

development. It should be supplemented by some system of state protection of technological advances.

It is at least arguable that a public interest in technology should not be sacrificed for a public interest in competition simply because one is implemented by state law while the other is a policy implicitly underlying federal law. Thus, *Kewanee* is as consistent with sound economic policy as it is inconsistent with broad concepts of federalism. An alternative would be to disallow trade secret protection entirely, eliminating the problems caused by partial preemption. Such a course was clearly too drastic for the *Kewanee* Court, both in terms of precedent⁸³ and economic consequences.⁸⁴ The refusal to apply preemption on the grounds that conflict between trade secret and patent law is de minimis appears difficult to dispute in terms of policy. In terms of the path which previous Courts had set, however, *Kewanee* seems a diversion, if not an outright anomaly.

W. THOMAS HAYNES

Labor Law—Union Security Provisions and First Amendment Rights—*Buckley v. American Federation of Television and Radio Artists*.¹—The American Federation of Television and Radio Artists (AFTRA)² appealed from a declaratory judgment issued by a federal district court³ exempting broadcasting commentators⁴ William F. Buckley, Jr. and M. Stanton Evans from formal membership, dues payments, and other incidents of membership in the appellant union. Appellees Buckley and Evans are nationally recognized journalists, authors, and “exponents” of “conservative” political philosophy.⁵ Mr. Buckley is host and commentator on the serious

⁸³ Goldstein v. California, 412 U.S. 546 (1973), would seem to preclude preemption of unpatentable trade secret protection. See note 32 supra.

⁸⁴ Undoubtedly preemption of trade secret protection would result in some loss to industries which have relied on trade secret protection and neglected to seek patents within the first year of public use of their inventions. The economic benefits to the consumer of opened competition in such secrets could well be overridden by the increased costs caused by increased security precautions and employee salaries. As such, it is difficult to see how anyone would benefit in either the short or the long run from either partial or full preemption. The relative costliness of patent to trade secret protection would also act to destroy any consumer benefits from free competition in all patentable but unpatented trade secrets.

¹ 496 F.2d 305, 86 L.R.R.M. 2103 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3355 (U.S. Dec. 24, 1974).

² AFTRA is a “labor organization” as defined by the National Labor Relations Act, 29 U.S.C. § 152(5) (1970); it is the collective bargaining agent for most employees in radio and television broadcasting.

³ Evans v. American Fed’n of Television and Radio Artists, 354 F. Supp. 823, 82 L.R.R.M. 2289 (S.D.N.Y. 1973).

⁴ The district court defined a commentator as a person hired to express his own sincere opinion and analysis from his viewpoint or bias. Id. at 842, 82 L.R.R.M. at 2301-02.

⁵ 496 F.2d at 308, 86 L.R.R.M. at 2104.

CASE NOTES

and issue oriented television program, "Firing Line." Mr. Evans is a radio commentator and analyst for CBS and participates in the radio series "Spectrum." Neither was or is primarily employed in broadcasting.⁶

In 1973 Buckley and Evans sought declaratory and injunctive relief from the obligations and liabilities of the "union shop"⁷ provision in the collective bargaining agreements between AFTRA and their respective broadcasting employers. They specifically alleged⁸ that the execution and enforcement of the "union shop" provisions were authorized by section 8(a)(3) of the National Labor Relations Act (NLRA),⁹ and that the resulting union requirements of compulsory membership, dues, and compliance with union regulations constituted a prior restraint and chill on their First Amendment rights of free speech and expression.¹⁰ The complaint based the allegation of First Amendment restraint on the grounds that the union power was achieved under the authority of the NLRA,¹¹ and therefore constituted government action violative of the First Amendment. In effect, it challenged the constitutionality of NLRA section 8(a)(3) as applied to the broadcasters, Buckley and Evans.¹²

The district court substantially agreed with the complaint and declared that although the "union shop" agreement was not unconstitutional on its face,¹³ it placed a threat of prior restraint on

⁶ 354 F. Supp. at 828, 82 L.R.R.M. at 2291.

⁷ Section 84 of AFTRA's "Code of Fair Practice" obligated employers to hire only AFTRA members in good standing or employees to become members on the thirtieth day after commencement of employment. The code further required employers to consider union membership in good standing as a condition to continued employment. The exact provisions are found *Evans*, 354 F. Supp. at 829, 82 L.R.R.M. at 2291.

⁸ 496 F.2d at 308-09, 86 L.R.R.M. at 2105.

⁹ 29 U.S.C. § 158(a)(3) (1970) which provides in pertinent part:

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the required periodic dues and initiation fees uniformly as a condition of acquiring or retaining membership . . .

¹⁰ 354 F. Supp. at 831, 82 L.R.R.M. at 2293.

¹¹ *Id.*

¹² *Id.* at 827-28, 82 L.R.R.M. at 2290-91.

¹³ *Id.* at 842, 82 L.R.R.M. at 2302.

While it may not be held that union membership in all circumstances chills First

the plaintiffs' free expression because of their unique situation and status¹⁴ as broadcasting commentators. The district court concluded¹⁵ that the combined effect of the payment of dues, compulsory membership, and threatened union discipline and incidents of the "union shop" agreement distinctly chilled and inhibited Buckley's and Evans' First Amendment rights of free speech and expression and required declaratory relief.¹⁶ The lower court concluded that Buckley and Evans appeared to receive only "de minimis" benefits from the collective bargaining agreement and therefore were not "free riders"¹⁷ on the collective bargaining system.

The lower court focused attention on the extent to which the union shop agreement as a whole affected the relationship between plaintiffs' unique status as broadcasting commentators, who are hired to express their own views and opinions, and the exercise of their First Amendment rights.¹⁸ In effect, the district court concluded that the threat of First Amendment harm to Buckley and Evans was direct and considerable, while the overall effect of the decision would only minimally undermine the federal policy favoring collective bargaining.¹⁹

Much of the district court's opinion dealt with the standing of Buckley and Evans to raise the First Amendment issues. The inquiry relevant to a determination of standing is whether "the person . . . is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."²⁰ The trial court

Amendment rights and freedom of expression, we find ample evidence in this present record, of uncontested facts which show an actual chilling of plaintiffs' freedom of expression. The commentator or analyst, hired to express his own opinion has been grouped, in the labor contract, with persons described as "artists" or "talent" who are primarily entertainers, whose expression is guided, at least in part, by script or scenario.

