NOTE

WHO PAYS FOR CHARITABLE CONTRIBUTIONS MADE BY UTILITY COMPANIES?

I. INTRODUCTION

This Note examines the recurrent dilemma of whether public utility companies may, under the rubric of operating expenses, recoup expenditures from their customers which were made to charitable organizations.[1] The Note addresses this issue in view of the recent case, *Cahill v. Public Service Commission*,[2] where ratepayers challenged recovery of charitable contributions in rates as a violation of their First Amendment right not to associate with political and ideological causes contrary to their personal beliefs. Although challenges to charitable contributions are not novel, this is the first instance in which a court has decided whether recovery of charitable contributions as a cost of service violates ratepayers' constitutional rights.[3]

Historically, courts and regulatory commissions have differed in their treatment of charitable contributions in rates. The majority of states disallow treatment of charitable contributions as operating expenses, holding that shareholders must bear the costs.[4] A minority of jurisdictions allow utility companies to include reasonable contributions as a cost of service as long as ratepayers receive an "indirect benefit."[5]

The court in *Cahill* recently rejected the New York Public Service Commission's (NYPSC) existing policy allowing utility companies to recover charitable contributions in rates because it violates ratepayers' First Amendment right not to associate with personally offensive causes.[6] The court concluded

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1. Peter M. Sikora, Note, *Charitable Contributions of Public Utilities: Who Should Bear the Cost?*, 30 CASE W. RES. L. REV. 357 (1980).

2. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133 (N.Y. 1990), *cert. denied*, 111 S. Ct. 344 (1990).

3. *See infra* notes 22-32 (listing the states that have decided this issue; there have been none found that have decided this issue on constitutional grounds.); Jewell v. Washington, 585 P.2d 1167, 1169-70 (Wa. 1978); The Supreme Court has decided this issue with respect to labor unions and integrated state bar associations. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977); Keller v. State Bar of Cal., 110 S. Ct. 2228, 2232 (1990).

4. *See infra* notes 22-25 and accompanying text.

5. The phrase "indirect benefit" is used to denote benefits that the ratepayers enjoy and possibly realize but that do not necessarily result in improved utility services. For example, ratepayers might receive benefits because of the improved relationship between the utility companies and the community. *See infra* notes 26-27 and accompanying text; *But see* Sikora, *supra* note 1 at 373. The alternative argument posits that if the ratepayers benefit from civic goodwill, then so must the utility and its shareholders because a more attractive community attracts new residents who must subscribe to utility services. Therefore, shareholders reap the ultimate benefits of the contributions.

6. *Cahill*, 556 N.E.2d at 137; *See also* Cahill v. Public Serv. Comm'n, 506 N.E.2d 187 (N.Y. 1986),*cert. denied*, 484 U.S. 829 (1987) (Mr. Cahill objected "in principle" to the New York Public Service Commission's (NYPSC) policy allowing recovery of charitable donations in rates; he objected to the

that the NYPSC's policy implicated the First Amendment right not to associate because one of the ratepayers disagreed with particular causes he was being compelled to support.[7]

In addition, the court in *Cahill*, following a strict scrutiny test, required that the State first show that the utility companies' charitable contributions serve a compelling State interest. Second, the contributions must have a pronounced effect on the utility companies provision of utility services; ratepayers must realize tangible benefits that are more than speculative.[8] *Cahill* leaves no room for recovery of charitable contributions in rates if the holding means it is inconceivable that utility companies could ever establish that charitable contributions pass along "tangible" and "non-speculative" benefits to the ratepayers.[9]

The court in *Cahill* held that allowing recovery of charitable contributions in rates does not give the ratepayers "tangible" benefits necessary to justify abridging the ratepayers' constitutional right not to associate with personally offensive causes.[10] The resulting civic goodwill is not necessary or even germane to advancing the service interests of the ratepayers.[11]

II. FACTS OF *CAHILL*

The State of New York charges the NYPSC with plenary regulatory and rate-fixing powers over public utilities.[12] The NYPSC relied on the Legislature's grant of rate-making power and its "exclusive authority to determine just and reasonable rates," when adopting a policy that permitted utility companies to pass the costs of charitable contributions to the ratepayers.[13] Therefore, the policy satisfies the threshold claim of State action.[14] The NYPSC justified treating the contributions as operating costs because they were rea-

principle that the NYPSC allowed the utility companies to recover any charitable contributions as a cost of providing utility services, no matter how small.).

