion and deception would be constitutionally permissible provided, (1) the regulation is the only feasible means of preventing the confusion or deception, (2) the consequence to the public of failure to so regulate would be severe, (3) alternative areas of communication of the desired information are not totally precluded, and (4) in addition to the

ers Union of the United States v. American Bar Ass'n, 427 F. Supp. 506 (E.D. Va. 1976); *see* note 94 *supra*; Health Sys. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E.D. Va. 1976); *see* note 141 *infra*.

106. 97 S. Ct. at 2709.

107. *Id.* at 2703-04 n.28.

108. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976). *See also* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977).

109. 427 F. Supp. 506 (E.D. Va. 1976). *See* notes 93-95 and accompanying text *supra*.

> above, the regulation is reasonable or justifiable in light of First Amendment considerations.[110]

In light of his prior discussion concerning the inherently confusing nature of attorney fee advertisement[111] and the acknowledged consequences of deceptive advertising, Judge Warriner said that the first two prerequisites were fulfilled.[112] As for alternative channels of communication, two options were presented. First, the potential client could always resort to an in-person consultation with an attorney.[113] Second, the language of 2-101(B) creates a restraint only upon attorneys; independent consumer groups could always compile and disseminate price information with complete immunity.[114] Thus, alternative channels of communication were present. As for the justifiability of the regulation, Judge Warriner observed that by reducing the possibility of misleading communications, the state was ensuring that the public's ignorance was not being exploited by unscrupulous professionals.[115] He also observed that unlike *Virginia Pharmacy Board*, where a ban on advertising did not affect professional standards because the advertisement in question concerned the sale of a product, "where a truly professional service is being rendered the quality thereof will have to suffer when the price through advertising is driven below a certain margin. And, unlike the substitution of ingredients in a drug, the shoddy will be difficult to ferret out."[116] Moreover, where the ban is imposed on the advertisement of virtually identical products, the preclusion of competition may be undesirable because the only variable is that of cost; "[b]ut where the product is an intricate and complicated professional service, allowing price advertising destroys the more important existing competition of quality without substituting a fair alternative measure with which to choose a lawyer."[117] Thus, the state's interest in regulation was a significant one.

Judge Warriner's points are well-taken. Certainly the state in *Bates* did not seek to regulate with reference to content. Indeed, it had adopted the American Bar Association's rule 2-102(A)(6), which permitted certain types of fee advertising in legal directories.[118] It is clear that regulations "clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression"[119] are unconstitutional. But the law

110. *Id.* at 529 (Warriner, J., concurring in part and dissenting in part).
111. *See* note 95 and accompanying text *supra*.
112. 427 F. Supp. at 529.
113. *Id.*
114. *Id.* at 530.
115. *See id.* at 530-31.
116. *Id.* at 531.
117. *Id.*
118. *See* note 25 and accompanying text *supra*.
119. Carey v. Population Servs. Int'l, Inc., 431 U.S. 678, 701 n.28 (1977). *Carey* ruled that a

in *Bates* was clearly directed at the manner rather than the substance of the speech in question; indeed, section 2-101(B) rather carefully outlines six exceptions where it is permissible to identify a lawyer by his profession as well as his name in the course of commercial announcements.[120] The governmental interest in regulating professional conduct was also not seriously disputed by the majority in *Bates*, which recognized the potential for confusion and deception in attorney fee advertising and indicated that the state did have considerable discretion in selecting a method by which to combat those problems.[121]

There is thus left the matter of alternative modes of communication. In-person consultation may not suffice. As the Court has noted elsewhere, "in a society in which each individual has but limited time and resources . . . he relies necessarily upon the press to bring him in convenient form the facts."[122] Many persons might thus find it difficult to question attorneys individually. But there are other alternatives, such as the publicizing efforts of impartial consumer groups, the many referral and group service legal plans suggested by Justice Powell[123] and the option provided by 2-102(A)(6), which permits attorneys to provide potential clients with individualized estimates of the cost of proposed legal services.[124] The Court in *Bates* never mentioned the suitability of the former two alternatives. The third was rather risibly dismissed with the observation that "an advertising diet limited to such spartan fare would provide scant nourishment."[125] In light of the fact that 2-102(A)(6) permits publicity with respect to twenty discrete items of information,[126] including the availability of fee schedules, this statement is rather fatuous. Indeed, the total failure of the Court even to consider the time, place and manner exception created by *Virginia Pharmacy Board* makes one wonder whether the balancing process engaged in by the majority in *Bates* was undertaken with any conscientiousness.

state law criminalizing the advertisement of contraceptives unconstitutionally abridged commercial speech.

120. *See* note 25 and accompanying text *supra*.

121. *See* notes 106-07 and accompanying text *supra*.

122. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). *Accord*, Health Sys. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 267, 273 (E.D. Va. 1976). As the court in the latter case points out, the presence of the alternative does not extinguish a First Amendment right, *see* Schneider v. State, 308 U.S. 147, 163 (1939), but it is a factor that must be weighed in the balancing process, *see* Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). 424 F. Supp. at 273.

123. 97 S. Ct. at 2716 (Powell, J., concurring in part and dissenting in part, joined by Stewart, J.).

124. *See* note 25 *supra*.

125. 97 S. Ct. at 2701. *See also* Consumers Union of United States v. American Bar Ass'n, 427 F. Supp. 506, 521 (E.D. Va. 1976).

126. *See* note 25 *supra*.

Moreover, the Court in *Bates* ignored one other element, the speech interests of the state of Arizona. According to *Bigelow v. Virginia*,[127] the state "may seek to disseminate information so as to enable its citizens to make better informed decisions"[128] about matters affecting their health and welfare. In *Bates*, unlike *Virginia Pharmacy Board*, the state and the bar were not merely suppressing information; they were also communicating facts to the public through authorized channels, through reputable law directories, bar-operated referral services, state-sponsored legal programs and so on.[129] The effect of Bates' and O'Steen's advertisement, then, was to interfere with the state's own speech activities by disseminating a type of information that the state deemed contrary both to the interests of the legal profession and to the goals of its own limited price advertising efforts.

To date, this possibility has been recognized by one case in this context, *American Meat Institute v. Ball*.[130] That decision upheld a Michigan statute requiring grocers and restauranteurs who sell meat or meat products that do not meet the standards set by the state for similar items produced and sold solely within its borders, to notify customers of that fact in a prescribed manner.[131] The court said:

> The source of a state's right of free speech may be threefold—sovereignty, and related to this, reserved powers under the Tenth Amendment, and finally, the First Amendment. The Bill of Rights, of course, was enacted at the insistence of the states as a guarantee of restraints on the federal government. While normally we think of the Bill of Rights as protection for individuals, there is no reason that at least some of these rights should not also apply to governmental units as well. For example, the federal government cannot take state property without due process.
>
> The Fourteenth Amendment, by incorporating the First Amendment, provides a vehicle for citizens to assert free speech rights against the state, but this does not mean that the state cannot also exercise rights of its own so long as they do not conflict with those of the people. When a state operates a public broadcasting facility, for example, it is acting in an area where freedom of expression is traditionally necessary and protected by the First Amendment. . . . This example is offered simply as one illustration of how states may exercise "free speech" rights. The opportunity for a state to communicate information to benefit the health and welfare of its citizen-consumers is a fundamental justification for the existence of such a right.[132]

127. 421 U.S. 809 (1975).

128. *Id.* at 824.

129. *See* 97 S. Ct. at 2703; *id.* at 2716-17 & n.9 (Powell, J., concurring in part and dissenting in part, joined by Stewart, J.).

130. 424 F. Supp. 758 (W.D. Mich. 1976).

131. MICH. COMP. LAWS ANN. § 289.584a (Supp. 1977).

132. 424 F. Supp. at 770.

Under this logic, Arizona was exercising its right of expression and, in doing so, came into conflict with the rights of Bates and O'Steen. At that juncture, since both interests emanate from the provisions of the First Amendment, the Court should have utilized a careful balancing process, one which would have analyzed both Arizona's constitutional interest in disseminating its own prescribed information on attorneys and the extent to which the alleged misinformation promulgated by the appellants infringed that interest. Instead, the Court assumed that the only speech rights at stake were those of the appellants, and thus cast the state in a defensive position from the beginning. In light of Arizona's own concern in providing accurate information to its citizen-consumers, the majority's omission seems anomalous.