Id.

¹⁴ See Note, 53 B.U.L. Rev. 745 (1973), for a discussion of the lower court opinion and the status of broadcasting commentators under the First Amendment.

¹⁵ 354 F. Supp. at 848, 82 L.R.R.M. at 2307. "More is involved in this controversy than mere payment of a modest dues bill, and the prior conduct of the employers required by the union agreement make it appropriate that these issues be resolved by declaratory judgment." Id.

¹⁶ The district court qualified this conclusion by stating that if it were shown that the commentators had received substantial "free rider" benefits from the efforts of the collective bargaining agents, perhaps Buckley and Evans would be required to pay an "amount not greater than union dues" without impinging their First Amendment rights. 354 F. Supp. at 848, 82 L.R.R.M. at 2307.

¹⁷ 354 F. Supp. at 848, 82 L.R.R.M. at 2307. A "free rider" is essentially someone who enjoys the fruits and benefits of the union without contributing his fair share to financially support the union. The foundations of the "free rider" concept discussed in the *Evans* case are outlined in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 231-32 (1956).

¹⁸ 354 F. Supp. at 847, 82 L.R.R.M. at 2305-06.

¹⁹ See id. at 841-43, 82 L.R.R.M. at 2301-02. The policy is set forth in 29 U.S.C. § 151 (1970).

²⁰ *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

[I]n terms of Article III limitations on federal court jurisdiction, the question of

decided that broadcasting commentators had standing to raise the First Amendment questions because their own views and opinions would be directly and immediately affected by the union dues requirements, the compulsory membership rule, and the possibility of discipline.²¹ Prior cases²² holding that the dues requirements and incidents of "union shop" provisions did not infringe First Amendment rights were found distinguishable by the district court because such decisions had turned on either statutory construction or on the fact that the plaintiffs had not actually shown a substantial, direct, and immediate relationship between the dues and "union shop" provisions, and the alleged harm to First Amendment rights.²³

standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," . . . and whether the dispute touches upon "the legal relations of parties having adverse legal interests."

Id. at 101. See *Baker v. Carr*, 369 U.S. 186, 204 (1962). In *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970), the Court discussed elements of standing in a business competition suit. The *Data Processing* decision relied on a two prong standing test in which the plaintiff first alleges "that the challenged activity has caused an injury in fact," and secondly, that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. at 152-53.

²¹ 354 F. Supp. at 844-45, 82 L.R.R.M. at 2303-04. See Note, 53 B.U.L. Rev. 745, 748-52 (1973), for a review of the lower court's analysis of these issues.

²² E.g., *Railroad Employees' Dep't v. Hanson*, 351 U.S. 225 (1956); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 77 L.R.R.M. 2609 (10th Cir. 1971); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

²³ In *Railroad Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), a group of employees claimed that being obliged to join the union under a "union shop" agreement sanctioned by section 2, Eleventh of the Railroad Labor Act (RLA), 45 U.S.C. § 152 (Eleventh) (1970), deprived them of their freedom of association as guaranteed by the First Amendment. The Supreme Court balanced the associational claim against the compelling governmental interest espoused by the labor legislation. It held that Congress had expressed a legitimate objective under the commerce power in order to encourage "[i]ndustrial peace along the arteries of commerce," and that this interest outweighed the general associational claims of the employees. Id. at 233. The *Hanson* Court, however explicitly reserved some First Amendment questions by stating: "If the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." Id. at 238.

Two years later in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court impliedly reaffirmed the *Hanson* dicta. There, certain employees worked under a similar "union shop" agreement authorized by section 2, Eleventh of the RLA. They contested specific union expenditures for political purposes contrary to their own beliefs. The Court acknowledged that this complaint fell squarely within the *Hanson* exception. Id. at 749. However, the Court declined to reach the constitutional issue because it believed that a fair reading of the statute warranted denial to the union of the authority to expend specific funds, "over the employee's objection, . . . for political causes which he opposes." Id. at 749-50.

Subsequent to the decision in *Street*, the First Circuit in *Linscott v. Millers Falls Co.*, 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir.), cert. denied, 404 U.S. 872 (1971), cited the *Hanson* dicta but failed to find the required directness and specificity of interest between the dues requirements and the alleged constitutional deprivation. Id. at 17, 76 L.R.R.M. at 2996. Compare *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003, 74 L.R.R.M. 2600, 2606 (9th Cir. 1970).

The lower court did not decide whether the incidents of the union shop provision also constituted unfair labor practices under section 8(a)(3) of the NLRA.²⁴ It did note that "[s]ubject matter jurisdiction has been taken [by federal courts] in cases involving disputes as to the extent of union power granted under the National Labor Relations Act."²⁵

The United States Court of Appeals for the Second Circuit HELD: that the federal district court had lacked jurisdiction to decide whether a requirement of compulsory membership and compliance with union regulations infringed appellees' First Amendment rights.²⁶ On these issues the court deferred to the jurisdiction of the National Labor Relations Board under the assumption that they constituted "arguable" unfair labor practices²⁷ over which the Board exercises primary jurisdiction under the preemption doctrine announced in 1959 in *San Diego Building Trades Council v. Garmon*.²⁸ Secondly, the court of appeals held that the requirement of union dues, standing alone, did not infringe the First Amendment rights of Buckley and Evans.²⁹ The court reasoned that the dues are "not flat fees imposed directly on the exercise of a federal right. . . . If there is any burden on appellees' free speech it would appear to be no more objectionable than a 'non-discriminatory (form) of general taxation' which can be constitutionally imposed on the communications media."³⁰

The *Buckley* decision appears to have left unanswered more questions than it resolved. It failed to decide the "government action" issue³¹ necessary to a determination of appellees' First Amendment claims. However, the court of appeals reached the merits on the issue of the constitutionality of a union dues requirement imposed upon broadcasters³² by application of a test of justiciability prescribed in *Bell v. Hood*.³³ Applying the doctrine of preemption the Second Circuit concluded that the claim of First Amendment infringement in the compulsory membership and union discipline aspects of the complaint was under the exclusive jurisdiction of the National Labor Relations Board. The court did not comment on the merits of this claim,³⁴ despite the district court's exhaustive discussion of appellees' standing to raise the constitutional issues and its finding that compulsory union membership and

²⁴ 354 F. Supp. at 829, 82 L.R.R.M. at 2290. See note 9 supra.

