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Recent Developments

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Constitutional Law—Supreme Court Extends *Younger* Comity Doctrine.—A default judgment was entered in a New York state court against Harry Vail after Vail defaulted on a credit arrangement with a private loan company. When Vail failed to pay the judgment, he was served with a subpoena pursuant to New York law, requiring him to appear at a deposition in order to give information relevant to the satisfaction of the judgment. It was stated on the subpoena that failure to comply was punishable as a contempt of court. When Vail did not comply, a local justice, Juidice, issued an order requiring him to appear in court and show cause why he should not be held in contempt. Vail failed to appear, was held in contempt, and fined. When Vail did not pay his fine, an *ex parte* commitment order was issued pursuant to which Vail was arrested and imprisoned. On the following day, when he paid the fine, Vail was released.

Vail, along with others similarly situated, then instituted a section 1983[1] suit on behalf of a class of judgment debtors in a federal district court, naming the state court justices who had employed the contempt procedures as federal defendants.[2] Plaintiffs sought to enjoin the New York contempt procedures leading to imprisonment as violative of the due process clause of the fourteenth amendment.[3] The federal defendants argued that the federal suit was barred by *Younger v. Harris*[4] and, therefore, that the district court should abstain from reaching the merits. The district court disagreed, however, holding that *Younger* did not bar federal injunctive relief against state civil proceedings because *Younger* was only applicable when the state action was

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1. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The pertinent jurisdictional statute is 28 U.S.C. § 1343 (1970), which provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

For a comprehensive discussion of the origins and development of section 1983, see *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133 (1977).

2. The federal suit was certified as a class action. The class, as defined, included "all persons who have been or are presently subject to the civil contempt proceedings contained in the challenged sections of the Judiciary Law." Juidice v. Vail, 97 S. Ct. 1211, 1215 (1977).

3. U.S. Const. amend. XIV, § 1.

4. 401 U.S. 37 (1971).

criminal or quasi-criminal in nature.[5] The court then found the sections of the New York Judiciary Law at issue unconstitutional[6] and permanently enjoined the application of those statutes to plaintiffs or to members of plaintiffs' class. On appeal, the Supreme Court reversed, holding that *Younger* was not limited solely to criminal or quasi-criminal state actions and that it was therefore error for the district court to have reached the merits of the constitutional claim. *Juidice v. Vail,* 97 S. Ct. 1211 (1977).

In *Younger v. Harris,*[7] the Supreme Court articulated the principles restraining the granting of federal equitable relief[8] against state court proceedings.[9] *Younger* involved a state criminal prosecution which was pending when the state defendant filed his federal action to enjoin the local district attorney from prosecuting him under an allegedly unconstitutional state statute. The Court held that federal injunctive relief was improper to stay a pending state criminal proceeding absent extraordinary circumstances or a bad faith prosecution.[10] It based its holding on two grounds: first, the "basic doctrine of

5. Vail v. Quinlan, 406 F. Supp. 951, 958 (S.D.N.Y. 1976), *rev'd sub nom.* Juidice v. Vail, 97 S. Ct. 1211 (1977).

6. *Id.* at 955-56; N.Y. Jud. Law §§ 756-57, 770, 772-75 (McKinney 1975).

7. 401 U.S. 37 (1971). *Younger,* along with five other similar cases decided on the same day, comprise what is commonly referred to as the *Younger* Sextet or the February Sextet. Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam); Dyson v. Stein, 401 U.S. 200 (1971) (per curiam); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

The *Younger* doctrine is to be distinguished from the doctrine of abstention enunciated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The thrust of the latter case is that federal jurisdiction is postponed, not relinquished, so that state courts can first have the opportunity to interpret issues of state law. *See generally* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1043-45 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]. *See also* A.C.L.U. v. Bozardt, 539 F.2d 340, 342 (4th Cir. 1976), *cert. denied,* 429 U.S. 1022 (1976).

There is some confusion concerning whether *Younger* should be referred to as an abstention doctrine. Some courts and commentators have carefully noted that the principles of *Younger* are those of equitable restraint, not abstention. *See, e.g.,* Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd., 542 F.2d 652, 653 (6th Cir. 1976); Hart & Wechsler, *supra* at 1009-50. The Supreme Court, however, in a comprehensive review of federal abstention, listed *Younger* as a species of federal abstention. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976). This note will use both terms.

8. The holding in *Younger* was limited to the issuance of federal injunctive relief where a state criminal prosecution was pending. 401 U.S. at 41 & n.2. In a companion case, the Court held that *Younger* rules also applied where federal declaratory relief was sought in the same situation. Samuels v. Mackell, 401 U.S. 66 (1971). For a general discussion of the holding in *Younger,* see Wechsler, *Federal Courts, State Criminal Law and the First Amendment,* 49 N.Y.U.L. Rev. 740 (1974).

9. The power of the federal courts to issue injunctive relief against unconstitutional acts by state officials was established in *Ex parte* Young, 209 U.S. 123 (1908).

10. 401 U.S. at 53-54. As an example of "extraordinary circumstances," the Court mentioned a prosecution under a statute that was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.* (quoting Watson v. Buck, 313 U.S. 387, 402

equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief";[11] and secondly, the "even more vital consideration"[12] of comity that the federal and state judicial systems should each carry on its legitimate functions without undue interference from the other.[13] These

(1941)). In its most recent pronouncement in the *Younger* area, the Court has indicated that this particular example of extraordinary circumstances is a very narrow exception to *Younger*. Trainor v. Hernandez, 97 S. Ct. 1911 (1977). In *Trainor,* the Court suggested that the finding of a district court that certain sections of an Illinois attachment statute were "on their face patently violative of the due process clause of the Fourteenth Amendment," *id.* at 1916, was not enough to trigger the application of the "patently and flagrantly" unconstitutional exception, *id.* at 1920. In his dissent, Mr. Justice Stevens accused the majority of reducing this exception to the mere "illusion of flexibility" while in fact "eliminat[ing] one of the exceptions from the doctrine." *Id.* at 1928 (Stevens, J., dissenting). He also cogently observed that the "Court has never explained why all sections of any statute must be considered invalid in order to justify an injunction against a portion that is itself flagrantly unconstitutional." *Id.*

Concerning other kinds of extraordinary circumstances which might mandate an exception to *Younger,* the Court has explained that "[t]he very nature of 'extraordinary circumstances,' of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. But whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." Kugler v. Helfant, 421 U.S. 117, 124-25 (1975).

The bad faith exception to *Younger* deries from Dombrowski v. Pfister, 380 U.S. 479 (1965). In *Dombrowski,* a civil rights organization and its officers sought to enjoin state officials from prosecuting them under an allegedly overbroad Louisiana Subversive Activities statute. *Id.* at 482. The federal plaintiffs showed that the state officials had harrassed the operations of their organization by repeated arrests, threatened arrests, and seizures of documents. *Id.* at 487-89. The Court held that under such circumstances, the plaintiffs had showed sufficient irreparable harm to justify federal equitable relief. *Id.* at 489. The suggestion in *Younger* is that federal intervention is warranted upon a showing of bad faith and harassment because a bad faith prosecution will not provide the potential federal plaintiff with an adequate forum for the vindication of constitutional rights. 401 U.S. at 48-49, *see Federal Equitable Restraint: A Younger Analysis in New Settings,* 35 Md. L. Rev. 483, 488 n.29 (1976) [hereinafter cited as *Younger Analysis*].

It is clear that these exceptions to *Younger* will be interpreted strictly in order to allow federal intervention only in the most egregious cases. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski,* 48 Tex. L. Rev. 535, 606 (1970).

11. 401 U.S. at 43-44.

12. *Id.* at 44.

13. *Id.* Justice Black, writing for the majority, labeled this notion of comity as " 'Our Federalism' " and described it as follows: "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

principles mandate equitable restraint in the criminal context because the state interest in the definition and enforcement of its criminal statutes is more important than the potential federal plaintiff's need of a federal forum—at least where the federal plaintiff is assured of an adequate state forum in which to raise his constitutional claims.[14]

These principles behind equitable restraint were articulated in the context of state criminal proceedings, and the cases cited in *Younger* in which equitable relief had been denied were in this very same context.[15] Although there is language in Justice Black's majority opinion which indicates that the considerations underlying *Younger* might also apply to pending state civil proceedings,[16] the Court did not explicitly deal with that issue.[17] Only Justice Stewart, in his concurring opinion, spoke specifically of *Younger* principles in a civil context. He briefly noted that the Court's equity and comity rationales mandating equitable restraint in *Younger* would be less forceful when the underlying state suit was civil because the state interest in a civil proceeding is less than its interest in a criminal proceeding.[18] Whether in fact the Court would extend *Younger* to hold that a federal court should abstain when the underlying state action is civil remained unanswered until the case of *Huffman v. Pursue, Ltd.*[19]

In a later case, the Court stated more specifically that the doctrine of comity was designed to prevent federal interference with state judicial proceedings because such interference would: (1) prevent a state from effectuating its substantive policies; (2) prevent a state from providing a forum for the vindication of constitutional rights infringed by those policies; (3) result in duplicative legal proceedings; and (4) would reflect negatively on the state judicial system. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

The doctrine of *Younger* comity is a matter of judicial discretion which manifests itself by federal "abstention." *See generally Younger Analysis, supra* note 10, at 485-86. *Younger* comity supplements the anti-injunction statute, which represents the congressional expression of the doctrine of comity. *See* note 28 *infra*.

14. 401 U.S. at 56 (Stewart, J., concurring).