(b) Implications of *Bates*

In one key respect, *Bates* differs from *Virginia Pharmacy Board*. In the latter case, the complainants consisted of consumers and nonprofit organizations representing the interests of consumers; in the former case, however, the complainants were the advertisers themselves. Clearly, both groups have vital interests; "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."[133] Nevertheless, the Court in *Virginia Pharmacy Board* identified "commonsense" differences between commercial speech and other types of expression:

> Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.[134]

The Court in *Virginia Pharmacy Board* used this assertion to buttress its conclusion that commercial expression might be accorded distinctive treatment; the state could tolerate fewer inaccuracies in such speech,[135] could

133. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976).

134. *Id.* at 771-72 n.24.

135. *See, e.g.*, Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 29-30 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1383-84 (7th

require an advertiser to insert disclaimers in his advertising copy[136] and could impose prior restraints.[137]

Because the complainants in *Bates* were advertisers themselves, the Court reached an issue not discussed in *Virginia Pharmacy Board*: the applicability of the overbreadth doctrine. It ruled that this doctrine applies weakly, if at all, in commercial speech cases because of the comparative durability of such speech and because the disseminator of such speech is more likely to know whether his expression is permissible.[138] This may be true with respect to Bates and O'Steen; they knew that they were breaking the law. But facial overbreadth claims have been upheld not only where the regulation in question could have been tailored more precisely so that protected speech would be uninfringed.[139] Such claims have also been said to exist where the law in question only purports to regulate the time, place and manner of communicative conduct or where it confers upon functionaries standardless discretionary power to approve or reject publication of a given item of speech.[140]

In these situations, it hardly seems that the durability of commercial expression will make much difference. While advertising may be the *sine qua non* of a mercantile system, it can be crushed if the state controls the media through which it must be transmitted. If an administrator delegated standardless powers can foreclose the major channels of communication to a given advertiser and thus undermine his ability to compete, it seems dubious to say that the law conferring such powers may not be challenged on

Cir. 1972); Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 438 F.2d 433, 437 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971). All these cases were defamation actions arising from false statements in credit reports. In each case, the court held that because commercial speech was at issue, the actual malice standard of liability for defamation announced in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), would not govern.

136. *See* cases cited in note 51 *supra*.

137. *See, e.g.*, Donaldson v. Reed Magazine, 333 U.S. 178, 189-91 (1948) (enforcement of order by postmaster general requiring the return to the sender of mail and money orders sent in response to advertisement for a puzzle contest); FTC v. Standard Educ. Soc'y, 302 U.S. 112, 120 (1937) (upheld cease and desist order directed against fictitious testimonials and recommendations used in advertising encyclopedias); E.F. Drew & Co., Inc., v. FTC, 235 F.2d 735, 739-40 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957) (upheld cease and desist order directed against use of certain phrases in advertisements for oleomargarine).

138. 97 S. Ct. at 2707-08. *See* note 47 and accompanying text *supra*.

139. *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 59-60 n.17 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973); Grayned v. City of Rockford, 408 U.S. 104, 114-18 (1972); Cameron v. Johnson, 390 U.S. 611, 617-19 (1968); Zwickler v. Koota, 389 U.S. 241, 249-50 (1967); Thornhill v. Alabama, 310 U.S. 88, 101-05 (1940).

140. *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 59-60 n.17 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 155-59 (1969); Cox v. City of Louisiana, 379 U.S. 536, 553-58 (1965); Kunz v. New York, 340 U.S. 290, 293-94 (1951); Lovell v. Griffin, 303 U.S. 444, 450-52 (1938).

overbreadth grounds. Similarly, where the statute in question confers such untrammeled authority to censor or purports to concern itself only with the time, place and manner of expression, the greater verifiability of what is being advertised is irrelevant. Confronted with such a statute, the advertiser receives scant solace from being told that he is in a better position to know the truth of what he is saying, because the criterion of regulation utilized by the state has, at least ostensibly, nothing to do with truth or falsity. Thus, *Bates* was only one type of overbreadth case. Yet based on the facts of that case, the Court foreclosed the general applicability of the overbreadth doctrine in commercial speech suits by relying on rationales that might not be germane to other types of overbreadth claims.

Indeed, prior to *Bates*, a number of courts struck down legislation restricting commercial speech on overbreadth grounds. In *Health Systems Agency v. Virginia State Board of Medicine*,[141] a district court ruled that a state law prohibiting fee advertisement by physicians constituted an unnecessarily broad encroachment on First Amendment rights.[142] Similarly, in *Consumers Union of the United States v. American Bar Association*,[143] a disciplinary rule for attorneys identical to that involved in *Bates* was invalidated as overly broad.[144] The rather tenuous line of demarcation between commercial and noncommercial speech for purposes of overbreadth analysis is well demonstrated by the case of *Person v. Association of the Bar of the City of New York*.[145] At issue in that case was a New York disciplinary rule prohibiting attorney fee advertising. The plaintiff, the director of a paralegal institute purportedly handling antitrust, securities and civil rights actions, argued that the law in question hindered him from advertising "public interest" and "politically expressive" services, which,

141. 424 F. Supp. 267 (E.D. Va. 1976). This case involved a challenge by a consumer agency to a state law banning advertisement by physicians. The court approved a directory compiled by the agency purporting to list, *inter alia*, a doctor's " 'charge for a standard office visit, or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified.' " *Id.* at 274-75 (footnote omitted). Thus, the solution arrived at in this case bears a resemblance to that suggested by Chief Justice Burger in *Bates*. *See* 97 S. Ct. at 2711 (Burger, C.J., concurring in part and dissenting in part).

142. *See* 424 F. Supp. at 273-74.

143. 427 F. Supp. 506 (E.D. Va. 1976). *See* notes 93-95 and accompanying text *supra*.

144. *Id.* at 523.

145. 414 F. Supp. 133 (E.D.N.Y. 1976). In a separate proceeding, Person also challenged the American Bar Association's Rule 7-109(c), which prohibits contingent fees for witnesses. The district court enjoined enforcement of this rule, saying it constituted a violation of the equal protection clause of the Fourteenth Amendment. Person v. Association of the Bar, 414 F. Supp. 144, 146-47 (E.D.N.Y. 1976). On appeal, the Second Circuit reversed, finding 7-109(c) to be a legitimate exercise of the state's police powers that affected no fundamental right and created no suspect classification. Person v. Association of the Bar, 554 F.2d 534, 539 (2d Cir. 1977).

presumably, the legal establishment frowned upon.[146] The district court found a substantial constitutional question, citing *Bigelow v. Virginia*[147] for the proposition that merely because speech is designated as "commercial" does not mean that it forfeits the protections of the First Amendment.[148] The implication of this case is that some avowedly commercial speech is also political or ideological, when viewed in context. The essence of Person's claim was that the rule against advertising developed by the organized bar had the effect of chilling litigation in certain areas and thus foreclosed some plaintiffs from becoming aware of their opportunity to gain access to the courts in order to institute "politically expressive" litigation. Thus, the Court in *Bates* accorded far too cursory a consideration to the problem of how the overbreadth doctrine applies in commercial speech cases, both because it ignored the fact that that doctrine encompasses differing types of claims and because it was too quick to assume that the advertisement of legal services is purely commercial speech without any political or ideological aspects.

Beyond the overbreadth issue, there is the larger problem of what effect *Bates* has on the decision in *Virginia Pharmacy Board*. A useful harbinger of future developments is provided by the Fifth Circuit's ruling in *Louisiana Consumer's League v. Louisiana State Board of Optometry Examiners*.[149] That case involved a challenge to statutes prohibiting the price advertising of prescription eyeglasses, lenses, or the frames or fittings thereof.[150] The trial court denied a preliminary injunction, observing that the Court in *Virginia Pharmacy Board* had restricted its ruling to the sale of a prepackaged product like prescription drugs.[151] The Fifth Circuit reversed. After citing *Bates*, it said that "[t]he only services at issue before this court are those involved in filling a prescription for eyeglasses. The as yet unchallenged expert testimony describes that process as one of mechanical tasks and choices no less routine than the judgment required in processing an uncontested divorce or a simple personal bankruptcy."[152] Under *Bates*, it was said that the plaintiffs need only demonstrate that filling a prescription for eyeglasses was not such a unique service that fixed rates could not be

146. *See* 414 F. Supp. at 137.

147. 421 U.S. 809 (1975). *See* note 1 *supra*.

148. *Id.* at 826, *cited in* 414 F. Supp. at 138. However, the district court granted a stay of action pending the decision of the Supreme Court in *Virginia Pharmacy Board*. 414 F. Supp. at 139.

149. 557 F.2d 473 (5th Cir. 1977).

150. LA. REV. STAT. ANN. §§ 37:1063(9), 37:1065 (1974).

151. 557 F.2d at 474.