²⁵ 354 F. Supp. at 837, 82 L.R.R.M. at 2298. See *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 74 L.R.R.M. 2600 (9th Cir. 1970).

²⁶ *Buckley*, 496 F.2d at 309, 86 L.R.R.M. at 2105.

²⁷ *Id.* at 312, 86 L.R.R.M. at 2107-08.

²⁸ 359 U.S. 236 (1959).

²⁹ 496 F.2d at 309-10, 86 L.R.R.M. at 2105-06.

³⁰ *Id.* at 311, 86 L.R.R.M. at 2107.

³¹ *Id.* at 309-10, 86 L.R.R.M. at 2105-06.

³² *Id.* at 310, 86 L.R.R.M. at 2106.

³³ 327 U.S. 678 (1946).

³⁴ 496 F.2d at 309, 86 L.R.R.M. at 2105.

the threat of union discipline placed a prior restraint and chill on the appellees' rights of free speech and expression.³⁵

This note will focus upon three aspects of the *Buckley* decision. First, the Second Circuit's use of the justiciability test of *Bell v. Hood*³⁶ to avoid deciding the "government action" issue will be criticized. Next, the Second Circuit's decision to apply the preemption doctrine to the claims relating to compulsory union membership and compliance with internal union regulations will be examined. In particular, the correctness of invoking the *Garmon* doctrine of preemption,³⁷ where substantive constitutional rights are threatened, will be analyzed in light of an alternative to preemption proposed by the Ninth Circuit in *Seay v. McDonnell Douglas Corp.*³⁸ Finally, the likely effects of the Second Circuit's decision in *Buckley* to isolate the dues requirement from the compulsory membership and discipline issues in fashioning a First Amendment standard of review will be evaluated.

GOVERNMENT ACTION

The government action question that confronted the Second Circuit was not novel. Prior to *Buckley*, both the First³⁹ and the Tenth⁴⁰ Circuits had decided similar questions. The issue was whether a union shop provision incorporated into a collective bargaining agreement executed under the authority of section 8(a)(3) of the NLRA constituted government action for First Amendment purposes. In the leading case of *Railway Employees' Department v. Hanson*,⁴¹ the Supreme Court of the United States held that a union shop provision authorized by the Railway Labor Act (RLA)⁴² constituted government action.⁴³ The RLA differs from the NLRA in that the RLA preempts⁴⁴ state "right to work" laws⁴⁵ while the NLRA

³⁵ *Evans*, 354 F. Supp. at 835-45, 82 L.R.R.M. at 2296-2304.

³⁶ 327 U.S. 678 (1946).

³⁷ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959).

³⁸ 427 F.2d 996, 74 L.R.R.M. 2600 (9th Cir. 1970).

³⁹ *Linscott v. Millers Falls Co.*, 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

⁴⁰ *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 77 L.R.R.M. 2609 (10th Cir. 1971).

⁴¹ 351 U.S. 225 (1956).

⁴² 45 U.S.C. § 151 et seq. (1970). Language authorizing "union shop" agreements under the RLA 45 U.S.C. § 152 (Eleventh) (1970), is similar to that used in the NLRA, 29 U.S.C. § 158(a)(3) (1970).

⁴³ 351 U.S. at 232.

⁴⁴ 45 U.S.C. § 152 (Eleventh) (1970), which provides:

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later,

expressly defers⁴⁶ to state law on the question. The NLRA does not forbid states to legislate limitations on the lawfulness of NLRA-authorized union security provisions.⁴⁷ Consequently, the degree of government action under the NLRA is arguably less than under the RLA.

In 1971 the First Circuit, in *Linscott v. Millers Falls Co.*⁴⁸ "ascribed little significance" to this distinction between the RLA and the NLRA. It concluded that a union shop agreement authorized by section 8(a)(3) of the NLRA created sufficient government involvement to warrant a finding of government action and to permit resolution of the First Amendment issues raised by the case.⁴⁹ Three months later, the Tenth Circuit in *Reid v. McDonnell Douglas Corp.*,⁵⁰ faced a similar government action question and reached a result opposite to *Linscott*. In *Reid* it was held that section 8(a)(3) did not render union shop agreements government action.⁵¹ The Tenth Circuit found that the difference between the RLA and the NLRA provided a critical distinction for determining government action in contracts authorized under the respective statutes.⁵² The court in *Reid* examined the degree of federal encouragement of union shops under the NLRA and found that the NLRA was "more neutral and permissive" than the policy of the RLA.⁵³ The court found that the "federal government does not appear . . . to have so far insinuated itself into the decision of a union and employer to agree to a union security clause so as to make that choice government action for purposes of the first and fifth amendments."⁵⁴

The First Circuit in *Linscott* had underlined the fact that the federal support of the collective bargaining agreement allowing union shops attached once the parties had agreed to it:

Defendants would distinguish *Hanson* because, unlike the Railway Labor Act, section 14(b) of the LMRA, 29

all employees shall become members of the labor organization representing their craft or class. . . .

⁴⁵ In essence a "right to work" law forbids "closed" or "union" shops, which are generally accomplished through the execution of union security provisions of the collective bargaining contract. See Note, 30 Temp. L.Q. 212, 212-15 (1957), for a discussion of state right to work laws and union shop provisions under the RLA.

⁴⁶ 29 U.S.C. § 164(b) (1970), which section provides: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

⁴⁷ See, e.g., *Local 1625, Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746 (1963); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410, 77 L.R.R.M. 2609, 2611 (10th Cir. 1971).

⁴⁸ 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

⁴⁹ 440 F.2d at 16-17, 76 L.R.R.M. at 2995.

⁵⁰ 443 F.2d 408, 77 L.R.R.M. 2609 (10th Cir. 1971).

⁵¹ Id. at 410-11, 77 L.R.R.M. at 2611.

⁵² Id. at 410, 77 L.R.R.M. at 2611.

⁵³ 443 F.2d at 410, 77 L.R.R.M. at 2611.

⁵⁴ Id. at 410-11, 77 L.R.R.M. at 2611-12.