7. *Cahill*, 556 N.E.2d at 136 (The NYPSC argued that the practice of allowing recovery of charitable contributions in rates could not implicate the First Amendment right not to associate because even if the ratepayers objected to the ideological positions expressed through charitable donations, the ratepayers would never be personally identified with such positions. The court stated: "It is enough that the extracted payments impose on the ratepayers, in some measure actually and in their estimation subjectively, particular and objectionable expressions and causes of a host of organizations.").

8. *Id.* at 137.

9. Petition for Writ of Certiorari at 6-7, Cahill v. Public Serv. Comm'n, 556 N.E.2d 133 (N.Y. 1990) (No. 90-255), *cert. denied*, 111 S. Ct. 344 (1990) (The Petitioner cites an improved local business climate resulting from attracting and maintaining customers, an assured availability of medical, educational, and community services, and an assured large pool of qualified applicants for company positions as benefits that could be realized from charitable contributions. Because the court of appeals did not categorize the previous benefits as "tangible," charitable contributions may never be allowed recovery in rate.).

10. *Cahill*, 556 N.E.2d at 133-34.

11. *Id.* at 137 (The court uses terms such as "germane" indicating it might allow recovery of charitable contributions in rates as long as they are at least relevant to the provision of utility services; however, the court accepts nothing less than the more exacting compelling state interest standard.).

12. *Id.* at 134.

13. Cahill v. Public Serv. Comm'n, 506 N.E.2d 187, 190 (N.Y. 1986), *cert. denied*, 484 U.S. 829 (1987).

14. *Id.; Contra Id.* at 193-95 (Titone, J., dissenting) (supporting the proposition that there is no State action, merely "governmental acquiescence in private economic decisionmaking").

sonable in amount and relevant to the utility companies' civic responsibilities.[15]

The public utilities in this case chose to make contributions to numerous charities, including politically and religiously active organizations.[16] These organizations included for example, the New York City Mission Society, the United Way, the New York Public Library, the New York Blood Center, Inc., the Rochester Institute of Technology, the National Organization for Women Legal Defense Fund, the American Jewish Congress, and One Hundred Black Men.[17] The intrastate rates of New York Telephone Company reflected recovery of approximately $3,000,000.00 in charitable contributions.[18]

Cahill, a customer of the State's public utilities, challenged the NYPSC's policy decision that allowed recovery of charitable contributions in rates.[19] Cahill argued that the utility companies forced ratepayers to support religious institutions, organizations supporting the right to abortion, and other causes that personally and politically offended them.[20] He also challenged the recovery of charitable contributions in rates "as a matter of principle," alleging violations of free speech, free exercise, and the establishment clause.[21]

III. EXISTING TREATMENT OF CHARITABLE CONTRIBUTIONS

The majority of the States that have considered the treatment of charitable contributions have disallowed the expenditure, because to do otherwise would work an "involuntary levy" on ratepayers.[22] An involuntary levy

15. *See infra* note 31 and accompanying text.

16. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 134 (N.Y. 1990), *cert. denied*, 111 S. Ct. 344 (1990).

17. Brief in Opposition to Petition for Writ of Certiorari at 2-3, Cahill v. Public Serv. Comm'n, 556 N.E.2d 133 (N.Y. 1990) (No. 90-255), *cert. denied*, 111 S. Ct. 344 (1990).

18. Cahill v. Public Serv. Comm'n, 506 N.E.2d 187, 188 (N.Y. 1986), *cert. denied*, 484 U.S. 829 (1990).

19. *Cahill*, 556 N.E.2d at 135.

20. *Id.*

21. *Cahill*, 506 N.E.2d at 188.