15. Douglas v. City of Jeannette, 319 U.S. 157 (1943) (prosecution under local solicitation ordinance); Williams v. Miller, 317 U.S. 599 (1942) (per curiam) (threatened prosecution under state statute licensing contractors); Watson v. Buck, 313 U.S. 387 (1941) (prosecution under state statutes regulating business of persons holding music copyrights); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941) (prosecution under state full train crew law); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) (prosecution under state unfair trade statute); Fenner v. Boykin, 271 U.S. 240 (1926) (prosecution under state statute forbidding certain futures transactions). *See generally* Note, *The New Federal Comity: Pursuit of Younger Ideas in a Civil Context*, 61 Iowa L. Rev. 784, 789-91 (1976) [hereinafter cited as *Federal Comity*].

16. For example, after discussing the philosophy behind the doctrine of comity, Justice Black stated: "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 45.

17. *Id.* at 54-55 (Stewart, J., concurring).

18. *Id.* at 55 & n.2 (Stewart, J., concurring).

19. 420 U.S. 592 (1975). Between *Younger* and *Huffman*, the Court had at least four occasions to consider the question of the applicability of *Younger* to civil proceedings. *See* Sosna

In *Huffman,* local officials in Ohio attempted to close a theatre exhibiting pornographic films. The officials invoked an Ohio public nuisance statute[20] pursuant to which they instituted a nuisance proceeding in the state court.[21] Judgment was rendered against the defendant. Rather than appeal the decision within the Ohio state court system, however, Pursue, Ltd.[22] instituted a section 1983[23] action in federal court seeking injunctive relief on the ground that the operation of the Ohio nuisance statute constituted a deprivation of constitutional rights under the color of state law. A three-judge district court was convened[24] and, apparently without considering *Younger,* held that some of the provisions of the statute constituted an overly broad prior restraint on first amendment rights and permanently enjoined enforcement of those provisions.[25] On appeal, the Supreme Court vacated the judgment of the district court, holding that the principles of *Younger* mandated federal abstention even though the state proceedings were civil in nature.[26]

In extending *Younger* to civil proceedings, the Court clarified a question it had left unsettled in *Mitchum v. Foster.*[27] The issue in *Mitchum* was a narrow one: whether the federal anti-injunction statute[28] was an absolute bar

v. Iowa, 419 U.S. 393, 396-97 nn.2 & 3 (1975); Speight v. Slaton, 415 U.S. 333, 334-35 (1974) (per curiam); Gibson v. Berryhill, 411 U.S. 564, 575-77 (1973); Mitchum v. Foster, 407 U.S. 225, 244 (1972) (Burger, C. J., concurring).

20. Ohio Rev. Code Ann. § 3767.01-.99 (Page 1971).

21. The Ohio statute provided that a place showing obscene films was a nuisance which could be closed for up to one year. In addition, any personal property used in "conducting" the nuisance could be sold. 420 U.S. at 595-97.

22. Pursue had succeeded to a property interest in the theatre prior to the state court final judgment against its predecessor. The district court held that Pursue had standing in the federal court to bring its action. 420 U.S. at 598-99 n.10.

23. *See* note 1 *supra.*

24. 28 U.S.C. § 2281 (1970) (repealed by Pub. L. No. 94-381, 90 Stat. 1119 (1976)) provided that a three-judge court must be convened where a federal injunction was sought against the operation of an allegedly unconstitutional state statute. Appeal from a decision of a three-judge district court was directly to the Supreme Court. 28 U.S.C. § 1253 (1970). Enacted in response to the decision in *Ex parte* Young, 209 U.S. 123 (1908), that federal injunctions could issue against state officials acting unconstitutionally, section 2281 was designed to alleviate the friction caused when a single judge prevented the effectuation of state policies by granting such relief. *See* S. Rep. No. 204, 94th Cong., 1st Sess. 2 (1975). The statute was repealed largely for reasons of judicial economy as well as because subsequent decisional law and statutory and rule changes lessened the evil which the three-judge court was designed to prevent. *Id.* at 4-5, 7-8. The current three-judge court statute retains the requirements of a three-judge court when specifically required by an act of Congress or in any case involving reapportionment of congressional districts or state legislatures. 28 U.S.C.A. § 2284 (Cum. Supp. 1977).

25. No. C 72-432 (N.D. Ohio Apr. 20, 1973). For a discussion of the district court opinion, see 5 U. Tol. L. Rev. 171 (1973).

26. The Court remanded to the district court for determination of whether the case fits within one of the *Younger* exceptions and therefore was appropriate for federal injunctive relief.

27. 407 U.S. 225 (1972).

28. 28 U.S.C. § 2283 (1970). The section states that '[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

to the granting of federal equitable relief in section 1983 actions.[29] An affirmative answer would have rendered irrelevant any *Younger* considerations since the anti-injunction statute in and of itself would have operated to preclude the granting of federal equitable relief. The Court found that section 1983 was an act of Congress which explicitly contemplated federal injunctions in civil rights suits and, therefore, fell within the "expressly authorized" exception to the anti-injunction statute.[30] However, the Court confined its holding to the fact that a federal court had the power to enjoin state court litigation.[31] It refused to comment on how and when that power should be exercised against state civil proceedings, thereby leaving unanswered the question of how *Younger* might affect the result in *Mitchum*.[32] Nevertheless, the concurring opinion of Chief Justice Burger, joined by two

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Section 2283 is a modern version of the original federal anti-injunction statute which was enacted in 1793. The original statute provided flatly that no "writ of injunction be granted [by any federal court] to stay proceedings in any court of a state . . . ." Act of March 2, 1793, ch. 22, § 5, 1 Stat. 333, 335. The origins of the original statute are obscure. See the discussion in Toucey v. New York Life Ins. Co., 314 U.S. 118, 130-32 (1941). However, its purpose was clearly to "prevent needless friction between state and federal courts." Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1940).

Despite the seemingly rigid language of the original statute, the court interpreted it to allow exceptions. Injunctions were permitted against state court proceedings despite the anti-injunction statute when certain acts of Congress called for such injunctions, when federal courts in in rem proceedings had first acquired jurisdiction over the res, when a defeated federal litigant sought relitigation of the same issues in a state court and when the United States or one of its agencies was plaintiff in a federal court. *See* the discussion and cases cited in Mitchum v. Foster, 407 U.S. 225, 233-36 (1972).

In 1941, however, the Court in its decision in *Toucey* reimposed much of the literal stringency of the anti-injunction statute by disapproving of all the non-statutory exceptions save the in rem exception. Congress responded to the Court's literal reading of the statute in *Toucey* by codifying the pre-*Toucey* exceptions in section 2283, thereby restoring "the basic law as generally understood and interpreted prior to the *Toucey* decision." H. R. Rep. No. 308, 80th Cong., 1st Sess., A 181-82 (1947). The Court has stated that the current version of the anti-injunction statute embodied in section 2283 is "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of three specifically defined exceptions." Atlantic Coast R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1970).

29. 407 U.S. at 226.

30. *Id.* at 242-43. The expressly authorized exception in section 2283 is one of three statutory exceptions to the general ban against federal injunctions. *See* note 28 *supra*. To fall within this exception, it is not necessary for a particular act to expressly refer to section 2283 or to explicitly provide for a federal injunction against state court proceedings. *Id.* at 237-38. The test is "whether an Act of Congress, clearly creating a federal right or a remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.* at 238. For examples of other acts found to be "expressly authorized" exceptions, see Studebaker Corp. v. Gittlen, 360 F.2d 692 (2d Cir. 1966) (Securities and Exchange Act); Dilworth v. Riner, 343 F.2d 226, 230-31 (5th Cir. 1965) (1964 Civil Rights Act). For a general discussion of the other two exceptions to the anti-injunction statute, see C. Wright, Law of Federal Courts § 47, at 204 (3d ed. 1976).

31. 407 U.S. at 243.

32. *Id.*

other Justices, did state that on remand the district court should consider *Younger* before proceeding to the merits of the section 1983 action.[33] The obvious implication was that *Younger* could be a bar to a section 1983 action even if the anti-injunction statute was not. The decision in *Huffman* settled the issue by holding that *Younger* style comity would preclude the issuance of federal equitable relief based on a section 1983 claim, at least where the civil proceedings were of a quasi-criminal nature.[34]

A comparison of *Huffman* with *Mitchum* is important beyond the mere fact that *Huffman* answered a question posed by *Mitchum*. Rather, the deeper significance of the cases lies in the fact that in both the Court had squarely poised in contradistinction a statute ostensibly granting access to the federal courts and a doctrine denying access. But in *Huffman*, unlike in *Mitchum*, the Court found the doctrine denying access more compelling. In holding that *Younger* mandated federal dismissal of Pursue's action, the Court clearly accorded the considerations of *Younger*[35] a higher priority than those of section 1983.[36] The Court simply ignored its language in *Mitchum* and in other cases which forcefully emphasized the congressional purpose of section 1983 to make the federal courts the "guarantor of basic federal rights against state power."[37] Thus, *Huffman* evidenced a change in the Court's attitude toward

33. *Id.* at 244 (Burger, C. J., concurring).

34. The Court defined a quasi-criminal civil action as a "proceeding which in important respects is more akin to a criminal prosecution than are most civil cases." 420 U.S. at 604. In labeling this action quasi-criminal, the Court emphasized several factors: First, as in a criminal case, the state was a party to this civil nuisance case; and second, the civil statute was closely related to a criminal statute prohibiting the showing of obscene films and, therefore, was designed to further the very interest underlying the criminal statute.