U.S.C. § 164(b), allows the state to outlaw union shop agreements. This misapprehends what *Hanson* basically decided. If federal support attaches to the union shop if and when two parties agree to it, it is the same support, once it attaches, even though the consent of a third party, the state, is a precondition. The means by which the agreement is attained does not affect the significant language in *Hanson*, 351 U.S. at 232, 76 S. Ct. at 718.

"(T)he federal statute is the source of the power and authority by which any private rights are lost or sacrificed."⁵⁵

Although noting the conflicting decisions in the First and Tenth Circuits, the *Buckley* court avoided the government action question.⁵⁶ The Second Circuit in *Buckley* eliminated the necessity of deciding whether government action existed in the First Amendment claims based on the compulsory membership and discipline issues, by holding that those claims fell within the exclusive jurisdiction of the National Labor Relations Board.⁵⁷ The court also avoided decision on the government action doctrine as applied to the dues requirement by invoking a 1946 justiciability⁵⁸ test prescribed in *Bell v. Hood*.⁵⁹

The *Bell* test of justiciability permitted the court in *Buckley* to reach the issue of whether the dues requirement did in fact infringe the broadcasting commentators' First Amendment rights.⁶⁰ The finding of no violation of First Amendment rights obviated the necessity of determining the government action question. The *Buckley* case presents a classic example of a court putting the cart before the horse in the difficult area of government action and First Amendment rights.

The *Bell* test primarily involves the justiciability and ripeness⁶¹ of constitutional issues for judicial resolution.⁶² *Bell* required "a

⁵⁵ *Linscott*, 440 F.2d at 16, 76 L.R.R.M. at 2995.

⁵⁶ *Buckley*, 496 F.2d at 309-10, 86 L.R.R.M. at 2105-06.

⁵⁷ *Id.* at 309, 86 L.R.R.M. at 2105.

⁵⁸ Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented . . . when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "(j)usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . ."

Flast v. Cohen, 392 U.S. 83, 95 (1968), quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961).

⁵⁹ 327 U.S. 678 (1946).

⁶⁰ 496 F.2d at 310, 86 L.R.R.M. at 2106.

⁶¹ Ripeness concerns the timeliness of deciding the constitutional question. It is inextricably intertwined with the questions of justiciability and standing. See *Bell v. Hood*, 327 U.S. 678 (1946).

⁶² See *id.* at 681.

federal court to assume jurisdiction over an action alleging violation of the U.S. Constitution if satisfied by an initial cursory examination, that there is, on the merits, a justiciable issue."⁶³ Factually, *Bell* did not present a government action problem as delicate as the one presented by the *Buckley* case. The defendants in *Bell* were FBI agents.⁶⁴ The issue was "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth" Amendment rights of the plaintiffs.⁶⁵ In order to adjudicate the damages issues in *Bell*, the Court did not need to decide whether the activities of the FBI agents constituted government action; it had to decide what effect their status as agents of the federal government had on the suit because of the doctrine of sovereign immunity and the unavailability of a statutorily created right to sue. The court in *Buckley* evaded the government action question.⁶⁶ It decided to resolve the issue of the constitutionality of the dues requirement under the First Amendment without deciding whether the government action doctrine would permit application of the First Amendment proscriptions⁶⁷ to the private agreement.

PREEMPTION

Initially, it should be noted that in their original complaints Buckley and Evans had alleged that section 8(a)(3) authorized the dues requirement, sanctioned the union shop provision of section 84 of the AFTRA "Code of Fair Practice,"⁶⁸ and subjected them to the threat of union discipline to the detriment of their First Amendment rights of free speech and expression. A showing of government action was a necessary prerequisite to relief. Thus, it was essential that plaintiffs base their constitutional attack on the statute upon activities authorized by the statute. The Second Circuit, however, separated the issues presented by the broadcasters into two

⁶³ *Buckley*, 496 F.2d at 310, 86 L.R.R.M. at 2106.

⁶⁴ Plaintiffs in *Bell* brought suit in a federal district court to recover damages in excess of \$3,000 from the defendant agents. The complaint alleged that the court's jurisdiction was founded upon federal questions arising under the Fourth and Fifth Amendments. It alleged that the damages were suffered as a result of the defendants' actions of imprisoning the petitioners in violation of their constitutional right to be free from deprivation of their liberty without due process of law, and of subjecting their premises to search and their possessions to seizure, in violation of their constitutional right to be free from unreasonable searches and seizures. The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for summary judgment on the grounds that the federal agents acted within the scope of their authority as officers of the United States and that the searches and seizures were incidental to lawful arrests and were therefore valid. 327 U.S. at 679-80.

⁶⁵ *Id.* at 684.

⁶⁶ 496 F.2d at 310, 86 L.R.R.M. at 2106.

⁶⁷ An initial finding of no government action would have obviated the necessity of reaching the merits of any First Amendment question.

⁶⁸ See note 7 *supra*.

categories. It characterized the dues requirements as "authorized by" section 8(a)(3),⁶⁹ and the compulsory membership requirement and threat of union discipline as "arguably violative" of section 8(a)(3) of the NLRA.⁷⁰

The Second Circuit rejected appellees' initial contentions that all aspects of the union security provisions were authorized by section 8(a)(3).⁷¹ Instead, it found that only the dues requirement was authorized by section 8(a)(3),⁷² and therefore only that element presented a challenge to the constitutionality of the statute sufficient to justify a discussion on the merits.⁷³ The *Buckley* court reasoned that the compulsory membership provisions and threats of union discipline as they affected the broadcasters' employment status⁷⁴ constituted "arguable" unfair labor practices best left to a Board determination as mandated by the preemption doctrine in *Garmon*. The compulsory membership and union discipline issues, being "arguably violative of" section 8(a)(3), did not present challenges to the constitutionality of the NLRA.

Under the court's construction of 8(a)(3) in *Buckley*, a union security provision authorized by section 8(a)(3) ultimately requires that no employee can receive benefits under a collective bargaining agreement without contributing financial support to the majority bargaining representative. It is suggested that this construction does not address the separate question of internal union discipline of nominal union members under an 8(a)(3) union shop provision. The Second Circuit did not discuss whether the broadcasters whose membership was limited only to the obligation of paying monthly dues under the union shop agreement authorized by section 8(a)(3) were subject to internal union disciplinary rules and regulations such as fines not affecting the broadcasters' employment status. Thus the decision failed to distinguish between union security discipline, in the form of discharge for reasons other than failure to pay dues, and internal union discipline which would not lead to discharge, but which might infringe or chill the broadcasters' First Amendment rights.