152. *Id.* at 475.

established.[153] Therefore, the Fifth Circuit remanded the case to the lower court with a direction to grant the requested relief. It observed:

> Defendants may attempt to discredit plaintiffs' description of the process of filling eyeglasses prescriptions. We note that unless that attempt enables the district court to conclude, which it now cannot, that plaintiffs have failed to establish that the services in question are no less routine than such legal services as processing an uncontested divorce or a simple personal bankruptcy, the certainty of plaintiffs' ultimate success on the merits will remain absolute.[154]

Louisiana Consumer's League unhesitatingly suggests that the logic of *Bates* will be extended to price advertising of routine tasks in all professions. In a way, this is no surprise. *Bates* presented the most difficult of cases, in which the service in question was highly judgmental. Therefore, it could very easily be applied to the less troublesome cases where the routinized task in question involves less judgment and discretion. In effect, *Bates* sounds the death knell for that series of rulings wherein the Court indicated that the state had wide discretion to regulate the advertising practices of the members of various professions. More importantly, in light of the Court's failure to address the many issues raised by the exceptions to the coverage of the *Virginia Pharmacy Board* doctrine, the decision in *Bates* suggests that the burden on the state to justify flat bans on professional price advertising may very well be impossible to meet. Thus, the effect of *Bates* is to compel states to protect their consumer-citizens by engaging in greater and more discriminating professional regulation than they had heretofore been willing to do.

b. Time, Place and Manner Restrictions on Commercial Speech: *Linmark Associates, Inc. v. Township of Willingboro*

The second major decision handed down by the Court during the 1976-77 term in the area of commercial speech was *Linmark Associates, Inc. v. Township of Willingboro*.[155] In that case, the Court was concerned primarily with the extent to which a governmental authority may place time, place or manner restrictions on the dissemination of commercial speech. The Court's analysis in *Linmark* suggests that this exception to the commercial speech doctrine, which was explicitly acknowledged in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[156] may be one

153. *Id.*
154. *Id.* at 476.
155. 431 U.S. 85 (1977).
156. 425 U.S. 748 (1976). *See* notes 14-22 and accompanying text *supra*.

on which a governmental authority may only rarely rely as a justification for the regulation of this form of expression.

(1) The Decision

The facts of this case are comparatively complex and subject to differing interpretations, as the opinion of the court of appeals demonstrates.[157] The township of Willingboro is a residential community located in southern New Jersey, near the military installations of Fort Dix and McGuire Air Force Base and the offices of several corporations transacting nationwide business.[158] Beginning in the late 1950's, the residential development of this community was undertaken by William Levitt & Sons, Inc., which constructed middle-income dwellings on the "part system." Under this scheme, ten distinct areas (parts) were sequentially developed.[159] By the time of this litigation, the development was virtually complete. Levitt initially refused to sell homes to members of minority groups, but this practice was enjoined by the state supreme court in 1960.[160]

Thereafter, a Human Relations Commission (HRC) was formed by the township in order to promote full racial integration. The community also joined National Neighbors, a nationwide organization dedicated to the elimination of discriminatory housing practices.[161] During the decade of the 1960's, population growth within Willingboro was dramatic. The total number of white residents increased by nearly 350%, from 11,801 to 38,326 by 1970.[162] The influx of nonwhite residents was also substantial: their numbers increased from sixty to 5,088 during the same period. As a result, while the nonwhite composition of Willingboro's population accounted for only 5.0% in 1960, it rose to 11.7% by 1970.[163] In the period between 1970 and 1973, the demographic data evinced a different trend. During those years, the white population declined by 1,841 members; in contrast, the nonwhite population increased by 3,034 members, so that by 1973, nonwhites accounted for 18.2% of the populace of the township.[164] Despite this increase in the number of nonwhites, there was no ghetto in Willingboro;

157. *Compare* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 797, 804 (3d Cir. 1976) (opinion of Markey, C.J., joined by Weis, J.) *with id.* at 806, 816 (Gibbons, J., dissenting).

158. 431 U.S. at 87.

159. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 789 (3d Cir. 1976).

160. *See* Levitt and Sons, Inc. v. Division Against Discrimination in State Dept. of Educ., 31 N.J. 514, 536, 158 A.2d 177, 188-89 (1960), *appeal dismissed*, 363 U.S. 418 (1960).

161. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 789 (3d Cir. 1976).

162. *See id.* at 807 (Gibbons, J., dissenting).

163. *Id.*

164. *Id.*

members of racial minorities were distributed throughout all ten parts of the community.[165]

Because of its location, the population of the township was transient in nature and the sale and resale of residences were recurrent. Consequently, the community was serviced by eighty-two realtors, all of whom belonged to the Multiple Listing Service of Burlington County (MLSBC).[166] A general result of these conditions was that many "Sold" or "For Sale" signs would appear on residential lawns within a very limited area. Many members of the community believed that these signs were creating a "fear psychology" among white residents, causing them to flee before a greater influx of nonwhites came to Willingboro, which in turn would depress property values.[167] Council member William J. Kearns, Jr. testified at trial that the leaders in the community were concerned primarily about preventing the growth of panic selling, and correcting the belief of many that the community was unstable.[168] The concern that the number of nonwhites in the township might increase to twenty or twenty-five percent of the total population was said not to be important; the community officials believed that such a percentage approached the norm for towns situated within the Delaware Valley.[169]

In light of these sentiments, the Council began searching for a method to counteract this "fear psychology." It investigated the approaches of other

165. *Id.* at 789 (opinion of Markey, C.J., joined by Weis, J.). As the Third Circuit pointed out, this pattern of evenly distributed integration is rare. Willingboro had registered a 60% increase in its nonwhite population between 1970 and 1973; the usual experience that accompanies such an influx of minority residents is that whites flee the affected neighborhood and it becomes a nonwhite enclave. *Id.* at 789 n.1 (citing U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN—EQUAL OPPORTUNITY IN HOUSING 119 (1975)).

166. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 790 (3d Cir. 1976).

167. *See id.* This fear psychology is related to the concept of "blockbusting," which has been defined as a process through which individuals stimulate and prey "on racial bigotry and fear by initiating and encouraging rumors that negroes . . . [are] about to move into a given area, that all non-negroes . . . [will] leave, and that the market values of properties . . . [will] descend to 'panic prices' with residence in the area becoming undesirable and unsafe for non-negroes." Contract Buyers League v. F. & F. Investment, 300 F. Supp. 210, 214 (N.D. Ill. 1969). *Accord*, Chicago Real Estate Bd. v. City of Chicago, 36 Ill.2d 530, 533-34, 224 N.E.2d 793, 797 (1967); Summer v. Township of Teaneck, 53 N.J. 548, 551, 251 A.2d 761, 762-63 (1969). *See also* Comment, *Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses*, 22 DE PAUL L. REV. 818, 819-22 (1973) [hereinafter cited as *Judical Response*]. For an analysis of the "fear psychology" adverted to by the Third Circuit, see Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J.L. & SOC. PROB. 538, 541-45 (1971) [hereinafter cited as *Novel Approach*.]

168. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 790 (3d Cir. 1976). He described the concern as one where people sensed "a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county." *Id.*

169. *Id.*

cities[170] and also asked the advice of the HRC. The latter organization recommended the enactment of an ordinance banning "For Sale" or "Sold" signs on residential property.[171] Alexander W. Porter, a member of the commission, indicated that the recommendation was motivated by a desire to produce a "harmonious" community, one in which people would not have to sell their homes unless they wished to do so.[172] The entire question became an issue in the 1973 councilmanic elections where the collective sentiment of the community appeared to be that some measure had to be taken before Willingboro declined irreversibly.[173]

Normally, one public meeting precedes the adoption of an ordinance. With respect to the proposal to ban "For Sale" signs, two were held, one before and one after the drafting of the ordinance in question.[174] Some residents at both of the meetings complained about panic selling and receiving unsolicited requests by realtors to put their homes up for sale.[175] Real estate brokers, however, objected to the adoption of the ordinance, which they said would curtail one of the more valuable tools of their trade, and claimed that the proposed enactment was a transparent attempt to prevent more nonwhites from coming to live in the township.[176] Yet among those supporting the proposed law were a number of civil rights organizations, including the NAACP.[177] But, on the whole, the thrust of the discussion at both sessions appeared to be focused upon aesthetic considerations and on the effects of the signs on property values;[178] the racial aspects of the

170. In particular, the Council noted the approach of Shaker Heights, Ohio, which had also passed an ordinance banning residential sale signs. Although the real estate brokers in that community balked initially at the measure, they eventually complied peacefully. *Id.* As a matter of fact, such bans are not uncommon and, prior to *Linmark*, had been upheld. *See, e.g.*, Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 136 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974); Burk v. Municipal Ct. of Whittier, 229 Cal. App. 2d 696, 702-03, 40 Cal. Rptr. 425, 428-29 (1964). *Cf.* Leet v. City of Eastlake, 7 Ohio App.2d 218, 223, 220 N.E.2d 121, 124 (1966) (suggested that some aspects of a ban on "For Sale" signs might be permissible, but invalidated the ban in question on vagueness grounds).

171. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 790 (3d Cir. 1976).

172. *Id.* at 791.

173. *See id.* (opinion of Markey, C.J. and Weis, J.); *id.* at 808 (Gibbons, J., dissenting).

174. *Id.* at 791 (opinion of Markey, C.J. and Weis, J.).

175. *Id.*

176. *Id.* Testimony at the hearings also disclosed (a) that a study of township home sales conducted in 1973 revealed a turnover rate of approximately 11%, (b) that in February, 1974—a typical month—there were 230 "For Sale" signs posted among Willingboro's 11,000 houses and (c) that the property values within the township were still comparatively high. 431 U.S. at 89. A number of agents who testified also claimed that 30-35% of their business emanated from such signs; at least one also claimed that selling realty without signs takes twice as much time as it would otherwise take. *Id.*

177. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 793 n.6 (3d Cir. 1976).

178. 431 U.S. at 90. But the Third Circuit argued that aesthetic considerations were not the

proposed regulation were not addressed by the proponents of the suggested law.[179]

Ordinance No. 5-1974 was passed unanimously by the council on March 18, 1974.[180] In order to understand its effect, it is necessary to consider the state of the law prior to its passage. Section 17-2 of the township's revised general ordinances bans the erection or maintenance of all signs within Willingboro;[181] section 17-6 listed five exceptions to this ban with respect to property zoned for residential use.[182] One of these exceptions embodied in section 17-6.5 was for "[s]igns pertaining to the lease, rental or sale of the premises on which they appear."[183] The effect of Ordinance No. 5-1974 was to repeal only this exception. The practical, as opposed to the legal, effect of this repeal is more troublesome to ascertain. In the nine months that elapsed between its passage and the beginning of trial in the *Linmark* case, the number of people who sold their homes because of racial fears did decline.[184] However, the absolute number of homes sold remained the same;[185] the primary benefit of the law appeared to be that at least some in-town realtors increased their share of the total sales, whereas certain out-of-town brokers not affiliated with the MLSBC may not have gained any business.[186] At least one realtor reported that the racial composition of his clientele remained unchanged.[187]

"primary public interest" sought to be served by the enactment of the ordinance. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 797 n.13 (3d Cir. 1976).

179. 431 U.S. at 90.

180. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 791 (3d Cir. 1976).

181. WILLINGBORO, N.J., REV. ORDINANCES ch. XVII § 17-2 (19—), *quoted in* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 805 (3d Cir. 1976) (Gibbons, J., dissenting).

182. WILLINGBORO, N.J., REV. ORDINANCES ch. XVII § 17-6.1 to 6.5 (19—). The other exceptions consisted of "Identification Signs," "Professional Signs," "Non-Business Usage Signs" and "Specific Recreational Activities Signs." Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 805 & n.1 (3d Cir. 1976) (Gibbons, J., dissenting).

183. WILLINGBORO, N.J., REV. ORDINANCES ch. XVII §17-6.5 (19—), *quoted in* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 805 (3d Cir. 1976) (Gibbons, J., dissenting).

184. 431 U.S. at 90.

185. *Id.*

186. The principal testimony in this regard was that of Donald Evans, a Willingboro-based realtor. He said that his business increased 25% due to the fact that out-of-town brokers were unable to display their signs. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 810 (3d Cir. 1976) (Gibbons, J., dissenting). But as the majority opinion of the Third Circuit pointed out, there was no evidence adduced that out-of-town brokers lost any business; Evans' increases may have been won at the expense of other brokers situated within Willingboro. Moreover, co-plaintiff Mellman, an out-of-town realtor affiliated with the MLSBC, apparently worked closely with Evans during this period. *See id.* at 794 n.7 (opinion of Markey, C.J., joined by Weis, J.). Thus, economic loss was simply not proven.

187. 431 U.S. at 90.

At trial in federal district court, the issue was raised whether Ordinance No. 5-1974 was racially discriminatory. Members of the township's council and of the HRC testified that they were solely interested in preventing panic selling, not in "freezing" nonwhites at a level of about twenty to twenty-five percent of the total population.[188] Nevertheless, they also admitted that the sentiments of many members of the community were that the proliferation of sale signs indicated that too many blacks were moving into Willingboro or that the residents of the township were being exploited because of their community's efforts to achieve balanced integration.[189] Indeed, one realtor not affiliated with local authorities testified that the purpose underlying the enactment of the ordinance was to maintain a twenty percent quota for nonwhites and thus arrest their tendency to increase their overall representation in the local populace.[190]

Based on these facts, the district court was able to distinguish the case from a prior ruling of the Seventh Circuit, *Barrick Realty, Inc. v. City of Gary*,[191] in which the court of appeals had upheld a local ordinance almost identical in effect to the one enacted by Willingboro.[192] It noted that in *Barrick*, the ordinance was intended to halt resegregration,[193] while the law in *Linmark* was meant "to promote a racial balance or more properly, a racial imbalance to perpetuate existing racial lines."[194] In light of the fact that one realtor had testified that thirty percent of his sales emanated from signs being posted on residences, the court found a serious abridgement of the constitutional right of property owners to communicate their intention to

188. *See* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 798-99 (3d Cir. 1976).

189. *See id.* at 808-09 (Gibbons, J., dissenting). As the passages quoted by Judge Gibbons show, however, the witnesses merely reported what they heard within the community. There was no evidence that the sentiments expressed by others mirrored their own views.

190. *See id.* at 810-11. This testimony was that of Donald Evans. *See* note 186 *supra*. He appeared to be speaking about brokers in general when he made his statements. Yet, as the majority opinion noted, Evans' views could not be imputed to the members of the township's council. *Id.* at 798 n.15 (opinion of Markey, C.J., joined by Weis, J.).

191. 354 F. Supp. 126 (N.D. Ind. 1973), *aff'd*, 492 F.2d 161 (7th Cir. 1974). For discussions of this case, *see* DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745, 769-70, 773 (1975); Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761, 781-82 (1976).

192. Gary, Ind., Ordinance 4685 (July 25, 1972), *quoted in* 354 F. Supp. at 128-29 n.1. The Gary ordinance prohibited signs reading "For Sale," "Sold," "Open House," "New House," "Home Inspection," "Visitors Invited," "Installed By" or "Built By."

193. In Gary, there was a segregated housing pattern that the local authorities were trying to counteract. Coupled with this problem was that of white flight. In the 1960's, the city's white population decreased by 24.9%, while its nonwhite population increased by 34.9%. 354 F. Supp. at 134.

194. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 792 n.5 (3d Cir. 1976). The unreported opinion of the district court is reprinted in its entirety in this footnote.

sell.[195] Moreover, the trial court also observed that the ordinance infringed the prospective purchaser's rights because it limited his choice of a potential residence to those shown to him by the broker. The latter is thus empowered to "arbitrarily regulate the racial and ethnic development of a particular residential area";[196] as a result, the fundamental right to travel was being abridged.[197]

The Third Circuit reversed. On the right to travel issue, it simply noted that no significant burden was imposed since seventy percent of all inquiries came from sources other than signs and, on the basis of the evidence adduced, the effect of the ban fell with equal force on whites and nonwhites.[198] Similarly, both with respect to the purpose and effect of the ordinance, the court of appeal found no taint of discrimination.[199] Finally, on the First Amendment issue, the court observed that the signs in question were purely commercial speech;[200] moreover, the regulation imposed was not one based on content, but solely a place and manner restriction.[201] The Third Circuit recognized that, after *Bigelow v. Virginia*,[202] even impingements upon commercial expression must be justified by a significant governmental interest.[203] But here that interest was easily identifiable: the protection of "stable, racially integrated neighborhoods from the destructive

195. *Id.*

196. *Id.* at 792 n.5. *See id.* at 802-03 & n.25. The district court here was referring to the concept of "steering." This term refers to the act of channeling a prospective buyer into or away from an area because of his race. Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975). On this point, the Third Circuit in *Linmark* found no evidence to support this claim and noted additionally that because nonwhites were distributed throughout all ten parts of Willingboro, there was no wholly nonwhite enclave to be steered to. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 804 (3d Cir. 1976).