Because of the holding in *Juidice*, the interpretation of "quasi-criminal" is no longer a pivotal issue in applying *Younger* in the civil context. However, for a list of some of the questions raised by this quasi-criminal standard, see *Federal Comity, supra* note 15, at 812. *See generally* Note, *Younger Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U.L. Rev. 870, 887-91 (1975) [hereinafter cited as *Equitable Abstention*].

35. *See* note 13 *supra* and accompanying text.

36. *See* note 37 *infra* and accompanying text. Such a result was obviously not the sole option open to the Court. Had it accorded a higher priority to section 1983 considerations, it could have reconciled *Younger* by holding that all section 1983 actions fit within the *Younger* special circumstances exception. *See* note 10 *supra* and accompanying text; Gunther, *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 217 (1972).

37. 407 U.S. at 239. The Court has stated that the federal courts, through section 1983, have been made the "*primary* and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States." Steffel v. Thompson, 415 U.S. 452, 464 (1974) (quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928) (emphasis added)). In Zwickler v. Koota, 389 U.S. 241 (1967), the Court stated: "We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." 389 U.S. at 248 (quoting Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945)).

In *Mitchum*, the Court further declared: "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." 407 U.S. at 239.

section 1983 suits in federal court—a change which narrowed the availability of such relief.[38]

Huffman shaped the civil comity doctrine in two specific ways: first, it extended *Younger* principles to civil proceedings of a quasi-criminal nature; and second, it held that *Younger* required exhaustion of state appellate remedies, even in a section 1983 suit, before a party could invoke the jurisdiction of a federal court. *Huffman* further suggested as a corollary that failure to pursue state remedies would result in loss of the section 1983 federal remedy.[39]

In extending *Younger* to non-criminal cases, the Court was careful to delineate the bounds of its decision: *Huffman* was not meant to be an extension of the *Younger* doctrine to civil cases in general.[40] Rather, the majority held that *Huffman* marked a narrow extension of the *Younger* doctrine to the facts then at bar and nothing more.[41] Because of the quasi-criminal nature of the state proceedings. the Court was still able to predicate federal restraint on *both* of the grounds relied on in *Younger*—comity[42] and the traditional reluctance of equity to interfere with a state's criminal processes.[43] This was significant because the Court left unclear whether it would view the civil comity rationale as capable of mandating

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38. There are several reasons why a potential section 1983 plaintiff would want to bring his action in a federal court. First, if the attack is directed against some state action, he may feel more confident of unbiased adjudication in the federal court. However, this was clearly rejected as a valid ground for allowing federal court action in Cousins v. Wigoda, 463 F.2d 603 (7th Cir.) (per curiam), *application for stay denied,* 409 U.S. 1201 (1972) (Rehnquist, Circuit Justice). In *Cousins,* the Seventh Circuit stated: "Unless some showing is made to the contrary, we must assume that an Illinois court would properly determine the merits of any federal issue properly presented to it. The mere possibility, unsupported by allegation or evidence, that a state judge might make a flagrantly erroneous ruling on a federal issue is an insufficient basis for federal intervention in the orderly progress of state litigation." *Id.* at 607.

Second, the potential federal plaintiff may feel that a federal judge is more competent to adjudicate federal rights than a state judge. *See* Thiokol Chemical Corp. v. Burlington Indus., Inc., 448 F.2d 1328 (3d Cir.), *cert. denied,* 404 U.S. 1019 (1971). Finally, the potential federal plaintiff may feel that the federal courts will afford him quicker and more efficient adjudication of his constitutional rights. *See generally Federal Comity, supra* note 15, at 808.

39. 420 U.S. at 611 n.22.

40. *Id.* at 607.

41. *Id.* Before *Huffman,* several lower court cases had already extended *Younger* to civil proceedings of a quasi-criminal nature. *See* MTM, Inc. v. Baxley, 523 F.2d 1255 (5th Cir. 1975); Duke v. Texas, 477 F.2d 244 (5th Cir. 1973), *cert. denied,* 415 U.S. 978 (1974); Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972).

42. *See* note 13 *supra* and accompanying text.

43. *Id. Huffman,* of course, was not a true criminal prosecution. However, the Court was able to apply this equity rationale by reasoning that the state's interest in preventing the dissemination of obscene material was exactly the same whether it moved under the civil nuisance statute or under the criminal statutes. Therefore, the nuisance proceeding was equated with the state's "paramount role" in defining and enforcing its criminal laws. *Id.* at 614 (Brennan, J., dissenting); *see* note 34 *supra.*

Younger abstention independent of the traditional equity considerations.[44] It therefore remained questionable whether *Younger* could be extended in the civil context beyond those factual situations which resembled *Huffman*.[45]

Precedents were not lacking, however, for an extension of *Younger* to civil cases other than those of a quasi-criminal nature. In *Cousins v. Wigoda*,[46] federal plaintiffs, losers in a contest to become delegates to the 1972 Democratic National Convention, sought to enjoin their victorious opponents from obtaining a state court injunction preventing the losers from challenging the election. On *Younger* grounds, the Seventh Circuit Court of Appeals vacated an order of the district court granting the federal injunction.[47] In applying *Younger* to this purely civil proceeding, the court conceded that comity considerations were less compelling in a civil suit where the state interest was not as strong as in a criminal case.[48] But the court nevertheless held that such considerations required "special respect" for the state judicial process and mandated federal abstention where the federal suit was initiated after the state civil suit.[49]

Justice Rehnquist, sitting as Circuit Justice, denied a stay of the Seventh Circuit's decision. He held that prior Supreme Court decisions clearly indicated that federal courts should not "casually enjoin the conduct of pending state court proceedings of [either criminal or civil] type."[51] The importance of *Cousins* is that the underlying state proceeding was not quasi-criminal in nature and, consequently, the denial of federal relief was predicated solely upon comity grounds.[52] This case, therefore, represented a more expansive

44. It should be recalled that the roots of the *Younger* doctrine lie in cases where state criminal prosecutions were sought to be enjoined. The decisions relied heavily on traditional equitable reluctance to interfere with an ongoing state criminal prosecution. *See* note 15 *supra* and accompanying text. For instance, in Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), the Court stated that "[t]he general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." *Id.* at 95; *accord,* Douglas v. City of Jeannette, 319 U.S. 157, 162-64 (1943). The importance of this consideration has been clearly acknowledged by the Court. "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

45. Several subsequent lower court decisions limited *Huffman* to civil proceedings of a quasi-criminal nature. *See, e.g.,* Buckner v. Maher, 424 F. Supp. 366, 374 (D. Conn. 1976); Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161, 1166-67 (D.N.J. 1976), *appeal filed,* 45 U.S.L.W. 3577 (U.S. Jan. 28, 1977) (No. 76-1037).

46. 463 F.2d 603 (7th Cir.) (per curiam), *application for stay denied,* 409 U.S. 1201 (1972) (Rehnquist, Circuit Justice).

47. 463 F.2d at 606.

48. *Id.* This was a specific reference to Justice Stewart's language in his concurring opinion in *Younger. See* note 18 *supra* and accompanying text.

49. 463 F.2d at 606.

50. Cousins v. Wigoda, 409 U.S. 1201 (1972).

51. *Id.* at 1206.

52. *Accord,* Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974). The Court in *Lynch* felt that the application of *Younger* principles should not depend on whether the state proceedings were labeled criminal or civil, but rather should be based on an "analysis of

view of the *Younger* doctrine than that espoused by the Court in *Huffman*. Indeed, *Cousins* anticipated the Court's holding in *Juidice* that comity considerations alone could mandate federal abstention where the underlying state civil proceeding was not quasi-criminal in nature.[53]

The second way in which *Huffman* shaped the emerging civil comity doctrine was to hold that *Younger* requires a litigant losing in the state courts to exhaust state appellate remedies even in a section 1983 action unless he could bring himself within one of the exceptions to *Younger*.[54] One of the results of this requirement, as Justice Brennan pointed out in his dissent in *Huffman*, would be that the mere filing of a complaint in a state court would require a potential section 1983 litigant to exhaust state appellate remedies before seeking federal relief.[55] The practical result of this is to render the section 1983 remedy meaningless where a state suit is filed first since an adverse decision rendered by the highest state court gives the litigant an appeal as of right to the Supreme Court.[56] Thus, although *Huffman* left the

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the competing interests in each case." *Id.* at 773. Accordingly, the court refused to enjoin the enforcement of a "possibly overbroad" state court order restraining certain persons from entering school property where there was a state civil action pending. *Id.* at 775.

53. In addition to *Cousins*, there were several Supreme Court cases which indicated that certain Justices did not view *Younger* as limited solely to quasi-criminal civil proceedings. In Lynch v. Household Finance Corp., 405 U.S. 538 (1972), the Supreme Court reversed a district court holding that the federal anti-injunction statute precluded a section 1983 challenge to the constitutionality of state prejudgment garnishment statutes. In a dissenting opinion, Justice White, joined by Chief Justice Burger and Justice Blackmun, noted that he would affirm the lower court's decision on the basis of *Younger*, arguing that it was "equally applicable where state civil litigation [was] in progress . . . ." *Id.* at 561 (White, J., dissenting); *accord*, Fuentes v. Shevin, 407 U.S. 67, 97-98 (1972) (White, J., dissenting).

Similarly, in Schmidt v. Lessard, 421 U.S. 957 (1975), *vacating and remanding* 379 F. Supp. 1376 (E.D. Wis. 1974), the Court vacated the district court's granting of equitable relief against Wisconsin's commitment procedures for the mentally ill and remanded for reconsideration in light of *Huffman*. The district court had considered *Younger* inapplicable to non-criminal proceedings. 349 F. Supp. at 1083. The Court's remand, therefore, could be read as an indication of the majority's view that *Huffman* was not necessarily limited to its facts. *But see* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), in which Justice Brennan, writing for the majority, cited *Huffman* for the narrow proposition that abstention is appropriate in cases of "state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films . . . ." *Id.* at 816.