In the leading case on internal union discipline, *NLRB v. Allis-Chalmers Manufacturing Co.*⁷⁵ the United States Supreme

⁶⁹ 496 F.2d at 312 n.4, 86 L.R.R.M. at 2108 n.4.

⁷⁰ *Id.*

⁷¹ 496 F.2d at 308-09, 86 L.R.R.M. at 2105.

⁷² *Id.* at 312 n.4, 86 L.R.R.M. at 2108 n.4.

⁷³ *Id.* at 309, 86 L.R.R.M. at 2105.

⁷⁴ Both *Buckley* and *Evans* claim that they have not only been compelled to pay dues to the union but have also been "required" to join the applicable local organization and to comply with union rules and regulations. . . . The union does not deny that its representatives informed *Buckley* that the ultimate penalty for failing to remain a "full-fledged" member would be his discharge from employment. It is abundantly clear that an "arguable" unfair labor practice would result if the union should carry out this threat. . . .

496 F.2d at 312, 86 L.R.R.M. at 2108 (footnotes omitted).

⁷⁵ 388 U.S. 175 (1967).

Court affirmed a union's right to impose a fine on a member in full standing for crossing a strike picket line.⁷⁶ In the *Allis-Chalmers* decision the Court reserved two questions for later resolution: (1) whether the union lawfully could impose fines on "members whose membership was in fact limited to the obligation of paying monthly dues,"⁷⁷ and (2) whether "union action for enforcement of disciplinary penalties is pre-empted by federal labor law."⁷⁸ The *Allis-Chalmers* Court stated that "Congress did not propose any limitations with respect to the internal affairs of the union, aside from barring enforcement of a union's internal regulations to affect a member's employment status."⁷⁹

It would seem that *Buckley* presented both of the questions reserved in *Allis-Chalmers* and that the Second Circuit answered each sub silentio. First, the Second Circuit's determination that a union shop provision authorized by 8(a)(3) merely requires that an employee financially support the union, squarely situated *Buckley's* and *Evans'* union status within the *Allis-Chalmers* reservation. The *Buckley* court's characterization of the threatened internal union discipline claims as "arguable" unfair labor practices implies a negative answer to the discipline question reserved by the *Allis-Chalmers* Court. Secondly, the court found the doctrine of preemption to the NLRB applied to the lawfulness of the union discipline question as a whole;⁸⁰ in so doing, it classified the threats of union discipline as an arguable unfair labor practice without distinguishing between discipline that threatened employment and that which did not.

The impact of the Second Circuit's treatment of the compulsory membership and union discipline issues as arguable unfair labor practices upon appellees' First Amendment claims is readily ascertainable. First, once the court isolated the dues question, the constitutional question that remained in *Buckley* closely paralleled the one raised in *Linscott v. Millers Falls Co.*⁸¹ There the First Circuit, after finding government action in the union shop provision authorized under section 8(a)(3), denied the First Amendment claim of a Seventh Day Adventist, who asserted that belonging to and supporting the union violated her religious beliefs.⁸² In *Linscott* the plaintiff's claim was fundamentally associational. She claimed that membership in a union was contrary to the tenets of her religion. Once the question of compulsory membership and internal union discipline were separated from the dues issue in *Buckley*, the parallel to *Linscott* is evident. The fact that *Linscott* talked of religious

⁷⁶ Id. at 196.

⁷⁷ Id. at 195.

⁷⁸ Id. at n.37.

⁷⁹ Id.

⁸⁰ 486 F.2d at 309, 86 L.R.R.M. at 2105.

⁸¹ 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

⁸² Id. at 15-16, 76 L.R.R.M. at 2994-95.

rights and *Buckley* of rights of free speech and expression⁸³ should not lead to different results on the First Amendment question. Once the Second Circuit in *Buckley* separated the incidents of the union shop provision, compulsory membership and internal union discipline, from the question concerning the constitutionality of the dues requirement, the First Circuit's reasoning in *Linscott* became dispositive of the dues requirement aspect of the complaint. The dues requirement, not being a burden placed directly on the exercise of the First Amendment right, did not, standing alone present a sufficient threat to the commentators' free expression to overcome the government's compelling interest in encouraging and regulating the collective bargaining system under the NLRA. The initial separation of the various aspects of the union shop provision obviated the necessity of the *Buckley* court's examining the cumulative impact of the union shop provision upon the commentators' First Amendment rights. In this way the Second Circuit treated *Buckley*'s and *Evans*' complaint as essentially associational and therefore apposite to *Linscott*, where the court entered a balancing test in which the compelling governmental interest was weighed against the employee's loss of employment due to her refusal to join the union or pay dues. *Linscott* held that the degree of the deprivation to the claimant was not sufficient to overcome the governmental interest and did not violate the First Amendment.⁸⁴ Furthermore, the *Linscott* court upheld the constitutionality of the union shop provision executed under the authority of the NLRA.⁸⁵

By separating the dues requirement from *Buckley*'s and *Evans*' other claims, the Second Circuit emasculated the relevant distinction, the cumulative impact of the union shop provision on the appellees' work as commentators, that had existed between *Buckley* and *Linscott*, and created an artificial parallel that became dispositive of the constitutional question without necessitating a prior decision on the government action question. As noted above,⁸⁶ *Linscott* had found government action in the union shop agreement made under section 8(a)(3) of the NLRA. The *Buckley* court's deferral to the jurisdiction of the National Labor Relations Board over the compulsory membership and union discipline issues eliminated the necessity of determining the constitutional questions concerning the total effect of the bargaining agreement and the powers of the bargaining unit on individuals exercising First Amendment rights as part of their duties of employment.

The *Buckley* court's decision not to take jurisdiction of these issues rested upon a technical adherence to the preemption doctrine in labor relations law established in 1959 in the controversial case of

⁸³ For further analysis of these claims, see Note, 53 B.U.L. Rev. 745, 755-56 (1973).

⁸⁴ 440 F.2d at 18, 76 L.R.R.M. at 2997.

⁸⁵ Id. at 17-18, 76 L.R.R.M. at 2996-97.

⁸⁶ See text at note 50 supra.