197. *Id.* at 793 n.5. The district court's analysis in this respect has some difficulties. The Supreme Court has held that the right to travel is a fundamental one, infringement of which may only be justified by the assertion of a compelling state interest. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257-58 (1974); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). But both decisions refer to attempts by a state to "penalize" the right to travel and the district court in *Linmark* never adduced evidence of the penalty effect flowing from the township's act. Morevoer, the Supreme Court has never extended this right to *intrastate* travel, which seemingly was all that was involved in *Linmark*; it explicitly refrained from answering that issue in *Maricopa County*. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974). Other courts have been less hesitant. *See, e.g.*, Valenciano v. Bateman, 323 F. Supp. 600, 603 (D. Ariz. 1971); King v. New Rochelle Mun. Hous. Auth., 314 F. Supp. 427, 430 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 863 (1971).

198. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 804 (3d Cir. 1976).

199. *See id.* at 797-803.

200. *Id.* at 795-96.

201. *See id.* at 795.

202. 421 U.S. 809 (1975). *See* note 1 *supra*.

203. *See* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 796 (3d Cir. 1976).

segregating effect of a panic selling psychology. . . ."[204] Moreover, the actual imposition upon brokers was said to be *de minimis*. The ordinance served, at most, "to slow the pace of sales on the 30% of inquiries received from signs to that of the other 70% received from other sources. Newspaper ads, in-town window displays or other possible means of conveying the desire to sell remain fully available to all."[205] Thus, no violation of the First Amendment was said to exist.[206]

In an unanimous opinion[207] authored by Justice Marshall, the Supreme Court reversed the decision of the Third Circuit. The Court dealt solely with the commercial speech issue and, for the purposes of its analysis, appeared to assume that the ordinance in question was not enacted to further a racially discriminatory purpose. After reviewing briefly its prior rulings in *Bigelow v. Virginia*[208] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[209] Justice Marshall then sought to establish whether Ordinance No. 5-1974 was distinguishable from the abortion and drug advertisements involved in those cases.

He began by noting that the speakers and listeners in *Linmark* had definite First Amendment interests at stake; the former wished to communicate their intention to sell a commodity and the latter desired to learn about the availability of that commodity.[210] The fact that the item being advertised was realty rather than prescription drugs was properly deemed irrelevant.[211] The respondents argued that, unlike the law involved in *Virginia Pharmacy Board*, their ordinance did not suppress speech totally, but only restricted one method of communication. The Court in *Linmark* admitted that "laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether."[212] However, it dismissed as unpersuasive the attempt by the township to defend its enactment on this ground for two reasons. First, no satisfactory alternative channels of

204. *Id.* at 797.

205. *Id.*

206. *See id.*

207. Justice Rehnquist took no part in the consideration or decision of this case.

208. 421 U.S. 809 (1975). *See* note 1 *supra*.

209. 425 U.S. 748 (1976). *See* notes 14-22 and accompanying text *supra*.

210. 431 U.S. at 92.

211. *Id.*

212. *Id.* at 93. Indeed, the Court in *Virginia Pharmacy Board* had acknowledged that such restraints on commercial speech are permissible provided they leave open alternative channels of communication. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976). *Compare* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); United States v. O'Brien, 391 U.S. 367, 377 (1968); Kovacs v. Cooper, 336 U.S. 77, 85-87 (1949) *with* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Saia v. New York, 334 U.S. 558, 562 (1948); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940).

communication were left open. Options such as newspaper advertisements or multiple listings involved "more cost and less autonomy" than signs,[213] were "less likely to reach persons not deliberately seeking sales information"[214] and "may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold."[215] Second, the Court noted that Willingboro was not genuinely concerned with the place or manner of the speech in question. Not all signs placed on the front lawns of residences were proscribed; there could be no argument that the regulation was enacted to promote aesthetic or other values unrelated to free expression[216] or to protect the privacy of the passerby who might be exposed to an objectionable message.[217] Nor had the township shown that the place or manner of expression yielded a detrimental secondary effect to society;[218]

> [r]ather, Willingboro has proscribed particular types of signs based on their content because it fears their "primary" effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case.[219]

The question remained whether the township had an independent interest in regulating the speech in question. The respondents contended that such an interest was present: the need to promote stable, racially integrated housing. Justice Marshall responded that the state in *Virginia Pharmacy Board* had also established a significant interest in maintaining the professional standards of pharmacists.[220] However, he observed,

> we nevertheless found the Virginia law unconstitutional because we were unpersuaded that the law was necessary to achieve this objective, and were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. For the same reasons we conclude that the Willingboro ordinance at issue here is also constitutionally infirm.[221]

213. 431 U.S. at 93 (citing Kovacs v. Cooper, 336 U.S. 77, 102-03 (1949) (Black, J., dissenting); Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).

214. *Id.* at 93 (citing United States v. O'Brien, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring)).

215. *Id.* at 93 (citing Cohen v. California, 403 U.S. 15, 25-26 (1971)).

216. *Id.* at 93-94 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

217. *Id.* at 94 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)).

218. *Id.* at 94 (citing Young v. American Mini Theaters, Inc., 427 U.S. 50, 71 n.34 (1976)).

219. *Id.* at 94.

220. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 766 (1976).

221. 431 U.S. at 95.

The record was said not to support a finding of panic selling and white flight. Therefore, the fact that "For Sale" signs appeared in front of two percent of the township's homes[222] was not necessarily the cause of the sales that had occurred, and the prohibition of such signs would not thus necessarily reduce public concern over such sales.[223] More importantly, Ordinance No. 5-1974 restricted the dissemination of facts important to the citizen-consumer:

> That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the receipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers.[224]

In invalidating Ordinance No. 5-1974, the Court noted that the authorities of Willingboro could always resort to other methods to combat what they deemed to be panic selling.[225] For example, it could offer inducements not to relocate or publicize how many whites chose to continue to reside in the township.[226] The Court also observed that its ruling in no way prevented the community from placing restraints on untruthful advertising.[227]

(2) Analysis

There are two major problems raised by the Supreme Court's discussion in *Linmark*. First, there is the issue of whether or not Ordinance No. 5-1974 was in fact classifiable as a time, place and manner restriction. Second, there is the issue of whether or not the township's alleged justifica-

222. *See* note 176 *supra*.

223. 431 U.S. at 95-96. The Court at this juncture said it expressed no view as to whether or not the case of Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974), *see* notes 191-193 and accompanying text *supra*, could "survive" *Virginia Pharmacy Board*. 431 U.S. at 95 n.9.

224. 431 U.S. at 96-97.

225. *Id.* at 97.

226. *Id.*

227. *Id.* at 98.

tion was sufficient to support the restriction being imposed. Each of these issues will be considered separately.

(a) Time, Place and Manner Restriction

It is apparent that the township council was not imposing any restraints on the posting of signs because of the content of the message displayed on them. That message, in the case of "For Sale" signs was simply that "The owner is leaving this residence and wishes to market it." In case of "Sold" signs, the message was merely that "The owner has left this residence."[228] Nothing in the record indicates an intent to censor that message. Indeed, it could be disseminated on billboards, in office window displays, in newspaper advertisements or on television. Moreover, by its terms, the ordinance permitted the placement of "For Sale" or "Sold" signs in front of model homes, where there would be no possibility of an underlying implication that the occupant was fleeing the community.[229] In summary, then, the enactment in question simply directed that the speech at issue could not be disseminated at a certain place, *i.e.*, in front of a residence or in a certain manner, *i.e.*, through the medium of a sign.

The Supreme Court nevertheless argued that the law could not be supported because it left open no feasible alternative channels of communication.[230] But as the Third Circuit noted, the alternatives of newspaper or television advertisement or window displays and the like were not foreclosed to realtors.[231] One could argue, as the dissent in the court of appeals did, that merely because many persons respond to listings in newspapers or in windows ignores the fact that the ordinance restricts the free flow of information to those people who rely solely on signs.[232] But in order for this argument to prevail, either the record or the pleadings should have indicated that there was in fact a discrete class of such persons whose knowledge would be totally foreclosed by the restraint in question. In the *Virginia Pharmacy Board*[233] case, the pleadings established that the plaintiffs represented, *inter alia*, aged or infirm persons physically incapable of acquiring information about the prices of drugs through comparison shopping or the other alternatives suggested in lieu of advertising.[234] The record in *Linmark*

228. *See* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 795 (3d Cir. 1976).

229. *Id.* at 800.

230. 431 U.S. at 93.

231. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 797 (3d Cir. 1976).

232. *Id.* at 816 (Gibbons, J., dissenting).

233. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). *See* notes 14-22 and accompanying text *supra*.