22. Alabama Power Co. v. Alabama Pub. Serv. Comm'n, 359 So.2d 776, 779-80 (Ala. 1978) ("The Company, being a monopoly, can operate without deducting charitable donations as an operating expense."); Homer Elec. Ass'n v. Alaska Pub. Util. Comm'n, 756 P.2d 874 (Alaska 1988) (A state statute expressly prohibits allowances for costs of political or charitable contributions or public relations.); Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 401 P.2d 353, 374-75 (Cal. 1965) ("Dues, donations and contributions, if included as an expense for ratemaking purposes, become an involuntary levy on ratepayers, who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy."); *Re* Mountain States Tel. & Tel. Co., 22 P.U.R.4th 516, 542-43 (Colo. Pub. Serv. Comm'n 1977) (The commission disallows all charitable contributions except those made to trade associations.); Southern New England Tel. Co. v. Public Util. Comm'n, 282 A.2d 915, 926 (Conn. Super. Ct. 1970) (The court deferred to the commission's decision to disallow on grounds that charitable contributions are not a necessary cost of doing business.); Washington Gas Light Co. v. Public Serv. Comm'n of the Dist. of Columbia, 450 A.2d 1187, 1229-31 (D.C. 1982) ("Since the ratepayers do not directly benefit from the charitable contributions in terms of utility service, they should not bear this cost."); Southern Bell Tel. & Tel. v. Public Serv. Comm'n, 443 So.2d 92, 95-96 (Fla. 1983) (disallowed charitable contributions because they are involuntarily imposed upon ratepayers); *Re* Southern Bell Tel. & Tel. Co., 63 P.U.R.4th 146, 153-54 (Ga. Pub. Serv. Comm'n 1984) ("[C]haritable contributions benefit the corporate image of the company . . . and . . . are in no way connected with the provision of utility service."); *Re* Hawaii Elec. Light Co., Inc., 120 P.U.R.4th 427, 450 (Haw. P.U.C. 1991) (disallowed because the

occurs because the utility company is a monopoly.[23] Ratepayers must involuntarily bear the cost of charitable contributions to causes they might find offensive because they are not free to subscribe to a different company.[24] Similarly, before 1970, the NYPSC disallowed treatment of charitable contribu-

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ratepayers do not receive a direct benefit from the contributions, and the contributions are not necessary for the provision of utility services); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 303 N.E.2d 363, 374-75 (Ill. 1973) (constitutes an "involuntary assessment" on the utility's patrons); Board of Directors for Utilities of the Dep't of Pub. Utilities of the City of Indianapolis v. Office of the Util. Consumer Counselor, 473 N.E.2d 1043 (Ind. Ct. App. 1985) ("The Commission can see absolutely no justification for a municipally owned utility using money from its ratepayers to fund charities."); Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583, 608 (Iowa 1971)("If charitable contributions are allowed as an operating expense of a monopoly, it amounts to an involuntary levy on the ratepayers."); South Cent. Bell Tel. Co. v. Public Serv. Comm'n, 702 S.W.2d 447, 453 (Ky. Ct. App. 1985) (adopted Uniform System of Accounts, which treats contributions as a non-operating expense); New England Tel. & Tel. Co. v. Public Util. Comm'n, 390 A.2d 8, 55-56 (Me. 1978) (ratepayers should not be "forced to make contributions through their telephone rates"); Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 187 A.2d 475, 485 (Md. 1963) (amounts to "an involuntary levy on the rate payers"); Boston Gas Co. v. Department of Pub. Utilities, 539 N.E.2d 1001, 1006 (Mass. 1989) (disallowed contributions, but stated that contributions would be allowed if they provided some "clear benefit" to ratepayers); Detroit Edison Co. v. Public Serv. Comm'n, 342 N.W.2d 273, 284-85 (Mich. Ct. App. 1983) (disallowed contributions to educational institutional because it "amounts to taxing" the ratepayers); *Re* Northern States Power Co., 75 P.U.R.4th 538, 583 (Minn. P.U.C. 1986); State, *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 435 So.2d 608, 617 (Miss. 1983) (disallowed recovery because donees might not be satisfactory to ratepayers); State, *ex rel.* LaClede Gas Co. v. Public Serv. Comm'n, 600 S.W.2d 222, 229 (Mo. Ct. App. 1980), *appeal dismissed*, 449 U.S. 1072 (1981) (amount to "involuntary contributions"); *Re* Southern Bell Tel. & Tel. Co., 55 P.U.R.4th 363, 384 (N.C. Utilities Comm'n 1983) ("involuntary contributions"); *Re* Otter Tail Power Co., 53 P.U.R.4th 296, 301 (N.D. Pub. Serv. Comm'n 1983) ("involuntary contribution"); Cleveland Elec. Illuminating Co. v. Public Util. Comm'n, 431 N.E.2d 683, 685 (Ohio 1982) ("involuntary levy"); State v. Oklahoma Gas & Elec. Co., 536 P.2d 887, 893 (Okla. 1975) ("involuntary levy"); *Re* Pacific Northwest Bell Tel. Co., 82 P.U.R.3d 321, 336 (Or. P.U.C. 1969); Pennsylvania Pub. Util. Comm'n v. General Tel. Co. of Pa., 55 P.U.R.4th 644, 665 (Pa. P.U.C. 1983) ("involuntary taxation"); Parker v. South Carolina Pub. Serv. Comm'n, 314 S.E.2d 148, 150 (S.C. 1984); *Re* Northwestern Bell Tel. Co., 68 P.U.R.4th 436, 444 (S.D. P.U.C. 1985) ("ratepayers should not be forced to make involuntary contributions"); *Re* Utah Gas Serv. Co., 110 P.U.R.4th 361, 369 (Utah Pub. Serv. Comm'n 1990) ("ratepayers should not be compelled to contribute involuntarily"); *Re* Central Vermont Pub. Serv. Corp., 113 P.U.R.4th 220 (Vt. Pub. Serv. Bd. 1990); *Re* Wisconsin Power & Light Co., 108 P.U.R.4th 476 (Wisc. Pub. Serv. Comm'n 1989) (disallowing charitable contributions because utilities are monopolies, and the customers do not have the choice to procure other service if they disagrees with particular causes the utility chooses to support); *Re* Chesapeake & Potomac Tel. Co. of West Virginia, 28 P.U.R.4th 120 (W. Va. Pub. Serv. Comm'n 1978); Jewel v. Washington Util. & Transp. Comm'n, 585 P.2d 1167, 1169 (Wa. 1978) ("involuntary levy"); *Cf.* Phillip I. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 181 n.48 (1970) (Prior to 1970, eleven of the nineteen judicial decisions that had decided the issue allowed treatment of contributions as operating expenses. On the other hand, in the twenty-six jurisdictions where judicial decisions were not controlling law, twenty regulatory agencies disallowed charitable contributions in rates.).