San Diego Building Trades Council v. Garmon.⁸⁷ It has been noted that *Garmon* required that "if the challenged activity was either arguably protected or arguably prohibited"⁸⁸ by section 7 or 8 of the National Labor Relations Act,⁸⁹ it was subject to the exclusive jurisdiction of the Board.⁹⁰ In contrast to the *Garmon* doctrine, the Second Circuit in *Buckley* found that preemption turned on whether the challenged activity was arguably violative of section 8(a)(3).⁹¹ Conversely, if the activity was authorized by section 8(a)(3), preemption would not apply, at least, if one read the *Buckley* decision narrowly, where a constitutional challenge is made against an activity authorized by the NLRA.

The *Buckley* decision acknowledged the necessity of judicial determination of a constitutional challenge to the NLRA by reaching the merits of the dues requirement. *Garmon*, carried to its extremes, would make the Board the "sole guardian of the federal regulatory scheme" under the NLRA.⁹² There have evolved, however, a series of exceptions to the *Garmon* rule in both state and federal law.⁹³ These exceptions may indicate that the court in *Buckley* failed to consider adequately the jurisdictional problem entailed in a case where a constitutional question also appeared as an unfair labor practice issue.

In 1970 the Ninth Circuit explored one possible exception to *Garmon*. In *Seay v. McDonnell Douglas Corp.*,⁹⁴ the court stated that "[t]he policy behind the pre-emption doctrine is not served by deferring to the Board where a constitutional question is validly

⁸⁷ 359 U.S. 236 (1959).

⁸⁸ Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 Texas L. Rev. 1037, 1039 (1973).

⁸⁹ 29 U.S.C. §§ 157, 158 (1970). Section 7 deals with rights of employees and provides:

Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this article.

29 U.S.C. § 157 (1970) (emphasis added). Section 8 of the NLRA defines and proscribes unfair labor practices. See note 9 supra for text of § 8(a)(3) of the NLRA.

⁹⁰ The *Garmon* decision prevented state courts from encroaching on the NLRB's exclusive jurisdiction, and provided a basis for uniform administration of the federal policy underlying the NLRA by requiring deference to the special expertise of the NLRB. See Bryson, supra note 88, at 1038-39.

⁹¹ 496 F.2d at 312 n.4, 86 L.R.R.M. at 2108 n.4.

⁹² Bryson, supra note 88, at 1039.

⁹³ Bryson carefully discussed and outlined major state and federal exceptions to the *Garmon* rule. Bryson, supra note 88, at 1040-41. In particular see *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958), for a discussion of the peripheral concern doctrine to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 (1970). It deals mainly with cases where the employee is fined or expelled from the union and parallels *Buckley* to some extent. See also *Vaca v. Sipes*, 386 U.S. 171 (1967), which involves the union's duty of fair representation (DFR). See Bryson, supra note 88, at 1040-41.

⁹⁴ 427 F.2d 996, 74 L.R.R.M. 2600 (9th Cir. 1970).

presented.⁹⁵ Later, quoting from the United States Supreme Court's decision in *Vaca v. Sipes*,⁹⁶ the Ninth Circuit said, "pre-emption depends upon 'the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.'" ⁹⁷ In *Seay*, the plaintiffs, nonunion members contributing agency fees to the union under an "agency shop" collective bargaining agreement, alleged that specific union expenditures for political candidates and purposes contrary to their own beliefs were violative of the non-members' First, Fifth, and Ninth Amendment rights.⁹⁸ The Ninth Circuit sustained the compulsory agency fee as a "permissible and valid form of union security" but stated that misuse of the funds did not constitute⁹⁹ an unfair labor practice. Instead, the court held that such misuse constituted a breach of the union's duty of fair representation (DFR).¹⁰⁰ *Seay* granted the federal district court jurisdiction over alleged abuses of union power gained through the collective bargaining system where those abuses possibly violate constitutional rights.

In *Reid* the court noted that *Seay* appeared to present the sole case "where a union was held to violate its duty of fair representation by its actions regarding an employee with respect to internal union matters as contrasted with its actions vis-à-vis the employer."¹⁰¹ Under the *Buckley* analysis misuse of union funds, not being authorized by the NLRA, would constitute arguable unfair labor practices. The court in *Seay* did consider the question of unfair labor practices and stated that the "policy of the preemption doctrine is not served by deferring to the Board where a constitutional question is validly presented."¹⁰² In addition, the court stated that even if the misuse of funds constituted an unfair labor practice and the *Reid* decision¹⁰³ was clearly on point advocating preemption, it "would decline" to follow *Reid*.¹⁰⁴

The *Seay* analysis hinged on two factors: first, claims of abuse of the collective bargaining power did not present issues which necessitated the particular knowledge or expertise of the Board; secondly, and more importantly, the adjudication of constitutional claims has traditionally been reserved to the courts.¹⁰⁵ In providing

⁹⁵ Id. at 1002, 74 L.R.R.M. at 2606.

⁹⁶ 386 U.S. 171 (1967).

⁹⁷ *Seay*, 427 F.2d at 1002, 74 L.R.R.M. at 2605-06, quoting from *Vaca v. Sipes*, 386 U.S. at 180.

⁹⁸ 427 F.2d at 998, 74 L.R.R.M. at 2602-03.

⁹⁹ Id. at 1002, 74 L.R.R.M. at 2605.

¹⁰⁰ Id. at 1000, 1002-03, 74 L.R.R.M. at 2604, 2605-06.

¹⁰¹ 443 F.2d at 411-12, 77 L.R.R.M. at 2612.

¹⁰² 427 F.2d at 1002, 74 L.R.R.M. at 2605.

¹⁰³ The reference to *Reid* is to the unpublished district court opinion of *Reid v. McDonnell Douglas Corp.* See id. The *Seay* case refers to *Reid* as *Reed*.

¹⁰⁴ 427 F.2d at 1001, 74 L.R.R.M. at 2605.