For a general discussion of pre-*Huffman* lower court interpretations of *Younger*, see *Federal Comity, supra* note 15, at 801-04 & n.172.

54. 420 U.S. at 608; *see* note 10 *supra* and accompanying text.

55. *Id.* at 615. (Brennan, J., dissenting).

56. Once a litigant has suffered an adverse decision rendered by the highest court of a state declaring a state statute valid over constitutional objections, appeal to the Supreme Court is available pursuant to 28 U.S.C. § 1257(2) which states: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of

potential section 1983 litigant with a route to the Supreme Court, that route may well not provide as effective a method of adjudicating his constitutional claims as would a section 1983 action.[57]

In holding that *Younger* requires the potential section 1983 litigant to exhaust state appellate remedies, *Huffman* arguably was inconsistent with the earlier holding of *Monroe v. Pape*.[58] With respect to section 1983, *Monroe* had stated that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[59] Rather than read this language broadly, the *Huffman* Court interpreted *Monroe* as applying only where no state suit was pending and, in that situation, to allow the section 1983 plaintiff to bring his suit in the federal courts without first initiating a state court action.[60] Therefore, the Court was able to reconcile *Huffman* with *Monroe* by holding, in effect, that the federal remedy was supplementary to the state remedy *only* where no state proceedings had been initiated against the potential section 1983 plaintiff. Where the state proceedings had already begun, *Younger* requires exhaustion of state appellate remedies. Thus, the effect of *Huffman* was to limit *Monroe* severely.

The *Huffman* Court, moreover, took this logic a step further by suggesting that the failure to pursue state appellate remedies might, under *Younger*, result in the loss of the right to bring a section 1983 action in a federal court.[61] The effect of this would be that the potential federal plaintiff, by failing to pursue his remedy in a state court after the initial adverse trial court decision,

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its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257(2) (1970).

Additionally, the *Huffman* Court noted that traditional principles of res judicata and collateral estoppel may operate to bar relitigation in a federal court of a section 1983 action which has substantially been decided in the state court suit. 420 U.S. at 606 n.18. Although this issue has not been decided, the Court has observed that res judicata principles are "fully applicable" to section 1983 actions. Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). Indeed, lower courts have applied those principles to foreclose section 1983 suits. *See, e.g.*, Chism v. Price, 457 F.2d 1037, 1040 (9th Cir. 1972); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209, 1211 (6th Cir. 1970). *See generally Equitable Abstention, supra* note 34, at 912-18.

57. Even though a section 1257 appeal is as of right, the Court, perhaps necessarily, disposes of most cases through summary affirmance or dismissals. *See* Note, *The Freund Report: A Statistical Analysis and Critique*, 27 Rutgers L. Rev. 878, 902-03 (1974). Hence, "the reality of such review is questionable." *Younger Analysis, supra* note 10, at 499 & n.86. Indeed, the Court itself has questioned section 1257 review as an alternative to a section 1983 action in a federal court. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

58. 365 U.S. 167 (1961).

59. *Id.* at 183.

60. 420 U.S. at 609 n.21.

61. The Court in *Huffman*, though suggesting this result, did not have to decide this issue. In Hicks v. Miranda, 422 U.S. 332 (1975), the potential federal plaintiff did not appeal a state order declaring a film obscene and ordering its seizure. "It may be that under *Huffman* . . . the failure of appellees to appeal the [state court order through the state judicial system] would itself foreclose resort to federal court, absent extraordinary circumstances bringing the case within some exception to *Younger* v. *Harris*." *Id.* at 351 n.20. Again, however, the Court did not decide this issue.

would have lost his state remedy and, under *Younger,* would be denied his section 1983 federal remedy.

In *Juidice v. Vail,*[62] the underlying state suit was not quasi-criminal in nature. The Court nevertheless held that the principles of *Younger* and *Huffman* mandated federal abstention in the subsequent section 1983 action,[63] and it thereby extended those principles for the first time to civil proceedings beyond the narrow confines of the *Huffman* quasi-criminal factual setting. In thus expanding the doctrine of civil comity, the Court could not rely on the traditional reluctance of equity to interfere with the state criminal process, a rationale employed in both *Younger*[64] and *Huffman.*[65] Accordingly, the Court, with Justice Rehnquist writing for the majority, justified federal abstention by relying solely on the " 'more vital consideration' " of comity,[66] thereby establishing that doctrine as an independent basis for denying federal equitable relief. The significance of this step is clear. With the quasi-criminal rationale now an unessential element in applying *Younger* to civil cases, the foundation is laid in *Juidice* for the potential application of *Younger* to more, if not all, types of civil actions.

Since the Court in *Juidice,* as in *Huffman,* reserved the question of the applicability of *Younger* to civil cases in general,[67] it is unclear what the impact of *Juidice* will be. However, the case can be read in three ways. Based on the Court's refusal to extend *Younger* to civil cases in general, the most narrow reading would limit the significance of *Juidice* to its facts. This reading is further supported by the uniquely essential function of contempt proceedings to the effectuation of a state's judicial process—a function which the Court clearly perceived.[68] Such a reading, in conjunction with *Huffman,* would limit the applicability of *Younger* to civil proceedings of a quasi-criminal nature and to those involving a state's contempt power. This narrow reading, however, does not seem plausible in light of broad language in *Juidice* which indicates that the Court does not view *Younger* as being confined solely to these narrow types of civil cases.[69] Furthermore, the general trend of the Court has been to extend the applicability of *Younger*[70] and thus

62. 97 S.Ct. 1211 (1977).

63. *Id.* at 1216-17.

64. 401 U.S. at 43-44; *see* note 11 *supra* and accompanying text.

65. 420 U.S. at 604-05; *see* note 34 *supra* and accompanying text.

66. 97 S.Ct. at 1217.

67. *Id.* at 1218 n.13.

68. *Id.* at 1217 & n.12. The Court further indicated that whether the contempt procedure was labeled criminal or civil was not an important distinction. *Id.* at 1217.

69. *See* note 76 *infra* and accompanying text.

70. *See, e.g.,* Hicks v. Miranda, 422 U.S. 332 (1975) (principles of *Younger* require dismissal of federal action where state action filed subsequent to federal action and where no "proceedings of substance on the merits" have taken place in federal courts); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (principles of *Younger* require dismissal of federal action where underlying state action is quasi-criminal in nature); Samuels v. Mackell, 401 U.S. 66 (1971) (federal issuance of declaratory judgments barred by principles of *Younger* where state criminal prosecution is pending). *But see* Steffel v. Thompson, 415 U.S. 452 (1974) (*Younger* does not bar federal relief where criminal prosecution is only threatened).

there is little reason to conclude that the logic of comity in civil cases has no further application beyond the factual situations contemplated in *Huffman* and *Juidice*.

A second reading, advanced by Justice Brennan in his dissenting opinion, is that *Juidice* merely postpones the formal announcement that *Younger* will be extended to all civil cases.[71] Justice Brennan based his reading of *Juidice* on the fact that the underlying state suits were between private litigants and, therefore, that the state interests involved were slight.[72] He saw this as an indication that the Court was willing to apply *Younger* even where the state interest was outweighed by other considerations, and accordingly concluded that the Court's reference to the state contempt power was simply a "cover" for that purpose.[73] However, Justice Brennan's prediction is not supported by the language in the majority opinion. The Court speaks of the state's contempt power as "surely an important interest"[74] and lying at "the core of the administration of a State's judicial system . . . ."[75] Indeed, the entire focus of the majority's analysis is on the importance of the contempt power to the state's judicial system. Far from considering the state interest slight, the Court seems to have found it quite substantial. Thus, despite some broad

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71. 97 S.Ct. at 1222 & n. (Brennan, J., dissenting). Even if *Younger* were extended to all civil cases, federal equitable relief would still be available, despite a pending state proceeding, where the federal plaintiff can show that he will not have an adequate opportunity to present his federal claim in the state proceedings, or where one of the exceptions to *Younger* applies. *Id.* at 1218-19; *see* note 10 *supra* and accompanying text. However, failure to take advantage of the opportunity to present constitutional claims in the state proceedings will foreclose federal relief. *Id.* at 1218.

72. *Id.* at 1221-22 (Brennan, J., dissenting).

73. *Id.* at 1222 (Brennan, J., dissenting). Certainly, Justice Brennan is correct that where a civil action is between two private litigants based on a statute whose primary purpose is the protection of private rights, the state interest is slight. *See generally Federal Comity, supra* note 15, at 812-13. However, this was not the case in *Juidice* where the court carefully noted that the contempt statutes, though an aid to private litigants, served a crucial function in maintaining the authority of the state judicial system. 97 S. Ct. at 1217 n.12.

If *Younger* were extended to all pending civil cases, regardless of the state's interest in the issue, the Court would be saying, in effect, that the federal interest in protecting federal rights by intervening in state court proceedings is even slighter than the state interest provided the potential federal plaintiff is afforded adequate opportunity to raise his federal rights in the state proceeding. However, such an extension would not seem sound because situations may arise where the potential harm to an individual resulting from the enforcement of an allegedly unconstitutional state civil statute against him would outweigh any state interest involved. *See generally Federal Comity, supra* note 15, at 812-13. In such situations, the balance would seem to favor federal relief if the state defendant decides to choose a federal forum. *Cf.* Zwickler v. Koota, 389 U.S. 241, 248 (1967) ("In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .' ").

74. 97 S.Ct. at 1217.