23. A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 1-2 (1969); *See also* Cincinnati v. Public Util. Comm'n, 378 N.E.2d 729, 737 (Ohio 1978) (The ratepayer cannot obtain utility services from another source should he disagree with certain contributions because the utility company constitutes a natural monopoly.).

24. *Pacific Tel. & Tel. Co.*, 401 P.2d at 374; *Id.* at 379 (Traynor, C.J., concurring); *Accord* LaClede Gas Co. v. Public Serv. Comm'n, 600 S.W.2d 222, 229 (Mo. Ct. App. 1980) (rationale); *See also* State v. Oklahoma Gas & Elec. Co., 536 P.2d 887, 893 (Okla. 1975); *Accord* Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583, 608 (Iowa 1971) (supporting the view that ratepayers relinquish their personal freedom of choice when utility companies force them to pay indirectly for discretionary contributions); *See also* Sikora, *supra* note 1 at 362-67 (1980) (good discussion of charitable contributions as an involuntary levy).

tions as operating costs because, among other reasons, company officers made the contributions at their own discretion.[25]

On the other hand, courts allowing the recovery of charitable contributions in rates generally follow an "indirect benefits" test.[26] The decisions do not, however, always require that ratepayers ultimately receive the same degree of benefit. For example, one court would allow contributions if they had "an effect upon the creation of the service or product of the corporation."[27] Other courts accept the rationale that charitable contributions promote civic goodwill which inevitably benefits the ratepayers.[28]

In addition, one court has recently disallowed charitable contributions as a cost of service because two things were not established: (1) the contributions were reasonable; and (2) they provided a "clear benefit" to ratepayers.[29] In another recent judicial decision, a court held that charitable contributions directly benefit ratepayers when the charity is well-known and established because of its "broad and salutory effect which has touched most and perhaps all of [the utility's] ratepayers."[30]

The NYPSC changed its policy in 1970, recognizing that "corporations throughout the country have come to realize that charitable contributions are no longer wholly voluntary," and that the contributions have an "important relationship to the necessary costs of doing business."[31] In addition, certain

25. *Re* Accounting Treatment for Donations, Dues, and Lobbying, 71 P.U.R.3d 440, 445 (N.Y. Pub. Serv. Comm'n 1967) (Prior to 1970, the NYPSC refused to allow recovery of charitable contributions in rates on the grounds that were not "necessary to the conduct of business and that they [were] made at the sole discretion of Company officers to donees of their choosing.").

26. *See, e.g.*, Southwestern Bell Tel. Co. v. State Corp. Comm'n, 386 P.2d 515, 545 (Kan. 1963) (charitable contributions related to development of good will in the community); *In re* Diamond State Tel. Co., 107 A.2d 786, 788 (Del. 1954), *modified on other grounds*, 113 A.2d 437 (Del. 1955); Public Serv. Co. v. State, 153 A.2d 801 (N.H. 1959) ("vital to establish and improve public relations"); United Transit Co. v. Nunes, 209 A.2d 215, 222 (R.I. 1965) (community relations benefit the utility company or its patrons); Howell v. Chesapeake & Potomac Tel. Co., 211 S.E.2d 265, 272 (Va. 1975), *appeal dismissed*, 423 U.S. 805 (1975).