¹⁰⁵ Id. at 1002-03, 74 L.R.R.M. at 2606.

this exception to the *Garmon* rule, the *Seay* court relied upon the fact that "the pre-emption doctrine 'has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to be with the NLRB.'"¹⁰⁶

Aside from an exception to *Garmon* possibly suggested by the *Seay* case, there is dicta in *Railway Employees' Department v. Hanson*,¹⁰⁷ often quoted in subsequent First Amendment cases¹⁰⁸ challenging the NLRA or the RLA, which suggests that preemption might not apply where specific and direct harm to a First Amendment right flowed from conduct pursuant to a union shop provision authorized by a federal statute:

It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. . . . [I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.¹⁰⁹

The language in *Hanson* was implicitly reaffirmed in a subsequent Supreme Court decision, *International Association of Machinists v. Street*.¹¹⁰

Buckley may be analogized to the *Seay* case. Initially, the union shop security clause prescribed by section 84 of AFTRA's "Code of Fair Practice"¹¹¹ posed a threat of more severe limitations on the individual rights of employees than the agency shop provision in *Seay*, which merely ensured that each employee would contribute his financial share to the collective bargaining representative for benefits received. The agency shop provision, by definition, does not

¹⁰⁶ 427 F.2d at 1002, 74 L.R.R.M. at 2605, quoting from *Vaca v. Sipes*, 386 U.S. at 179. "The courts have blithely assumed that federal law would also be preempted, but each time that the Supreme Court has considered a federal remedy, it has held it free from preemption." Bryson, *supra* note 88, at 1038 n.6.

¹⁰⁷ 351 U.S. 225 (1956).

¹⁰⁸ *International Ass'n of Machinists v. Street*, 367 U.S. 740, 748-49 (1961); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17, 76 L.R.R.M. 2994, 2996 (1st Cir.), cert. denied, 404 U.S. 872 (1971); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003, 74 L.R.R.M. 2600, 2606 (9th Cir. 1970).

¹⁰⁹ 351 U.S. at 238.

¹¹⁰ 367 U.S. 740 (1961). While the First Amendment issues were squarely presented to the Court in *Street*, the Court decided the case on the basis of statutory construction and reserved the constitutional question for a later date. *Id.* at 750.

In *Street* . . . a group of unions and rail carriers entered into a union-shop agreement pursuant to Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 (Eleventh) (1970). A group of employees brought suit in the Georgia courts alleging that the money each was compelled to pay to the union to hold his job was in substantial part used to promote political and economic concepts with which he disagreed. A constitutional violation under the First and Fifth Amendments was asserted and sustained.

Seay, 427 F.2d at 1003, 74 L.R.R.M. at 2606.

¹¹¹ See note 7 *supra*.

raise the same problems of internal union discipline as a union shop agreement because it does not require even nominal union membership. An agency shop agreement requires employee financial support and nothing more. Secondly, the *Seay* case was less advanced procedurally than *Buckley*. In *Seay* the court reversed the district court's dismissal and required it to assume jurisdiction in order to decide the constitutional claims on the basis of the constitutional implications of the allegations.¹¹² The *Buckley* case seems a stronger one for refusing to invoke the preemption doctrine because the district court had already taken jurisdiction and had decided that the plaintiffs' constitutional claims were valid.¹¹³ A reversal on the merits by the Second Circuit as to all the issues would have been more consistent and more understandable.

Additionally, both *Seay* and *Buckley* presented disputes between employees and unions. It is suggested that there was no need for deferring to the Board's special expertise.¹¹⁴ Essentially, an employee's relationship to the union is contractual and the courts, not the Board, are the natural forum for determining contractual relationships.¹¹⁵ Furthermore, "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied."¹¹⁶ The proviso to section 8(b)(1) of the NLRA states that "this paragraph shall not impair the right of a labor union to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."¹¹⁷ A fair reading of this provision appears to remove internal union security questions from the unfair labor practice limitations of sections 7 and 8(a)(3). In his dissent in *Amalgamated Association of Street Employees v. Lockridge*,¹¹⁸ Justice White wrote that one should be concerned

. . . over the possibility of denying a hearing to an employee who felt his individual interests had been unfairly subordinated by the union. . . . [In *Vaca v. Sipes* the] Court expressed fear that, were preemption the rule, "the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."¹¹⁹

¹¹² 443 F.2d at 1004, 74 L.R.R.M. at 2607.

¹¹³ 354 F. Supp. at 847, 82 L.R.R.M. at 2305-06.

¹¹⁴ See *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 302-08, 318-19 (1971) (Douglas and White, JJ., dissenting).

¹¹⁵ See id.

¹¹⁶ *Machinists v. Gonzales*, 356 U.S. 617, 620 (1958).

¹¹⁷ 29 U.S.C. § 158(6)(1)(A) (1970).

¹¹⁸ 403 U.S. 274, 309-32 (1971) (White, J., dissenting).

¹¹⁹ Id. at 314-15 (dissenting opinion), quoting from *Vaca v. Sipes*, 386 U.S. 171, 182 (1970).

Finally, like *Seay* but unlike *Street*, *Buckley* is not fairly resolved through statutory construction without affecting the overall status of the union shop concept as expressly authorized under section 8(a)(3).¹²⁰ *Buckley* limits the union's use of 8(b)(1) powers to fullfledged members only and implies that the only conditions under which a union shop can exist are voluntary ones. In essence, the case whittles the union shop provision to its financial core.

Thus construction of section 8(a)(3) limiting an employee's obligation to its financial core redefines a union shop provision into an agency shop provision. Inherent in the union shop concept is the existence of at least minimal or nominal union membership. It should be noted that the Supreme Court has cautioned against a reading of section 8(a)(3) which too narrowly limits the union shop concept.¹²¹ Implicitly, the Court's caveat in both *Hanson* and *Street*, that a union shop could be subjected to specific constitutional restraints, militates against excluding the concept of a union shop from the combined protections of sections 8(a)(3) and 8(b)(1) of the NLRA.

It appears that the federal district court carved out a narrow constitutional exception to the union shop provision incorporated into the collective bargaining agreement between AFTRA and Buckley's and Evans' respective broadcasting employers on the basis of the Court's language in *Hanson* and *Street*.¹²² The district court correctly assumed the Supreme Court standards for upholding the union shop concept generally in that the district court places the adjudication of constitutional issues in the federal courts and the creation of federal labor policy, the definition of a union shop, with the Congress.

In 1971 in *Amalgamated Association of Street Employees v. Lockridge*,¹²³ the Supreme Court narrowly reaffirmed *Garmon*.¹²⁴ Two members on the majority in *Lockridge* are no longer with the present Court, while the four strong dissenters remain.¹²⁵ This factor, in addition to the numerous federal law exceptions to *Gar-*

¹²⁰ See note 9 supra.