234. *See id.* at 763-64 n.18. *See also* Virginia Citizens Consumer Council v. Virginia State Bd. of Pharmacy, 373 F. Supp. 683, 684 (E.D. Va. 1974).

was not as helpful. Presumably, if a large class of persons depended *only* upon signs for their knowledge of residences on the market, then the total number of sales should have decreased in the nine months between the passage of the ordinance and the date that trial began. In fact, this did not occur. The absolute number of sales made did not decline.[235] Indeed, the business of some realtors increased,[236] and no broker was able to establish economic loss because of the enactment of the ordinance.[237] Thus, on the basis of the record, the Supreme Court appeared to be concerned about the right to receive information enjoyed by a hypothesized class of persons that very possibly did not exist.

One is then left with the other objections raised by Justice Marshall: that the ordinance compelled realtors to rely on alternative means of communication, such as newspaper advertisements and multiple listings, which were more costly, offered less autonomy and were less effective.[238] The points about cost and autonomy seem irrelevant. Merely because a state regulation inconveniences the class of persons regulated ought not to be a basis for invalidating it. Every restriction on commercial speech may inconvenience the one seeking to have his message communicated, but that fact provides no independent ground for asserting that the restriction cannot qualify as one of time, place and manner, at least not unless the alternative channels of communication left open are so costly or so inadequate that the persons subject to regulation would never be able to utilize them. As for the putative lack of effectiveness, again the Court implicitly makes the unwarranted assumption that a significant class of persons acquires its sale information only from lawn signs. Indeed, even the plaintiffs in *Linmark* admitted that seventy percent of their business came from sources other than signs[239] and that market turnover with respect to the remaining thirty percent was slowed but not eliminated.[240] Thus, the alternative channels of communication left untouched by the township appear, at second glance, far more adequate than Justice Marshall suggests.

But the Court goes on to observe that even if this were so, the ordinance in question was really directed against the content of the message displayed on the signs in question.[241] But what message? Certainly not that contained literally in the words "For Sale" or "Sold"; as noted earlier, that

235. 431 U.S. at 90.

236. *Id. See* note 186 *supra*.

237. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 794 & n.7 (3d Cir. 1976).

238. 431 U.S. at 93.

239. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 797 (3d Cir. 1976).

240. *See id.* at 793-94. *See also* 431 U.S. at 89.

241. 431 U.S. at 93-94.

message could be freely disseminated in a variety of other manners and contexts. The testimony given at trial was that the township's Council sought to combat the perceived effect the placement of signs bearing the words "Sold" or "For Sale" had on those who viewed them.[242] It did not seek to interdict the information that a residence was once or is presently on the market; it sought to counteract the impression created by a sign bearing that information that something was amiss in Willingboro. In other words, the ordinance attempted to dispel a belief about the community that may very well have been unjustified by the content of the message on the lawn signs themselves.

Justice Marshall observed that the regulation in question did not attempt to further aesthetic values, to protect the privacy of passersby or to regulate a detrimental secondary effect on society.[243] The second part of this trilogy was certainly not involved, but the same cannot be said for the first and third parts. Testimony was taken at the Council hearings on the aesthetic merits of banning the signs in question;[244] since Willingboro consisted primarily of tract houses having sixty to seventy feet of street frontage,[245] the proliferation of lawn signs could prove to be an eyesore. But as the Third Circuit noted, the township Council was not motivated by aesthetic concerns.[246] Moreover, aesthetic interests would seemingly be best furthered by a flat ban on the display of all signs, not the selective proscription of some types of signs, as was effectuated by Ordinance No. 5-1974.[247] Moreover, if the concern of stable integration could not justify the prohibition encountered in *Linmark*, it is difficult to see how an asserted aesthetic justification would fare any better if it interdicted the free flow of information to the citizen-consumer.[248]

242. *See* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 798-99 (3d Cir. 1976).

243. 431 U.S. at 93-94.

244. *See id.* at 90.

245. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 790 n.2 (3d Cir. 1976).

246. *Id.* at 797 n.13.

247. An analogy might be made at this juncture to the various cases that have held that the total exclusion of all political posters from residential areas is invalid. *See* Ross v. Goshi, 351 F. Supp. 949, 953-54 (D. Hawaii 1972); Farrell v. Township of Teaneck, 126 N.J. Super. 460, 465, 315 A.2d 424, 427 (1974); Pace v. Village of Walton Hills, 15 Ohio St. 2d 51, 52, 238 N.E. 2d 542, 543 (1968); Peltz v. City of South Euclid, 11 Ohio St. 2d 128, 132, 228 N.E.2d 320, 323 (1967); Gibbons v. O'Reilly, 44 Misc. 2d 353, 357, 253 N.Y.S.2d 731, 733 (Sup. Ct. 1964); Town of Huntington v. Estate of Schwartz, 63 Misc. 2d 836, 840, 313 N.Y.S.2d 918, 922-23 (Dist. Ct. 1970). *See generally* Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179, 194-95 (1975).

248. Nevertheless, some First Amendment challenges to aesthetic commercial billboard regulations have been attempted and have foundered on the distinction between commercial

But there remains the matter of "secondary effect." In *Erznoznik v. City of Jacksonville*,[249] the Court invalidated a municipal ordinance making it a public nuisance for drive-in theaters to exhibit films containing scenes of nudity where the motion picture screen was visible from a public thoroughfare.[250] It ruled that the regulation in question discriminated among films solely on the basis of content.[251] Subsequently, in *Young v. American Mini Theaters, Inc.*,[252] the Court was confronted with a set of Detroit zoning ordinances prescribing that, absent a waiver, an adult movie theater could not be located within one thousand feet of any other "regulated use,"[253] one of which was adult theaters generally,[254] and defining such a theater as one which presented material "characterized by an emphasis"[255] on "Specified Sexual Activities"[256] or "Specified Anatomical Areas."[257] The Court upheld this ordinance and, in doing so, the main opinion[258] distinguished *Erznoznik* as follows:

> The [Detroit] City Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech. In contrast, in Erznoznik v. City of Jacksonville . . . the justifications offered by the city rested

and noncommercial speech. *See, e.g.*, Howard v. State Dept. of Highways, 478 F.2d 581, 585 (10th Cir. 1973); State v. Diamond Motors, Inc., 50 Hawaii 33, 35, 429 P.2d 825, 827 (1967); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 439, 200 N.E.2d 328, 338 (1964); Markham Advertising Co. v. State, 73 Wash. 2d 405, 428-29, 439 P.2d 248, 262-63 (1968), *appeal dismissed*, 393 U.S. 316 (1969). All these cases antedate the latest rulings on commercial speech. Indeed, in *Linmark*, the Court cited *Markham* and Baldwin v. Redwood City, 540 F.2d 1360, 1368-69 (9th Cir. 1976) (permitted aesthetic size restrictions on political signs), and then said it would leave the question of a ban on signs for aesthetic reasons until another day. 431 U.S. at 94 n.7.

249. 422 U.S. 205 (1975).

250. JACKSONVILLE, FLA., CODE § 330.313 (1972).

251. 422 U.S. at 211. Arguments that the ordinance was a traffic regulation were rejected because it was said that motorists were likely to be distracted by any film, not simply one showing nudity. *Id.* at 214-15.

252. 427 U.S. 50 (1976).

253. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000, as amended in 1972.

254. *See* DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G (1972) (amending No. 390-G); DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 743-G (1972) (amending Ch. 5, art. 2).

255. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 32.0007 (1972) (amending no. 390-G).

256. DETROIT, MICH., ZONING ORDINANCE No. 742-G, § 66.0101 (1972) (amending No. 390-G).

257. DETROIT, MICH., ZONING ORDINANCE No. 742-G, § 32.0007 (1972) (amending No. 390-G).

258. The relevant portion of which represented the views of Justice Stevens, joined by Chief Justice Burger and Justices White and Rehnquist.

> primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic—an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity.[259]

The situation in Willingboro appeared to resemble that of Detroit rather than that of Jacksonville. The ordinance in *Linmark* did not attempt to discriminate on the basis of content; it proscribed only those "For Sale" or "Sold" notices appearing on signs placed in front of residences. Certainly, there was never any suggestion that the township's council found those words offensive; nor did it attempt to regulate the primary effect of those words, the conveyance of the information that the homeowner intended to sell or had sold his house. Rather, the Council was concerned with a secondary effect of those signs, the tendency to foster panic selling. Justice Marshall claimed that the ordinance's proscription was based on his definition of primary effect: that those viewing the signs would act upon the information contained therein.[260] But the information contained therein is the notice of sale. What the Council was concerned with was what it deemed to be a wholly unjustified interpretation of such a notice that might arise in the mind of the viewer, the interpretation that residency patterns in Willingboro were unstable and that therefore it was time to pack up and depart. This interpretation would seem to constitute the classic example of the "secondary" effect referred to in *Young*. Thus, in deciding *Linmark*, the Court manages to misapply the very rule it purports to rely upon.