27. New Jersey Bell Tel. Co. v. Department of Pub. Util., 97 A.2d 602, 616 (N.J. 1953).

28. *See supra* note 26.

29. Boston Gas Co. v. Department of Pub. Util., 539 N.E.2d 1001, 1004-06 (Mass. 1989) (The court cited, as an example, a plan where the utility company matches charitable contributions made by employees. The court reasoned that this activity benefits the ratepayer directly because it promotes employee goodwill and helps attract and retain employees, who in turn produce more desirable services.); *See also* El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n, 706 P.2d 511, 512-13 (N.M. 1985) (may include certain contributions as a cost of service if it affirmatively demonstrates that such expenses are "reasonable" and "result in a direct benefit to the ratepayer;" however, maintenance of good will and good corporate citizenship are insufficient reasons for the inclusion of charitable contributions in the cost of service.); Reno Power, Light & Water Co. v. Public Serv. Comm'n, 298 F. 790 (D.C. Nev. 1923).

30. Detroit Edison Co. v. Public Serv. Comm'n, 342 N.W.2d 273, 284 (Mich. Ct. App. 1983) (The utility company in this instance could point to tangible and proven benefits. In the same case, the court disallowed deductions for contributions to educational institutions saying that the benefit to the ratepayers would not be direct enough even if the utility company recruited employees from the donee institutions.).

31. *Re* New York Tel. Co., 84 P.U.R.3d 321, 349-50 (N.Y. Pub. Serv. Comm'n 1970) (The Commission, in adopting the policy of the Federal Power Commission in United Gas Pipe Line Co., 31 F.P.C. 1180, 1189 (1964), held that, "[m]ost charities could not function were it not for corporate contributions, and the corporations themselves, recognizing their role in the communities in which they operate and their public interest obligations to these communities, have supplied charities with a large share

federal agencies engaged in economic regulation of utility companies allow reasonable charitable contributions, e.g., the Federal Communications Commission and the Federal Energy Regulatory Commission.[32]

IV. TREATMENT OF CHARITABLE CONTRIBUTIONS BY *CAHILL*

The standard for determining when utility companies may treat charitable contributions as operating expenses becomes more rigorous when treatment impinges upon a ratepayers' constitutional rights.[33] The court in *Cahill*, held that a constitutional problem exists when the State compels ratepayers to subsidize utility companies' charitable contributions that ultimately support political or ideological causes contrary to the ratepayers' personal beliefs.[34] Utility companies must show that the State has a compelling interest in allowing the contributions, and that the ratepayers realize non-speculative and tangible benefits because of the contributions.[35]

A. Does Recovery of Charitable Contributions In Rates Implicate Ratepayers' Constitutional Rights?

The Supreme Court has historically maintained that State action, compelling an individual to support a cause that is personally offensive, implicates constitutional interests.[36] Compelled support implicates constitutional interests because it deprives the contributor of his First Amendment right to asso-

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of the funds needed to carry on their necessary community activities."); *But cf.* New York Tel. Co., 121 P.U.R.4th 117, 152-53 (N.Y. Pub. Serv. Comm'n March 7, 1991) (Interpreting *Cahill* as prohibiting utility companies from "forcing ratepayers to reimburse" the utility companies for contributions made by the utility company's affiliates. The commission also held that "forcing" ratepayers to support the Pioneers (previously treated as partly an employee benefits expense and partly as charitable contributions, this support acted as a retirement plan for employees) and indirectly, the charities they support, would run "afoul of *Cahill*.").

32. *In re* Rules to Prescribe Components of Rate Base and Net Income, 3 F.C.C. 269, 280 (1977) ("reasonable charitable contributions are very much an obligation of a business enterprise to the community it serves and upon which it is dependent for its revenues" and are "part of the cost of doing business"); Union Elec. Co. & Missouri Edison Co., 26 F.E.R.C. ¶ 61,125, at 61,312 (1984) (allowing reasonable contributions).

33. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 136-37, (N.Y. 1990), *cert. denied*, 111 S. Ct. 344 (1990) (The court relies upon the traditional First Amendment strict scrutiny standard as compared with the NYPSC's prevailing policy that allowed contributions if "reasonable.").