¹²¹ In *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960), the Supreme Court stated:

It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not choose to do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly.

Id. at 418 n.7.

¹²² 354 F. Supp. at 837, 844, 848, 82 L.R.R.M. at 2298, 2303-04, 2307.

¹²³ 403 U.S. 274 (1971).

¹²⁴ *Id.* at 285-302.

¹²⁵ Chief Justice Burger, Justices Douglas, White and Blackmun dissented in *Lockridge*. 403 U.S. at 302-32.

mon already noted,¹²⁶ militates against the preemption of unfair labor practice claims under *Garmon* where a federal constitutional question is raised. When all considerations are taken into account, the Second Circuit's decision to apply the doctrine of preemption to the compulsory membership and union discipline claims, despite the lower court's finding for Buckley and Evans, seems unjustified. The preemption question in a *Buckley* context where a constitutional claim is raised in the form of an arguable unfair labor practice should turn on the substantiality of the constitutional claim and not on proof of that claim. Thus, the justiciability test of *Bell v. Hood*¹²⁷ would be applicable and would permit assertion of federal court jurisdiction in order to adjudicate the constitutional question in its natural forum in the federal courts.

FIRST AMENDMENT STANDARD OF REVIEW

A determination of the merits of Buckley's and Evans' First Amendment claims in their totality is difficult. It would presuppose a finding of government action in the union activities similar to that found by the First Circuit in *Linscott v. Millers Falls Co.*¹²⁸ The District court in *Evans v. American Federation of Television and Radio Artists*,¹²⁹ based its decision on the close associational ties between the work of broadcasting commentators and the First Amendment. It found that both Buckley and Evans suffered direct and immediate harm from the union membership that they were forced to maintain with the union according to the union shop agreement.¹³⁰ Furthermore, the court was impressed by the threat of union discipline because of the union's past criticism of the late Chester Huntley during the 1967 strike between AFTRA and the networks.¹³¹ The district court decided to weigh the total effect of union activities upon Buckley's and Evans' rights. This standard of review consisted of a balancing test weighing the cumulative effect of all incidents of the union shop provision on the commentators, and the importance of the individual rights asserted against the government policy to encourage the union shop under section 8(a)(3).

The district court restricted its holding in order to preserve the federal policy underlying the NLRA but the court did not find that policy sufficient to warrant subjection of individual liberties to direct and immediate curtailment, especially where First Amendment liberties are involved.¹³² By weighing the combined effect of all the

¹²⁶ See note 93 *supra*.

¹²⁷ 327 U.S. 678 (1946).

¹²⁸ 440 F.2d 14, 76 L.R.R.M. 2994 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

¹²⁹ 354 F. Supp. 823, 82 L.R.R.M. 2289 (S.D.N.Y. 1973).

¹³⁰ *Id.* at 845, 82 L.R.R.M. at 2304.

¹³¹ *Id.* at 843-44, 82 L.R.R.M. at 2302-03.

¹³² *Id.* at 847, 82 L.R.R.M. at 2306.

incidents of union shop activities on Buckley and Evans, the lower court employed a balancing test, unlike the Second Circuit's test which had isolated the issues and therefore weakened the impact of the union shop activities on the appellees. The Second Circuit, in isolating the dues issue, presented a Platonic analogy to *Linscott*, which resulted in a decision that did not address the basic question presented in the case: whether the totality of requirements—the exaction of dues, membership and other incidents of membership—infringed upon Buckley's and Evans' First Amendment freedoms.¹³³

First Amendment guarantees are not absolute.¹³⁴ They are restricted where they conflict with a "compelling" governmental interest. By refusing to consider all aspects of the union shop agreement on the question of the infringement of Buckley's and Evans' freedom of expression, the Second Circuit handicapped the First Amendment claim from the beginning. The *Buckley* court limited its balancing test to one which measured only the dues requirement's effect on the fundamental right of freedom of expression against the government policy encouraging financial support of the collective bargaining system authorized under the NLRA. It is submitted that the First Amendment standard of review required more: that the Second Circuit take into account all elements of the union shop provision which might infringe upon the broadcasters' First Amendment rights. Adherence to this standard would have required the court to consider the impact of possible internal union discipline on appellees' First Amendment rights.

In conclusion, the *Buckley* case leaves serious questions unanswered concerning the government action status of union shops created under the authority of section 8(a)(3) and the concept of the union shop itself. While the invocation of the *Bell* test prevented a tug of war between the circuits over the government action question, the application of *Bell* to avoid deciding that question in a First Amendment context is undesirable. Where the challenged activity pervades so many facets of life as do the activities of labor unions, indecision and fence-sitting seem inappropriate.

The court's decision will allow the NLRB to preempt valid constitutional issues where they accompany arguable unfair labor practices from their natural forum in the federal courts to the National Labor Relations Board. The wide discretion given the General Counsel¹³⁵ of the NLRB to prosecute unfair labor practice

¹³³ 496 F.2d at 314, 86 L.R.R.M. at 2109 (Friendly, J., concurring).

¹³⁴ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Cox v. New Hampshire*, 312 U.S. 569 (1941). See text at note 30 *supra*.

¹³⁵ The powers and duties of the General Counsel of the NLRB are set out in section 3(d) of the NLRA, 29 U.S.C. § 153(d) (1970). See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245-46 (1959), for the Court's discussion of the duties and powers of the General Counsel in preemption cases. See also *General Drivers v. NLRB*, 179 F.2d 492, 25 L.R.R.M. 2237 (10th Cir. 1950), holding that the decision of the General Counsel is not reviewable in the courts as a "final order." *Id.* at 494, 25 L.R.R.M. at 2238.

complaints relegates the determination of the issues to an uncertain fate. The fact that the district court had found that these same issues constituted constitutional violations militates strongly against preemption and makes the *Seay* analysis appear to be a more rational and acceptable view. Preemption under the much disputed and exception-riddled doctrine of *Garmon* should be avoided in the wake of *Lockridge*, *Seay*, and the *Buckley* decisions. It is hoped that the Supreme Court will find an opportunity in the near future to address and resolve both the government action and preemption questions which have split the various circuits in deciding First Amendment questions arising under section 8(a)(3) of the National Labor Relations Act. The course taken by the Second Circuit in *Buckley* appears to be an improvident one for both labor unions and individual employees.

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