(b) The Township's Alleged Interest in Regulation

If one assumes that the township's Council had no intention of trying to fix the racial proportions of the residents of Willingboro within its own arbitrarily-devised quota, one then must confront the larger issue raised by the case: was the announced purpose of the Council, the prevention of panic selling, important enough to justify a restriction on commercial speech? In order to answer this query,

> [i]t is important first to define the problem of panic selling. "Blockbusting," or "panic peddling," is not the same as panic selling. Blockbusting refers to the practice of directly inducing or persuading an individual to sell his home by representations as to the entry into his neighborhood of blacks or other minority groups. Panic selling is a broader problem which, although it may be prompted by blockbusting practices, does not depend upon direct inducements or face-to-face contact between people. Panic

259. 427 U.S. at 71 n.34.
260. 431 U.S. at 96.

> selling occurs when a resident who is otherwise disposed to remain in a neighborhood succumbs to any one or more of a number of pressures to move out when it appears that a minority racial group is beginning to enter. Among the fears of white residents as non-whites begin to move into their neighborhood are rising crime rates, overcrowded schools, declining property values, and a generally lower quality of life. As neighbors move away, there is also the feeling of being left behind, giving rise to the commonly-expressed fear, independent from any intrinsic hostility toward the incoming racial group, of being "the last white family on the block." Where these fears persist and intensify, panic selling generally occurs on a wide scale.
>
> The evidence . . . strongly supports the . . . position, and this court finds, that the proliferation of "for sale" signs in a neighborhood aggravates the fears of white residents and has a strong tendency to provoke panic selling. Admittedly, "for sale" signs act upon the existing fears of white residents outlined above; however, the mere fact that these underlying fears exist does not . . . compel the conclusion that "for sale" signs do not themselves cause panic. The impact of "for sale" signs is best illustrated by their obvious relationship to the very real, concrete fear of substantial pecuniary loss due to declining property values. A proliferation of "for sale" signs not only intensifies this fear, but also tends to transform it into reality by depressing prices. Many white residents desire to remain in changing neighborhoods provided they can be maintained on a stable, integrated basis. The evils they fear most—crime, overcrowding, depressed property values, and being left behind—need not come to pass if stability can be achieved. A steadily increasing number of "for sale" signs tends, no less than overt blockbusting practices, to undermine any hope of such stability. Once this hope is lost and complete racial transformation appears inevitable, even those desiring to remain are virtually forced to sell.[261]

The result of panic selling, then, is resegregation of neighborhoods. In order to counteract this possibility, it is necessary to take steps before the effect of panic selling reaches a "tipping point," or the percentage of the concentration of nonwhites residing in a given locality that will cause white residents to flee.[262] It has thus been said that

> [t]his gradual tendency of integrated areas to become more and more Negro is accentuated by the popular belief—often transmitted into action—that the rate at which white families move out rises with the percentage of Negroes in the area and, more important, that there exists a "tipping point"—a given percentage of

261. Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 134-35 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974). *See* notes 191-193 and accompanying text *supra*.

262. Otero v. New York Hous. Auth., 484 F.2d 1122, 1136 (2d Cir. 1973). *See also* Zuch v. Hussey, 394 F. Supp. 1028, 1033 n.7 (E.D. Mich. 1975); Gautreaux v. Chicago Hous. Auth., 304 F. Supp. 736, 739-40 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

> Negroes, after which the departure of whites from the areas will be greatly accelerated.[263]

The members of Willingboro's Council felt it necessary to take remedial steps before it was too late, before integrated neighborhoods began declining irreversibly. Justice Marshall claimed that the record did not indicate that the "For Sale" signs were a major cause of panic selling or that the prohibition of such signs would alleviate the problem.[264] But the printed evidence suggests a contrary conclusion. Testimony at trial indicated that the community in general believed that the "For Sale" signs were harbingers of trouble, and, furthermore, that this belief was inducing the action of emigration.[265] One realtor reported that both purchasers and sellers of homes expressed to him the sentiments that the signs indicated that a street might be "going black," in which case it was time for whites to leave.[266] Another broker disclosed that eighty percent of those who sold their homes gave for their decision to sell the assertion that "the whole town was for sale, and they didn't want to be caught in any bind."[267] Furthermore, after the passage of the ordinance, there was agreement that the number of persons selling or considering the sale of their homes declined sharply.[268] Based on these facts, it would seem that the "For Sale" signs did induce panic selling and that the ordinance eliminated that inducement.

But was this asserted interest sufficient to justify an infringement of speech? The key case prior to *Linmark* is *Barrick Realty, Inc. v. City of Gary*.[269] There, also, an ordinance prohibiting "For Sale" signs was enacted.[270] But, unlike *Linmark, Barrick* involved a segregated city where panic selling was occurring in largely white neighborhoods which then became black, thus perpetuating segregated housing patterns.[271] Moreover, in *Barrick*, some realtors actively encouraged resegregation by unlawfully inciting

263. Kaplan, *Equal Justice in an Unequal World—Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 390 (1966). *See also* Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30, 31-37 (1960); Note, *Administrative Law—Urban Renewal—HUD Has An Affirmative Duty to Consider Low Income Housing's Impact Upon Racial Concentration, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970)*, 85 HARV. L. REV. 870, 875-76 (1972).

264. 431 U.S. at 95-96. Indeed, he cited evidence that the banning of "For Sale" signs might exacerbate racial tension. *See* Laska & Hewitt, *Are Laws Against "For Sale" Signs Constitutional? Substantive Due Process Revisited*, 4 REAL ESTATE L.J. 153, 160-62 (1975).

265. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 808-09 (3d Cir. 1976) (Gibbons, J., dissenting).

266. *Id.* at 807.

267. 431 U.S. at 88.

268. *Id.* at 90.

269. 354 F. Supp. 126 (N.D. Ind. 1973), *aff'd*, 492 F.2d 161 (7th Cir. 1974).

270. GARY, IND., ORDINANCE NO. 4685 (July 25, 1972). *See* note 192 *supra*.

271. 491 F.2d at 163-64.

whites to sell before the latter had black neighbors or depressed property values.[272] Finally, in *Barrick*, panic selling and its evils had already settled on the city of Gary,[273] whereas Willingboro was a victim of what the Third Circuit termed incipient panic selling.[274] The first two differences are probably *de minimis*. The effect of panic selling in an integrated neighborhood differs little from its effect on a wholly white enclave.[275] The district court in *Barrick* never mentioned the premeditated conduct of some realtors, and the court of appeals remarked upon it only in passing, suggesting that it was a factor of minor significance. The third distinction is more troublesome; however, as the Third Circuit in *Linmark* noted,

> [b]ut to forbid termination of a cause of panic selling until its detrimental effects had burdened the community would be an exaltation of form over substance. That approach would bar combating at its inception the very problem now plaguing so many urban areas where measures such as "busing" are now found necessary. To force Willingboro to await the evils of segregation, which it has so successfully avoided to date, so that the principle of *Barrick* may thereafter be employed in an effort to fight back, seems to us an approach devoid of common sense.[276]

Thus, assuming *Barrick* is applicable to *Linmark*, what are the teachings of the former decision with respect to the First Amendment? The district court in *Barrick* simply ruled that "reasonable regulations upon communications of a purely commercial nature are not subject to scrutiny under the First Amendment."[277] The Seventh Circuit was more circumspect. It found that a First Amendment challenge could not be avoided merely because "For Sale" signs display a commercial message; some balancing of interests had to occur.[278] But the court of appeals chose to accord the city's interests decisive weight, defining those interests as the maintenance of restrictions on commercial activity in areas zoned for residential use[279] and the need to ensure the continued existence of stable, racially integrated neighborhoods.[280] The district court's analysis is no

272. *Id.* at 164.

273. *See* 354 F. Supp. at 134. Between 1960 and 1970, the white population of Gary decreased by 24.9%, while its nonwhite population increased by 34.9%. *Id.*

274. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 799 (3d Cir. 1976).

275. *See id.* at 800.

276. *Id.*

277. 354 F. Supp. at 132.

278. 491 F.2d at 164-65.

279. *Id.* (citing City of Euclid v. Amber Realty Co., 272 U.S. 365, 387-97 (1926)).