34. *Id.; But Id.* at 138-40, (Titone, J., concurring) (The constitutional violation is that the State impermissibly delegated its power to tax. The implications are that charitable contributions promote goodwill that benefits the community, and not the shareholders or employees. Therefore, only the government can levy "taxes" from the ratepayers for benefits accruing to the entire community.); It is unclear whether the same action, according to Justice Titone's rationale, would be constitutional if the shareholders or employees received the benefits.

35. *Id.* at 136-37.

36. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (forced obedience to governmentally prescribed doctrine held unconstitutional); Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956) (conditioning union employment on payment of union dues held constitutional); International Ass'n of Machinists v. Street, 367 U.S. 740, 777-78, 788 (Black, J., dissenting) (compelled fees for political causes violate freedom to support causes of their choice); Lathrop v. Donohue, 367 U.S. 820, 842 (1961) (plurality opinion) ("In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*].); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (forcing individual to display ideological message on license plate unconstitutional); Abood v.

ciate or to refrain from associating with personally offensive ideas.[37] *Cahill* would appear to fit into this tradition because the utility companies supported causes that offended the ratepayers.[38]

The Supreme Court has examined and forbade both direct action and compelled funding that supports personally distasteful notions.[39] For example, the Court in *Wooley v. Maynard*[40] held that forcing a citizen to display a license plate with a message repugnant to his moral, religious and political beliefs violated his right of association.[41] The Court in *Abood v. Detroit Board of Education*[42] extended this constitutional protection even further to include non-union workers who were required under an "agency shop" agreement to pay the union a service fee equal to union dues. As non-members of the union, the workers would not be associated with the expressions of the union, yet the First Amendment was implicated because the worker might disagree with principles being supported by a portion of his dues.[43] Even more recently, following *Abood*, the Supreme Court in *Keller v. State Bar of California*[44] held that using bar members' dues to finance ideological activities with which they disagree also implicates their First Amendment right of association.[45]

Similarly, the court in *Cahill* held that forcing ratepayers to support util-

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Detroit Bd. of Educ., 431 U.S. 209, 222 (1977) (first amendment interests implicated because workers forced to pay union dues might have ideological objections).

37. *Id.* (The Court, following the principles laid forth in Buckley v. Valeo, 424 U.S. 1, 22 (1976), stated that it "works no less an infringement of their constitutional rights" when individuals are compelled to make contributions rather than prohibited from making contributions. "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); *See also* Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 631 (1st Cir. 1990) ("The Supreme Court cases upholding compelled membership rest on an implicit assumption that 'the cause which justified bringing the group together' would be sufficiently narrow that dissenting employees would be forced to associate against their will in only a limited way."); *But see Cahill*, 556 N.E.2d at 138-39 (Titone, J., concurring) (There is no initial impairment of the ratepayers' First Amendment rights because unlike *Abood*, the forced contributions to utility companies are merely for services already received by the contributor; the argument fails to recognize that the 'services rendered' could also include expenditures to various causes totally unrelated to utility services.).

38. *Cahill*, 556 N.E.2d 136 ("It is enough that the extracted payments impose on the ratepayers, in some measure actually and in their estimation subjectively, particular and objectionable expressions and causes of a host of organizations."); *Contra Id.* at 138-39 (Relying on PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980), Justice Titone argues that there can be no infringement of a right of association under the First Amendment because no one would suspect that the ratepayers support particular causes merely by virtue of their payment of utility bills.).

39. *See infra* notes 41-47 and accompanying text.

40. *Wooley*, 430 U.S. at 717.

41. *Id.* at 714-15 (Thus, the Court finds, in the First Amendment right to associate, a negative right to not associate when it states: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such beliefs.").

42. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

43. *Id.* at 237 ("The objective is to prevent compulsory subsidization of ideological activity by employees who object thereto. . . ."); Ellis v. Brotherhood of Ry. Airline and Steamship Clerks, 466 U.S. 435, 455-56 (1984); Chicago Teachers Union v. Hudson, 475 U.S. 292, 302 (1986).