75. *Id.*

language in *Juidice,*[76] as well as in *Huffman,*[77] which could still be read as a basis for the extension of the *Younger* doctrine that Justice Brennan predicts, the majority's analysis actually supports the proposition that the state interest in the civil proceedings must be "important" for *Younger* to apply. This would clearly limit the application of *Younger* in the civil context.

It is therefore submitted that a third reading of *Juidice* is the most accurate. According to this analysis, the Court has moved toward a balancing approach which should limit the extension of *Younger* in civil cases. This conclusion is supported by the majority opinion in *Juidice* which focused on the importance of the contempt process to the state judicial system. The Court emphasized that although this process benefited the interests of private litigants, it also served to maintain the authority of the state judicial system.[78] The Court was careful to note that the state's interest in its contempt process is not as strong as its interests in its criminal or quasi-criminal proceedings.[79] Nevertheless the Court concluded that there was a sufficiently important state interest to warrant abstention on comity grounds.[80]

Therefore, *Juidice* need not be broadly interpreted to extend *Younger* principles to civil cases where no important state interest is involved. The Court characterized the interference with the state's contempt process as " 'an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding.' "[81] The significance of the state's interest in its criminal laws has traditionally been acknowledged.[82] By comparing the possible injury to the state interest in *Juidice* with the injury to the state by federal interference in its criminal processes, *Juidice* can be viewed as requiring a state interest of great significance before *Younger* principles will

76. To support its extension of *Younger* in *Juidice,* the Court quoted from *Ex parte* Young, 209 U.S. 123 (1908), which established federal court power to issue injunctive relief against state officials. "[T]he Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Id.* at 162. It would seem that the rationale of this quotation would require dismissal of the federal action whether *pending* state proceedings concerned important state interests or not. This wording is sufficiently broad to require the application of *Younger* in all civil cases.

77. In his opinion in *Huffman,* Justice Rehnquist emphasized that "*Younger* turned on considerations of comity and federalism peculiar to the fact that state proceedings were pending . . . ." 420 U.S. at 606. Likewise, he felt that prospective section 1983 plaintiffs should not have the "luxury" of a federal forum when state proceedings were ongoing. *Id.* at 605-06. In addition, he pointed out that a federal proceeding would reflect negatively on the state judicial system's ability to enforce constitutional rights; this logic would apply with equal validity whether the state proceeding were criminal or civil. *Id.* at 604.

78. 97 S.Ct. at 1217 n.12.

79. *Id.* at 1217.

80. *Id.*

81. *Id.* (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)).

82. *See, e.g.,* Stefanelli v. Minard, 342 U.S. 117, 120-21 (1951); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 94-95 (1935); Fenner v. Boykin, 271 U.S. 240, 243-44 (1926). *See generally Equitable Abstention, supra* note 34, at 882. In *Huffman,* the Court characterized the state interest in quasi-criminal proceedings as virtually identical to the state interest in its criminal proceedings. 420 U.S. at 604.

apply in the civil context. Only those state interests of "sufficiently great import"[83] would outweigh the federal interest, under section 1983, in preventing the deprivation of constitutional rights by state action. If a state interest did not meet that standard, federal equitable relief could be granted.[84] Thus, under this third reading, *Juidice* replaces the *Huffman* quasi-criminal standard with a balancing analysis that looks to the importance of the state interest in determining the applicability of *Younger* in the civil context.

Under any reading, *Juidice* marks an extension of *Younger* principles and a concomitant narrowing of available federal relief under section 1983. Therefore, the trend started in *Huffman* continues.[85] Yet, in neither *Juidice* nor *Huffman* has the Court attempted to reconcile explicitly the principles of federalism embodied in the *Younger* doctrine with the objectives of Congress expressed in section 1983.[86] Indeed, it is possible to read the majority opinions in *Juidice* and *Huffman* without even realizing that there is an inherent tension between the two.[87] Nevertheless, it is clear from *Juidice* that at least where there is an important state interest involved in an ongoing state civil proceeding, *Younger* will require dismissal of the section 1983 federal suit. Conversely, the language of *Juidice* supports the implication that where no important state interest is involved, the objectives of section 1983 will best be attained by allowing a federal court to reach the merits of constitutional claims.

John Gallagher, Jr.

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83. 97 S.Ct. at 1217. Several lower court cases have looked to the importance of the state interest involved before determining that *Younger* principles mandated federal restraint: Williams v. Williams, 532 F.2d 120 (8th Cir. 1976) (important state interest in domestic relations); Littleton v. Fisher, 530 F.2d 691 (6th Cir. 1976) (same); Ahrensfeld v. Stephens, 528 F.2d 193, 197-98 (7th Cir. 1975) (important state interest in eminent domain system); Burdick v. Miech, 409 F. Supp. 982, 984-85 (E.D. Wis. 1975) (important state interest in paternity proceedings).

84. *See* Brown v. Liberty Loan Corp., 539 F.2d 1355, 1362 (5th Cir. 1976) (state interest in operation of postjudgment garnishment statutes not sufficiently important to merit application of *Younger* principles).

85. *See* notes 36-38 *supra* and accompanying text.

86. Compare the majority opinions in *Juidice* and *Huffman* with that of Mitchum v. Foster, 407 U.S. 225 (1972), where the Court carefully analyzed the purposes of both the federal anti-injunction statute and section 1983 before reconciling the two. *See* notes 36-38 *supra* and accompanying text.

87. *But see* the dissenting opinions of Mr. Justice Brennan in both *Juidice*, 97 S.Ct. at 1220, and *Huffman*, 420 U.S. at 613. This tension between the *Younger* doctrine and the congressional purpose behind section 1983 was discussed in Wall v. American Optometric Ass'n, 379 F. Supp. 175, 186-87 (N.D. Ga.) (three-judge court), *aff'd sub nom.* Wall v. Hardwick, 419 U.S. 888 (1974).

Labor Law—Representation Election—Discriminatory Conduct of a Union Does Not Bar the Granting of Certification as Exclusive Bargaining Representative.—An election conducted to determine the collective bargaining representative for the employees of Handy Andy, Inc., was won by Teamsters' Local 657.[1] In the past, Local 657 had been found to have engaged in discriminatory practices.[2] The employer therefore filed exceptions with the National Labor Relations Board (NLRB) to the Regional Director's recommendation that Local 657 be certified as exclusive bargaining representative for Handy Andy's employees. The employer contended that, pursuant to the NLRB's holding in *Bekins Moving & Storage Co.*,[3] Local 657 was disqualified from being certified because of its prior history of engaging in discriminatory practices. The NLRB reversed its ruling in *Bekins* and held that the Board is not authorized to withhold certification from a labor organization selected by a majority of the employees because of discriminatory practices of the union.[4] Instead, the NLRB stated that allegations of discrimination are more appropriately raised at a later date in a full hearing pursuant to an unfair labor practice complaint.[5] *Handy Andy, Inc.*, 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (Feb. 25, 1977).

This Note will discuss the two main issues in *Handy Andy*: (a) whether the NLRB's certification of a labor organization as exclusive bargaining representative constitutes state action which violates the fifth amendment's due process clause, and (b) whether the NLRB's certification of a union which engages in discriminatory practices comports with the objectives of the National Labor Relations Act (the Act).

The NLRB's policy of denying certification to a union found to discriminate based upon race, alienage, or national origin evolved from *NLRB v. Mansion House Center Management Corp.*[6] The employer was found by the NLRB to have violated the Act by refusing to bargain[7] with the certified bargaining representative.[8] The employer's defense had been that no duty to bargain existed, since the union practiced racial discrimination. The Eighth Circuit

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1. Teamsters' Local 657 received 108 out of the 174 ballots cast. The unit in question contained 58 blacks and 114 Spanish-surnamed individuals; 162 of a total of 211 employees were minority group members. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1360 (Feb. 25, 1977).

2. Local 657 had been aiding employers in perpetuating discrimination on the basis of race and national origin through a seniority scheme. *See* Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974), *vacated*, 97 S. Ct. 1891 (1977); Herrera v. Yellow Freight Sys., Inc., 505 F.2d 66 (5th Cir. 1974), *vacated*, 97 S. Ct. 1891 (1977); Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69 (5th Cir. 1974), *vacated*, 97 S. Ct. 1891 (1977). Reversal of these cases followed the NLRB's decision in *Handy Andy, Inc.*, the case to which this Note is directed. The Supreme Court held the seniority scheme was not discriminatory.

3. 211 N.L.R.B. 138 (1974).

4. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1355 (Feb. 25, 1977).

5. *Id.* at 1355-56.

6. 473 F.2d 471 (8th Cir. 1973).

7. A violation of the National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

8. Mansion House Center Management Corp., 190 N.L.R.B. 437 (1971), *enforcement denied in part*, 473 F.2d 471 (8th Cir. 1973).

refused to enforce the Board's order, reasoning that there is state action when the Board recognizes a union which discriminates, because it "becomes a willing participant in the union's discriminatory practices."[9] Therefore, the Constitution required the NLRB to evaluate a charge of racial discrimination before certifying a union which had won a representative election.[10] Noting that the law in the area needed to be more fully developed, the court left it for the Board to derive a manageable procedure.[11]

The Board responded in *Bekins Moving & Storage Co.*[12] An employer sought to block a representation election on the ground that the union discriminated on the basis of sex and national origin. The NLRB ordered an election to be conducted, but it stated that in the future it would consider a union's discriminatory conduct before certifying it as exclusive bargaining representative.[13] In reaching this conclusion, the Board concurred with the Eighth Circuit's holding in *Mansion House* that certification constituted state action which aids discrimination.[14] It was the Board's opinion that if a federal agency were to confer benefits upon a union engaging in invidious discrimination, it would in effect be sanctioning and even furthering the union's continued discrimination, thereby violating the due process clause of the fifth amendment.[15]

Although the Act apparently mandates that a certificate of representation be issued,[16] the Board argued that a collateral duty of fair representation is con-

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9. 473 F.2d at 473. The court reasoned that the state prohibition against racial discrimination by the state contained in the fourteenth amendment was applicable to the federal government under the fifth amendment. *Id.* at 472-73; *see* Colorado Anti-Discrimination Comm. v. Continental Air Lines, Inc., 372 U.S. 714, 721 (1963); Bolling v. Sharpe, 347 U.S. 497 (1954). " '[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." ' That racial discrimination is so invidious as to be unjustifiable cannot be denied. Accordingly, any recognition or enforcement of illegal racial policies by a federal agency is proscribed by the Due Process Clause of the Fifth Amendment." 473 F.2d at 473 (footnote omitted) (citing Schneider v. Rusk, 377 U.S. 163, 168 (1964)).