280. 491 F.2d at 164-65. *But cf.* DeKalb Real Estate Bd., Inc. v. Chairman & Bd. of Comm'rs of Roads, 372 F. Supp. 748, 754-55 (N.D. Ga. 1973) (struck down ordinance prohibiting realtors, but not homeowners, from setting up "For Sale" signs; noted the logic of *Barrick*, but said the discriminatory features of the ordinance in question violated the due process and equal protection clauses of the Fourteenth Amendment).

longer valid after the *Virginia Pharmacy Board* case. But the Seventh Circuit's reasoning that balancing must occur is similar to that expressed in *Virginia Pharmacy Board*[281] and it was applied by the Third Circuit in *Linmark*.[282] Yet, Justice Marshall eschews balancing as an approach. His conclusion seems to be that because the Council sought to restrict the free flow of vital data and because it sought to adopt a "highly paternalistic" approach, the ordinance embodying this approach was invalid per se.[283]

If so, interesting consequences are implied. As noted earlier,[284] the concept of panic selling is related to that of blockbusing,[285] *i.e.*, inducing sales of property by making representations about the likely racial composition of the surrounding neighborhood. A number of state laws forbid the practice of blockbusting[286] and there are judicial decisions upholding the validity of such regulations.[287] Blockbusting is also prohibited by section 804(e) of the federal Fair Housing Act of 1968,[288] now codified at section 3604(e) of Title forty-two of the United States Code.[289] That provision makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin."[290]

One of the leading cases construing this provision is *United States v.*

281. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762-70 (1976).

282. *See* Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 796-97 (3d Cir. 1976).

283. 431 U.S. at 96-97.

284. *See* note 167 *supra; see also* note 261 and accompanying text *supra*.

285. For cases defining this term, *see* note 167 *supra*.

286. *See, e.g.*, ILL. ANN. STAT. ch. 38 §§ 70-51 to -53 (Smith-Hurd 1978); MD. ANN. CODE art. 56, § 230A (Supp. 1977); MASS. GEN. LAWN ANN. ch. 112, § 87AAA (Supp. 1970); MICH. COMP. LAWS ANN. § 564.203 (1974); MINN. STAT. ANN. § 363.03(2)(4) (West Supp. 1978); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1976); WIS. STAT. ANN. § 101.22 (West Supp. 1977); VT. STAT. ANN. tit. 26, § 2296 (1975). *See generally Judicial Response, supra* note 167, at 834-38; Note *Blockbusting*, 59 GEO. L.J. 170, 171-74 (1970) [hereinafter cited at *Blockbusting*]; Comment, *The Constitutionality of a Municipal Ordinance Prohibiting "For Sale," "Sold," or "Open" Signs to Prevent Blockbusting*, 14 ST. LOUIS U.L.J. 685, 697-717 (1970).

287. *See, e.g.*, Chicago Real Estate Bd. v. City of Chicago, 36 Ill. 2d 530, 553, 224 N.E.2d 793, 807 (1967); Montgomery Citizens League v. Greenhalgh, 253 Md. 151, 162, 252 A.2d 242, 247 (1969); State v. Wagner, 15 Md. App. 413, 424, 291 A.2d 161, 166 (1972); Summer v. Township of Teaneck, 53 N.J. 548, 553-54, 251 A.2d 761, 764 (1969).

288. 42 U.S.C. §§ 3601-3631 (1970).

289. 42 U.S.C. § 3604(e) (Supp. V 1975).

290. *Id.* Section 3604(e) has been found to be constitutional. *See* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 121-22 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); United States v. Mintzes, 304 F. Supp. 1305, 1312-13 (D. Md. 1969); Brown v. State Realty Co., 304 F. Supp. 1236, 1240 (N.D. Ga. 1969). *See generally Judicial Response, supra* note 167, at 823-33; *Blockbusting, supra* note 286, at 174-82.

Bob Lawrence Realty, Inc.,[291] decided by the Fifth Circuit in 1973. *Lawrence* involved a suit against five Atlanta realty firms whose agents, though engaging in no blatantly impermissible conduct as individuals, undertook a "group pattern" of harassment and racial representations that induced sales of property in white neighborhoods.[292] On appeal, the Fifth Circuit ruled that section 3604(e) did not violate the First Amendment because it "is aimed at the commercial activities of those who would profiteer off the ills of society, conduct that the Thirteenth Amendment empowers Congress to regulate."[293] Because the speech in question was purely commercial, constitutional attack was thus foreclosed; any concomitant restraint on the informational value of a statement violative of section 3604(e) was said to be "clearly outweighed by the government's overriding interest in preventing blockbusting."[294] The Supreme Court in *Bigelow v. Virginia*,[295] decided in 1975, cited *Lawrence* with approval as an example of one of those cases where "there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating."[296] It therefore left open the possibility that *Lawrence* represented one instance of a constitutional restriction on commercial expression.

Lawrence was a blockbusting case involving actual representations made by realtors. But as the district court in *Barrick* noted, "[t]he only difference between [federal anti-blockbusting] laws and the ordinance here in question lies in the means employed to attack the problem of panic selling. This court finds the prohibition of 'For Sale' signs no less rationally related to this objective, or to the ultimate objectives of integration and social and economic stability, than the prohibition of overt blockbusting practices."[297] Similarly, the Third Circuit in *Linmark* also indicated that the township's ordinance could be analogized to section 3604(e). Thus, it stated:

> [n]o reason appears of record to indicate that the . . . ordinance is not even more constitutionally acceptable as reasonable means to

291. 474 F.2d 115 (5th Cir.), *cert denied*, 414 U.S. 826 (1973).

292. *See* United States v. Mitchell, 335 F. Supp. 1004, 1006-07 (N.D. Ga. 1971).

293. 474 F.2d at 121. The Fifth Circuit relied on the First Amendment analysis undertaken in United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), which upheld the constitutionality of 42 U.S.C. § 3604(c) (1974), a provision prohibiting the publication of discriminatory advertisements in connection with the sale or rental of a dwelling. *Hunter* held that the Constitution does not shield commercial expression against governmental restraint. 459 F.2d at 211.

294. 474 F.2d at 122.

295. 421 U.S. 809 (1975). *See* note 1 *supra*.

296. *Id.* at 825 n.10.

297. Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 135-36 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974). *See* notes 191-193 and accompanying text *supra*.

> halt early panic-selling and its incipient segregation effects. The federal Fair Housing Act prohibits the mere *attempt* to encourage "white flight." 42 U.S.C. § 3604(e) . . . . The ordinance herein being preventive in nature and constitutionally permissible, the present case fits the adage, "an ounce of prevention is worth a pound of cure."[298]

The Supreme Court in *Linmark* expressed no view about whether *Barrick* survived *Bigelow v. Virginia*[299] and the *Virginia Pharmacy Board*[300] ruling. But its holding in *Linmark* does suggest that if the record evincing panic selling in that case would not create a justification for abridging speech, then neither would the record in *Barrick* or even *Lawrence*. If this assessment is accurate, then the validity of prosecutions under section 3604(e) in any but the most blatant cases may be in doubt and the language in *Bigelow* about "legitimate regulation" may have been consigned to oblivion. However, this conclusion about the federal statute may be premature. The Court in *Linmark* did speak of the fact that "Congress has made a strong national commitment to promote integrated housing";[301] moreover, in *Virginia Pharmacy Board* itself, the Court noted that First Amendment protection of commercial speech would not prevent governmental regulation of unlawful conduct,[302] citing in support of this statement *United States v. Hunter*,[303] a decision construing another provision of the federal housing act, which *Lawrence* had relied on for its First Amendment analysis.[304]

But if the federal laws constitute legitimate regulation, it is difficult to see why the same should not be said of Ordinance No. 5-1974, which is directed at attaining a similar goal of stable, integrated housing. It is difficult to understand why such an ordinance is invalid per se because it restricts the free flow of information and evinces too paternalistic an attitude if legislation like section 3604(e) is not subject to similar attacks. Perhaps the distinguishing factor that may be relied on in later cases is the alleged absence of evidence in *Linmark*; but in light of what the record actually disclosed, this factor only suggests that future governmental attempts to

298. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 800 (3d Cir. 1976) (emphasis in original).

299. 421 U.S. 809 (1975).

300. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

301. 431 U.S. at 95. *See also* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977).

302. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772-73 (1976).

303. 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

304. *See* note 293 *supra*.

preclude panic selling will be invalidated in all but the most obvious cases. As a result, the Court in *Linmark* binds the hands of municipal authorities, telling them they cannot stem the tide of resegregation until it has already occurred. The decision therefore marks a new limitation upon local efforts to maintain racially integrated communities.