44. Keller v. State Bar of Cal., 110 S. Ct. 2228 (1990).

45. *Id.* at 2232-33 (An integrated bar required membership of all lawyers who wanted to practice in California. The petitioners disagreed with political and ideological activities their dues supported. The Supreme Court held that to justify mandatory payment of activities that encroached on the members' first

ity companies' charitable contributions implicates their First Amendment right of association.[46] The court also acknowledged that the public probably would not associate ratepayers with ideological positions supported by the utility companies' contributions merely because of utility payments; nonetheless, the court held that it is sufficient that the ratepayers subjectively and personally disagree with particularly offensive associations.[47] Although the court in *Cahill* held that forced support of personally offensive ideological or political causes abridged the customer's constitutional right, charitable contributions necessary to further a compelling governmental interest may justify the constitutional infringement.[48]

B. The Magnitude of the State's Interest

The court in *Cahill*, following the rationale set forth in *Abood v. Detroit Bd. of Educ.* and *Austin v. Michigan Chamber of Commerce*,[49] first required utility companies to identify a compelling governmental interest that justifies the impairment of ratepayers' ideological interests.[50] A compelling interest must at least promote the collective interests of the group whose rights are infringed. Beyond this, the Supreme Court has provided little guidance in identifying "compelling" governmental interests.[51]

The Supreme Court in *Abood* held that agency-shop dues of dissenting non-union employees could not be used to support political and ideological union causes that are unrelated to collective bargaining activities.[52] In other words, the Court deemed collective bargaining a sufficiently important governmental interest to justify a First Amendment infringement. Although the majority in *Abood* did not clearly articulate that the labor union's interest must be compelling, it effectively implied the same when it stated that union activities supported by forced funding must be "germane to collective bargaining" to be constitutionally justified.[53] The Court in *Railway Employees' Department v. Hanson* held that collective bargaining was an important interest legislated by Congress because it "promotes peaceful labor relations."[54]

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amendment right, the Bar must prove that the expenditures are closely related to serving the state's important interest of regulating attorneys.).

46. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 135-36 (N.Y. 1990), *cert. denied*, 111 S. Ct. 344 (1990).

47. *Id.* at 136.

48. *Id.* at 135-37.

49. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1406 (1990) (Brennan, J., concurring) ("[T]he State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to [its] political message.").

50. *Cahill*, 556 N.E.2d at 135-37.

51. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 245 (1977) (Powell, J., concurring in part).

52. *Id.* at 235-36.

53. *Id.*; *See also* Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 14 (1983) (acknowledging that the Court never did quantitatively assess the state's interest in promoting peaceful labor relations as is usually the practice when identifying a compelling state interest).

54. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 235 (1956); *See also* Cantor, *supra* note 53 at 40 (The Court does not identify the characteristics that make the governmental interest sufficient, other than it was important enough to warrant Congressional legislation.).

In contrast, the court in *Cahill* refused to accept the utility companies' contention that civic goodwill, produced as a result of charitable contributions, improves the quality of service.[55] Although the court in *Cahill* implicitly assumes that the provision of adequate utility services is a "compelling" interest, it required the utility companies to show that the expenditures result in tangible services to the ratepayers.[56] The utility companies' argument that contributions benefit the rate-paying consumers by increasing their quality of life and therefore improving utility services proved too tenuous.[57]

Also, the court rejected the utility companies' argument that *Abood* displaced the compelling interest test with a "germaneness test."[58] The proposed "germaneness test" would justify a constitutional impairment if the contributions are merely relevant to the State's interest in promoting goodwill between the utility and the customers.[59] The court acknowledged the importance of charitable contributions and their positive effect upon the community and stated that the true interest is in providing adequate utility services, and not in merely promoting civic goodwill.[60] Although the court in *Cahill* reasoned that the "germaneness" aspect discussed in *Abood* could help evidence the importance of the State's interest, in this instance the connection between civic goodwill and the provision of utility services was too attenuated.[61]

The court in *Cahill* demanded tangible evidence that civic goodwill substantially increases utility companies' ability to provide services.[62] Unlike the Court in *Austin*, the utility companies could not point to congressional legislation that was implemented to support regulation that had historically proven beneficial to individuals whose constitutional rights had been impaired.[63]

C. *The Nexus Between the Contributions and Utility Services*

Even if utility companies can show that promoting goodwill between themselves and the community is a compelling State interest, they must also establish that recovery of charitable contributions in rates is necessary to provide adequate utility services.[64] The court in *Cahill* employed rationale from both *Abood* and *Austin* when holding that the nexus between the utility companies' policy of recouping contributions from ratepayers and their ability to

55. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 136-37 (N.Y. 1990), *cert. denied*, 111 S. Ct. 344 (1990).

56. *Id.* (The utility companies put on evidence, and the court accepted the allegation that charitable contributions result in benefits to the utility company; it was not shown that the effects of the charitable contributions benefitted the ratepayers, except indirectly, through the utility companies).

57. *Id.* at 137.