10. *Id.* at 474.

11. *Id.* at 474-75; *see* Naffziger, *The NLRB Attitude on Discrimination and the Judicial Response*, 26 Labor L.J. 21, 28-29 (1975) [hereinafter cited as Naffziger], wherein the author indicates that even after *Mansion House* and *Bekins* the NLRB is still considered relatively ineffective in the discrimination area.

12. 211 N.L.R.B. 138 (1974).

13. *Id.* Consideration of discrimination, however, is limited to the suspect classifications of race, alienage, and national origin. *Id.* at 143 (Kennedy, member, concurring); *see* Bell & Howell Co., 213 N.L.R.B. 407 (1974).

14. 211 N.L.R.B. at 138-39. "[T]he Supreme Court has held repeatedly that neither the Federal nor the state governments may take any action in furtherance or support of, or assistance to, any forms, or practices of discrimination." *Id.* at 139; *see* notes 9-11 *supra* and accompanying text.

15. *Id.* at 139. It was the Board's premise that certification placed a labor organization in the position whereby it could continue to exercise its discriminatory practices.

16. "If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970); *see* 211 N.L.R.B. at 147 (dissenting opinion); notes 51-57 *infra* and accompanying text.

tained in the Act and the Constitution.[17] According to the Board, these two mandates are not mutually exclusive, but must be construed together. Therefore it held that issuance of a certificate of representation without consideration of a union's ability to represent employees fairly would violate the Constitution.[18] The Board concluded that in the future it would review a union's ability to represent its employees fairly on a case-by-case basis, and then determine whether it had the constitutional power to certify the results of the election.[19]

Fewer than three years later the NLRB in *Handy Andy* reversed its position.[20] One of the primary reasons[21] given by the Board for the reversal was that the *Bekins* majority had misconstrued the state action doctrine.[22]

The concept of state action, as applied to government involvement in other-

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17. *Id.* at 139; *see* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

18. 211 N.L.R.B. at 139. "Indeed, the Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation." Local 12, Rubber Workers v. NLRB, 368 F.2d 12, 17 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

The Board held that, although the statute does not specifically grant the power to withhold certification, the Constitution does not permit the issuance of a certificate to a union which invidiously discriminates. 211 N.L.R.B. at 139.

19. 211 N.L.R.B. at 139. The procedure was met with mixed reaction. Although the dissent argued strongly that this procedure violated the statutory mandate to issue a certificate, *id.* at 147 (dissenting opinion), several circuit courts have acknowledged that the Board can withhold certification. *See, e.g.*, NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 13 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); NLRB v. Sumter Plywood Corp., 535 F.2d 917, 929-30 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). Several commentators foresaw a potential problem in the overlap of jurisdiction between the NLRB and the Equal Employment Opportunity Commission and the resulting difficulty of coordinating remedies. *See, e.g.*, Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?* 42 U. Chi. L. Rev. 1, 10 (1974) [hereinafter cited as Meltzer]; ABA Section of the Labor Relations Law, *Report of the 1974 Proceedings in Honolulu* 191 (remarks of Professor Morris). A situation might arise where, after the Board has determined discrimination existed and denied certification, a suit brought before the EEOC is dismissed for failure to find discrimination.

A further criticism was that *Bekins* illustrates the Board's uncertainty over how to approach discrimination. ABA Section of Labor Relations Law, *Report of the 1975 Proceedings in Montreal* 53 (remarks of Professor Hanslowe). This is borne out by the subsequent cases decided under *Bekins* and the lack of unanimity of opinion among the Board. *See* Bell & Howell Co., 213 N.L.R.B. 407 (1974) (2 majority, 1 concurring, 2 dissenting); Grant's Furniture Plaza, Inc., 213 N.L.R.B. 410 (1974) (2 majority, 3 concurring). On the positive side, one commentator envisioned *Mansion House* and *Bekins* as forcing unions to desist from discriminatory practices. For if the union failed to do so, the Board would revoke or prevent the union from being recognized as exclusive bargaining representative. Naffziger, *supra* note 11, at 27.

20. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (Feb. 25, 1977).

21. Another and perhaps the most important reason was the change in the composition of the Board. Only one, Jenkins, of the three Board members advocating the position in *Bekins* remains.

22. *Id.* at 1356.

wise private discrimination, originated in *Shelley v. Kraemer*.[23] In *Shelley*, local courts had enforced restrictive covenants which prohibited the sale of land to blacks. Even though private agreements to engage in discriminatory practices do not violate the Constitution, the Supreme Court held that enforcement of a private agreement by a state court violated the equal protection clause of the fourteenth amendment because such conduct constituted state action.[24] The Court reasoned that the discriminatory purpose of the agreements could not be secured without the active intervention of the courts in enforcing the agreements.[25] The key element in *Shelley* defining state action was *affirmative enforcement* of the private agreement to discriminate.[26] Thus, if a governmental agency affirmatively aids private discrimination, there is state action.

The existence of state action, however, is not limited to cases in which there is affirmative enforcement of private discrimination. Courts also find state action when there are mutual benefits exchanged between a governmental entity and a private party which discriminates.[27] There are two leading cases in this area, *Burton v. Wilmington Parking Authority*[28] and *Moose Lodge No. 107 v. Irvis*.[29] In *Burton* there was state action because the state as lessor was involved in a "symbiotic relationship" with the discriminating lessee.[30] In *Moose Lodge* the Court found there was not state action even though a state liquor authority granted a license to a private club which refused to serve blacks.[31] The question of whether the NLRB-union relationship involved in the certification procedure is state action may be answered by comparing it with the fact patterns of these two cases.

In *Burton* the Supreme Court emphasized the failure of the municipal parking authority lessor to prevent discrimination by inclusion of a clause in the lease requiring the restaurant to serve blacks.[32] This approach is not applicable to the problems dealt with in *Handy Andy*. First, the land and the building the restaurant occupied were owned by the parking authority and upkeep and external repairs were the responsibility of the parking authority.[33] A parallel relationship does not exist between the NLRB and a labor organization. Second, the "symbiotic relationship" arising from the interdependence of the parking authority and the restaurant has no analogue in the procedure by which the

23. 334 U.S. 1 (1948).

24. *Id.* at 20-21.

25. *Id.* at 13-14.

26. This same element appears in two other decisions as well. *See* Reitman v. Mulkey, 387 U.S. 369 (1967) (a state constitution which prohibited any governmental agency from abridging the right of a property owner to refuse to sell or lease as he saw fit was held to be prohibited state action); Peterson v. City of Greenville, 373 U.S. 244 (1963) (a local ordinance requiring segregation was found to be state action).

27. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

28. *Id.*

29. 407 U.S. 163 (1972).

30. 365 U.S. at 723-24; *see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

31. 407 U.S. at 175-76.

32. 365 U.S. at 725.

33. *Id.* at 724.

NLRB certifies a union. Both the parking authority and the restaurant received mutual benefits from their association.[34] These benefits included such items as a convenient place for patrons of the restaurant to park, which meant a corresponding increase in customers for the parking facility, the tax-exempt status of the physical improvements made by the lessee, and the profits which the state earned from rental of the restaurant.[35] The NLRB and the union confer no analogous benefits upon each other. Of course, the union does receive a certificate of representation and is free from challenge from another union for a year,[36] but at the same time certification also imposes duties on the union, including the duty of fair representation.[37] The only benefit received by the Board for certifying the union is the intangible one of achieving labor peace, one of the purposes of the Act.[38] Comparing the mutual benefits received in the NLRB-union relationship with those described in *Burton*, there appears to be little room for analogy.

One other key factor in finding state action in *Burton* was the parking authority's failure to include a provision in the lease affirmatively requiring the restaurant not to practice discrimination.[39] Since the Act requires the NLRB to enforce the duty of fair representation, however, it cannot be said that the Board is guilty of the same type of neglect. Using this analysis, a *Burton*-type fact pattern does not appear to exist when the NLRB certifies a union as an exclusive bargaining representative.

The relationship appears to be more closely analogous to the facts in *Moose Lodge*. In *Moose Lodge* it was alleged that state licensing of a private club which refused to serve blacks constituted state action. The Court held there was no state action for the following reasons. First, the lodge was a private social club which occupied a private building. As a result, the lessee-lessor relationship existing in *Burton* was not present.[40] Secondly, the Court pointed out that the liquor control board plays "no part in [either] establishing or enforcing the membership or guest policies" of its licensees.[41] Unlike the liquor control board, however, the NLRB does influence membership policies—but the influence exerted by the NLRB helps prevent discrimination. When it certifies a union the Board designates that union as exclusive bargaining representative[42] and imposes a duty to represent all members equally.[43] A union found discriminat-

34. *Id.*

35. *Id.*

36. *See* Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1366 (dissenting opinion).

37. *See* cases cited in note 17 *supra*. The full import of the duty will be discussed at notes 60-61 *infra* and accompanying text.

38. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1970) (preamble to the Act).

39. 365 U.S. at 725.

40. 407 U.S. at 175.

41. *Id.*

42. National Labor Relations Act § 9, 29 U.S.C. § 159 (1970).

43. The duty of fair representation was established in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), and was held to apply to labor unions in Wallace Corp. v. NLRB, 323 U.S. 248 (1944). *See* notes 60-61 *infra* and accompanying text.

ing can have its status as exclusive bargaining representative revoked.[44] Therefore, since the Board is actually charged with discouraging discrimination, there is even less state involvement in discriminatory conduct than there was with the liquor control board in *Moose Lodge*.

Another factor that the Court examined in *Moose Lodge* was the extent of the liquor control board's regulation of private clubs.[45] Regulation included standards for the physical construction of the premises, a requirement that a list of names and members be supplied to the board, that extensive financial records be maintained, and that the board be given access to the premises for inspection at any time. In discounting the pervasiveness of state involvement,[46] the Court stated that the regulation in no "way foster[ed] or encourage[d] racial discrimination."[47]

The nature of certification is the key to determining whether regulation by the NLRB is pervasive enough to constitute state action. If certification is a mere mechanical function of the Board, as the *Handy Andy* majority contends,[48] there is probably no state action. However, if certification is something more—in particular, if it is involvement more extensive than the liquor control board in *Moose Lodge*—state action might be found. The question is whether the NLRB's certification of a union which discriminates constitutes such pervasive regulation of the union as to support the conclusion that the NLRB fosters or encourages discrimination.

The Board plays a passive role in the certification procedure. After a petition is filed by a labor organization seeking to be recognized as a bargaining representative for a unit of employees, the NLRB conducts an investigation to determine whether a question of representation exists. If the Board determines that a valid question exists, an election is directed and the results are certified.[49] Certification validates the election results.[50] The NLRB provides machinery to determine the desires of the employees.[51] It does not do this to aid the labor organization, but rather to aid the employees presently working for an employer. The employees may select a good or bad labor organization or none at all; the onus of making an intelligent selection rests squarely on the employees.[52]

An argument can be made, however, that the Board's role in certification is more than that of a passive ballot counter, because certain benefits are conferred

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44. Teamsters Local 671, 199 N.L.R.B. 994 (1972) (discrimination against part-time warehouse employees); Metal Workers Local 1, 147 N.L.R.B. 1573, 1577 (1964) (discrimination against black workers).

45. 407 U.S. at 176-77.

46. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), where the Court held that extensive regulation in and of itself does not create state action. Instead, the Court looked for a *Burton*-type of connection between the private party and the state regulatory agency. *Id.* at 357-58.

47. 407 U.S. at 176-77.

48. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1357 (Feb. 25, 1977).

49. National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970).

50. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1357 (Feb. 25, 1977).

51. Alto Plastics Mfg. Corp., 136 N.L.R.B. 850, 851 (1962).

52. *Id.* at 851.

upon a labor organization which is certified by the NLRB. Thus, an employer is placed under a statutory duty to bargain,[53] and a union receives both the exclusive right to represent all the employees,[54] free from challenge for a year,[55] and the "presumption that its majority status continues after a year."[56] Therefore, it could be argued that certification is not solely a mechanical function, and that it does foster or encourage discrimination.

However, a certified union is not authorized to practice discrimination in the exercise of these rights. If a union does practice discrimination, the NLRB possesses the power to revoke the certification.[57] The one-year protection and the majority status would thereby be terminated. A union is also subject to discipline if it attempts to force an employer to hire on the basis of union membership.[58] It therefore would be difficult for a union to change the composition of the work force to conform to the union's prior racial make-up by insisting that an employer hire only union members. Moreover, the existing minority members in the work force would be protected by the application of the doctrine of fair representation. This doctrine requires that a union represent all members in the unit equally and prohibits it from favoring one group of members over another.[59] A union's bargaining power must be exercised in furtherance of this duty.[60] Therefore, even though certain benefits are conferred upon the union when the Board certifies it, certification cannot be said to foster or encourage discrimination because at the moment a union is certified it becomes subject to the Board's sanctions against discrimination. As in *Moose Lodge* there is no enforcement of the discrimination, and accordingly there is no state action.

When alternative remedies are available to an aggrieved individual, courts are wont to apply the state action doctrine to fashion a remedy. An examination of the state action cases reveals that in those cases where government involvement with private discrimination was viewed as state action, the Constitution was "the only available remedy against governmental support or toleration."[61] In

53. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

54. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970).

55. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1970).

56. 94 L.R.R.M. at 1366 (dissenting opinion).

57. Teamsters Local 671, 199 N.L.R.B. 994 (1972); Metal Workers Local 1, 147 N.L.R.B. 1573, 1577 (1964).

58. National Labor Relations Act § 8(b)(2), 29 U.S.C. § 158(b)(2) (1970).

59. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); Miranda Fuel Co., 140 N.L.R.B. 181, 184-85 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The NLRB's ruling in *Miranda*, holding that a breach of the duty of fair representation was an unfair labor practice, was upheld in Local 12, Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

60. The doctrine of fair representation was developed in a series of Supreme Court decisions and imposes upon the union the duty to represent all employees "fairly and impartially." Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). The duty "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). Violation of this duty is an unfair labor practice. *Id.* at 178; Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

61. Meltzer, *supra* note 19, at 9.

Shelley, for example, if state action had not been found, there would have been no means of preventing covenants restricting the sale of land to blacks from having full effect.[62] Similarly, in *Burton* the finding of state action was the only means whereby discrimination by the restaurant owner could be stemmed.[63]

62. *See* Shelley v. Kraemer, 334 U.S. 1, 13-14 (1948).

63. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). This point is illustrated by the Court's holdings in other cases. In a case with a fact pattern similar to *Burton*, the Court held that a private restaurant located in a municipal airport must cease discrimination. The relationship which existed between the municipality and the restaurant created a symbiotic relationship which resulted in state action. Turner v. City of Memphis, 369 U.S. 350 (1962). The Court acknowledged that absent state action there was no means to prevent discrimination. *Id.* at 353.

In Griffin v. Maryland, 378 U.S. 130 (1964), an amusement park guard requested several blacks to leave the premises, pursuant to a long standing policy of segregation. When the blacks refused to leave, they were arrested and later convicted. The Court noted that although the guard was privately employed, he had been deputized by state authorities. As a result, his enforcement of the amusement park's discriminatory practices constituted state action, and the convictions were set aside. Absent a finding of state action, the Court would have been powerless to reverse the convictions.

In Peterson v. City of Greenville, 373 U.S. 244 (1963), blacks were arrested for trespassing when they sat at an all-white lunch counter. A local ordinance prohibited the serving of blacks and whites at the same place. In finding discrimination and reversing the convictions, the Court held that the state by enacting the ordinance removed from the individual the choice and, therefore, constituted state action. As with *Griffin*, alternative grounds for overturning the convictions were not available.

In Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), a white school teacher brought six students, all blacks, to the defendant's lunch counter. The students were served, but the teacher was not. Upon her protest, she was arrested. In an action against the store owners under 42 U.S.C. § 1983, alleging that they conspired with the police to deprive her of her civil rights, the Court refused to dismiss the suit on the gounds that the defendants were private individuals. The Court held that if the teacher could establish at trial a state-enforced custom of segregation in public restaurants, state action would exist and the cause of action would lie. If the Court had not found state action, the teacher would not have had a remedy against the defendants.

In Norwood v. Harrison, 413 U.S. 455 (1973), the state had a policy of loaning textbooks to private schools. This policy was challenged on the gound that the schools practiced racial discrimination and that the support provided by the state in loaning the textbooks constituted state action. The Court found that state action was present, since the giving of the textbooks to the private schools constituted tangible economic support in aid of discrimination. Although the Constitution provided no remedy for discrimination in private schools, the Court was able to prevent the state from supporting the discrimination.

Gilmore v. City of Montgomery, 417 U.S. 556 (1974), involved an injunction prohibiting the city from making available public recreation facilities exclusively to segregated private groups. One of the questions with which the Court was faced was how extensive this injunction was. The Court held that the prohibition could not be extended to any mere use by a private group which practiced discrimination, but if the city provided any support to the group, it would constitute state action. The group would thus be banned from use of the public facility. *Id.* at 574. Thus, though the Court could not ban the private groups completely from the public facilities, it was able to use the state action doctrine to curtail the utilization by private segregated groups. There was no other action available to the Court to limit the discriminatory practices.

In Evans v. Newton, 382 U.S. 296 (1966), a parcel of land was devised to be used as a park for members of the white race. The city undertook the management of the park, and an action was brought claiming that this participation by the city violated the equal protection clause. The Court found state action, and, additionally, held that even if management of the park were placed in the

Therefore, if adequate alternate remedies are available to an individual hurt by a union's discriminatory practices, courts would probably not find that state action exists in the NLRB-union relationship involved in the certification procedure.

Several alternative remedies are, in fact, available when a union practices discrimination. Union membership policies which discriminate against or bar minorities violate the Civil Rights Act of 1964.[64] The standards laid down by the *Mansion House* court for the Board to follow when dealing with discriminatory conduct of unions are identical to those utilized by the Equal Employment Opportunities Commission (EEOC).[65] As discussed above, the NLRB has other remedies to apply as well.[66] Since these other remedies are available, it is difficult to reach a determination that the NLRB is affirmatively enforcing discrimination, and accordingly state action prohibited by the due process clause of the fifth amendment can be said not to exist. Moreover, a court confronted with this problem is freed from having to fall back on the state action doctrine in order to fashion a remedy for the discrimination.[67]

Aside from the problem of state action, the question remains whether the procedure set out in *Handy Andy* will further the purposes of the Act. Recently, the Supreme Court considered an analogous situation in *NAACP v. Federal Power Commission.*[68] The NAACP attempted to compel the Federal Power Commission (FPC) to issue a rule "requiring equal employment opportunity and non-discrimination in the employment practices of its regulatees."[69] The FPC contended it lacked jurisdiction to promulgate such a rule, since its statutory authority extended only to economic regulation of those engaged in resource development.[70] The Supreme Court agreed that the FPC need not issue the rule and held that the scope of regulation must be confined to the purpose of the

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hands of private individuals, state action would still exist, as the service provided was municipal in character. The Court was thus able to use state action to prevent private land from being used in a discriminatory manner. As in *Gilmore*, this was the only remedy the Court could supply.

64. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 to h-6 (1970 & Supp. II 1972).

65. In NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 475-77 (8th Cir. 1973), the court discussed the admissibility of the offer of proof provided by Mansion House to establish the union's discrimination. The Board had rejected the offer of proof because it only asserted the imbalance of the union's membership and did not allege that the union actually denied membership on the basis of race. *Id.* at 475. In holding that the Board erred in not admitting the offer of proof, the court drew primarily from Title VII cases, and in remanding the case, the court indicated that the Board must consider this type of information. *Id.* at 475-77; *see* Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1358 n.30 (Feb. 25, 1977). The Eighth Circuit interpretation of Title VII appears, however, to be incorrect, since the Supreme Court has indicated that it "never [has] held that the constitutional standard[s] for adjudicating claims of invidious racial discrimination [are] identical to the standards applicable under Title VII . . . ." Washington v. Davis, 426 U.S. 229, 239 (1976). Furthermore, Professor Meltzer points out that the "Constitution does not provide an adequate basis for the disqualification imposed by *Mansion House.*" Meltzer, *supra* note 19, at 11.

66. *See* notes 54-61 *supra* and accompanying text.

67. This was seen in the cases previously cited. *See* notes 63-64 *supra* and accompanying text.

68. 425 U.S. 662 (1976).

69. *Id.* at 664 (quoting the petition of the NAACP).

70. *Id.*

regulatory legislation.[71] The FPC's authority to consider discriminatory employment practices, the Court held, exists only insofar as the consequences of the discrimination are directly related to the establishment of rates.[72] A government agency's primary concern must be to fulfill the purpose for which it was established.

Chief Justice Burger stated in a concurring opinion that primary responsibility for preventing discrimination was centralized in the EEOC. When diffusion of authority among administrative agencies occurs, congressional intent in establishing the various agencies is frustrated.[73] As a result, "regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly."[74]

The primary purpose of the NLRB is to eliminate obstructions to the free flow of commerce by promoting tranquility in labor-management relations.[75] An essential element in achieving this end is the representation machinery, *i.e.*, the procedure whereby a labor organization obtains certification as exclusive bargaining representative for a unit of employees.[76] Part of that procedure involves conducting an election among the employees and certifying the results. The Act directs that once the election is held and the votes counted, the Board "shall certify the results thereof."[77] This language mandates that the Board issue a certificate of representation. Moreover, in accordance with the principles of *NAACP v. FPC*,[78] the Board is required to fulfill its statutory purpose of certifying the union. The resolution of discrimination charges, as the Court stated in *NAACP*, should be left to another branch of the government,[79] or else the Board should use its other statutory powers to deal with discrimination at a later date.

In *Bekins* the majority held that, in addition to conflicting with fifth amendment due process requirements, the granting of a certificate to a labor organization which practiced discrimination was prohibited by the doctrine of fair representation.[80] There are two important reasons, however, why the *Bekins* solution of considering, during the certification procedure, the effect of a union's discriminatory practices on the union's ability to represent fairly the employees is poor labor policy. First, in stressing the duty of fair representation over the statutory mandate that the Board certify whichever union wins the election, the approach of the *Bekins* majority results in the suspension of an important

71. *Id.* at 669-70.

72. *Id.* at 671.

73. *Id.* at 673-74 (Burger, C.J., concurring).

74. *Id.* at 674 (Burger, C.J., concurring). Additionally, Chief Justice Burger noted that when the FPC denies a license to a regulatee because of discriminatory practices, it is "thrust . . . into a complex, volatile area for which Congress has already assigned authority to the EEOC." *Id.*

75. National Labor Relations Act § 1, 29 U.S.C. § 151 (1970).

76. National Labor Relations Act § 9, 29 U.S.C. § 159 (1970).

77. National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970).

78. 425 U.S. 662 (1976); *see* notes 69-75 *supra* and accompanying text.

79. *See* Meltzer, *supra* note 19, at 9-10.

80. Bekins Moving & Storage Co., 211 N.L.R.B. 138, 139 (1974). For a discussion of the duty of fair representation, see notes 60-61 *supra* and accompanying text.

right—the right of the employees to have a bargaining representative.[81] For example, the representation election can involve more than one union vying for status as bargaining representative.[82] If the union practicing discrimination wins the election, the employees are left without a representative when the Board refuses to certify the victorious union. Second, the application of the *Bekins* procedure does not require fair representation for all employees. Instead, the inquiry is narrowly limited to discrimination based upon race, alienage, or national origin.[83] The duty of fair representation, therefore, as applied by the *Bekins* majority, should not by itself be sufficient ground for ignoring the mandate of the Act to certify a union, since that duty runs counter to the primary aim of facilitating collective bargaining.

A better approach is that proposed by the NLRB in *Handy Andy, Inc.*, relegating consideration of discrimination to a post-certification unfair labor practice proceeding for the failure to represent the employees fairly.[84] This procedure whereby inquiry into a union's discriminatory practices is postponed until after certification furthers the Board's policy of handling representation questions in the most expeditious manner.[85] In the interest of expediency, a pre-certification investigation is conducted in a non-adversary atmosphere,[86] while an unfair labor practice proceeding is adversary in nature.[87] Meanwhile, adequate pre-certification procedures are always available to prevent discriminatory practices that would affect the free selection of a bargaining representative. For example, under established law, the use of discriminatory pre-election propaganda is the basis for setting aside an election,[88] and the usual rule that a collective bargaining agreement serves as a bar to another election is suspended if it is shown that the incumbent union discriminates.[89]

Due process considerations are another factor which indicates the *Handy Andy* approach is correct. When a labor organization's capacity to provide fair representation is challenged in a non-adversary pre-certification proceeding, the union's right to due process of law is denied.[90] Though the non-adversary proceeding does permit each party to present evidence,[91] judicial review is not available. Review can only be obtained in an independent action before a United

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81. *See* Meltzer, *supra* note 19, at 24.

82. *See* National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970).

83. Bell & Howell Co., 213 N.L.R.B. 407, 408 (1974) (dismissal of petition for sex discrimination); Bekins Moving & Storage Co., 211 N.L.R.B. 138, 143 (1974) (concurring opinion) (sex discrimination by itself is not sufficient grounds to deny certification).

84. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1363 (February 25, 1977).

85. *Id.* at 1361.

86. 29 C.F.R. § 101.20 (1976).

87. National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1970).

88. Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (1962).

89. Pioneer Bus Co., 140 N.L.R.B. 54, 61 (1962). Additionally, recognition of a union might be denied if the union's constitution or bylaws contain a discriminatory membership clause. Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1364 (Feb. 25, 1977) (concurring opinion); National Labor Relations Act § 10(g), 29 U.S.C. § 160(b) (1970).

90. 94 L.R.R.M. at 1361-62.

91. 29 C.F.R. §§ 101.20(c), 102.66 (1976).

States district court[92] and is limited to those cases in which the NLRB acts in excess of its delegated powers and contrary to a specific prohibition in the Act.[93] The review by the district court does not reach "factual finding[s] that the union engaged in the disqualifying discrimination."[94] Full due process protection, on the other hand, is afforded when the issue is determined in an unfair labor practice proceeding. The issues are litigated before an administrative law judge, reviewed by the Board, and then can be reviewed by a circuit court of appeals, where findings of fact can be evaluated.[95]

Another reason why the Board should delay consideration of discrimination charges until after certification is that it will thereby prevent an employer from using frivolous discrimination charges to avoid bargaining with the union.[96] The handling of objections is time consuming and would thwart the aim of the Board to settle questions of representation as quickly as possible.

It appears that the Board's new position in *Handy Andy* is the proper course to follow. The involvement of the NLRB in certifying a labor organization which discriminates is insufficient to be classified as state action which violates the due process prohibitions of the fifth amendment. In the absence of state action, the requirements of the National Labor Relations Act mandate the granting of a certification as exclusive bargaining representative, leaving the rectification of discriminatory practices to other procedures.

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92. Printing Pressmen's Local 46 v. McCulloch, 322 F.2d 993, 996-98 (D.C. Cir. 1963).

93. *Id.* at 994.

94. 94 L.R.R.M. at 1361-62 n.56.

95. National Labor Relations Act § 10(b), (c), (e), (f), 29 U.S.C. § 160(b), (c), (e), (f) (1970). The Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951), indicated that a court could set aside "a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

96. 94 L.R.R.M. at 1360. The dissent notes that the experience under the *Bekins* procedure does not bear out the contention that frivolous charges bog down the certification procedure. *Id.* at 1367 (dissenting opinion).