58. *Id.* at 136; *See also* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990) (interpreted *Abood* as requiring a strict scrutiny standard); Keller v. State Bar of Cal., 110 S. Ct. 2228, 2236 (1990) (requiring an exacting scrutiny).

59. *Cahill*, 556 N.E.2d at 136-37.

60. *Id.*

61. *Id.* at 137.

62. *Id.*

63. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1397 (1990).

64. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 137 (N.Y. 1990), *cert. denied*, 111 S. Ct. 344 (1990).

provide services must be germane as well as narrowly tailored.[65]

The Supreme Court in *Austin* recently applied the compelling State interest standard in upholding the Michigan Campaign Finance Act (Act).[66] The Act prohibited corporations from using corporate treasury funds for independent expenditures supporting or opposing candidates for State office.[67] Rather, it allowed corporations to make such expenditures from separate, segregated funds used solely for political purposes.[68] The Court held the statute was narrowly tailored to further the compelling governmental interest of preventing corruption caused by corporate spending.[69] The narrowly tailored statute achieves its goal because the Act is "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views" through separate segregated funds.[70]

Abood indicated that the labor union could constitutionally recover expenses "germane" to collective bargaining. This was only after the Court had determined that collective bargaining was a necessary means of achieving the State's compelling interest of promoting peaceful labor relations.[71] Although the Court in *Abood* did not consider whether the same objective might be achieved by employing less drastic measures,[72] the "germaneness" aspect has generally been interpreted by courts and commentators as requiring the more exacting constitutional scrutiny.[73]

Similarly, the court in *Cahill* required that the effects of charitable contributions benefit the ratepayers. The benefit must be less speculative and more tangible than the effects produced by civic goodwill.[74] The court acknowledged the important and useful benefit that civic goodwill reaps on the community and the ratepayers;[75] however, the benefits resulting from increased public relations, enure to the shareholders and the utility companies them-

65. *Id.*

66. *Austin*, 110 S. Ct. at 1397.

67. *Id.* at 1395.

68. *Id.*

69. *Id.* at 1398.

70. *Id.*

71. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).

72. David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1015 (1982).

73. Galda v. Bloustein, 686 F.2d 159, 164 (3d Cir. 1982); *See also* Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984) (The Court seems to impose a less exacting scrutiny than traditional strict scrutiny when it holds that the expenditures must be "necessarily or reasonably incurred" for the purpose of achieving the state's important interest. The Court continues to hold that, under this standard, the objecting employees may be compelled to pay not only direct costs expended toward this objective, but also those costs which are necessary or reasonable. This standard was also followed by the Supreme Court in Keller v. State Bar of Cal., 110 S. Ct. 2228 2236-37 (1990), with respect to the expenditures of mandatory bar dues.); Lehnert v. Ferris Faculty Assoc., 59 U.S.L.W. 4546, 4548-49 (May 30, 1991) (The Court has never interpreted the "germaneness test" to require a direct relationship between the expense at issue and some tangible benefit to the collective bargaining unit. The only connection required is that "there must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization.")

74. Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 137, (N.Y.1990), *cert. denied*, 111 S. Ct. 344 (1990).

75. *Id.* at 137.

selves because the improved quality of life attracts new residents who in turn subscribe to public utility services.[76]

V. CONCLUSION

The treatment of charitable contributions as operating expenses implicates the First Amendment when the contributions support causes that offend ratepayers' personal or ideological beliefs.[77] The court's holding in *Cahill* also supports the principle that any contributions, for any reason, triggers First Amendment scrutiny.[78] A compelling State interest may justify this constitutional infringement if charitable contributions buy more than goodwill, and utility companies prove that recovering charitable contributions in rates is necessary to achieve the provision of adequate utility services.[79]

Cahill presents at least two possible interpretations regarding if and when utility companies may recover charitable contributions in rates. One interpretation is that utility companies may never be allowed to recover charitable contributions in rates for two reasons. First, charitable contributions standing alone can never be designated as a compelling State interest. The court reasoned that "the tendered State interest in this case does not qualify as a compelling State interest."[80] It did not qualify even though utility companies demonstrated that charitable contributions attracted new customers, helped ensure the availability of medical, educational and other community services needed by its employees, and helped ensure a pool of qualified applicants for company positions.[81]

Second, even if the State could show a compelling interest in promoting civic goodwill, the utility companies in this instance did not establish that goodwill had a tangible effect on the provision of utility services. The court held that the effects of civic goodwill benefit the utility companies more than the ratepayers.[82] In addition, the NYPSC's primary purpose in allowing recovery of charitable contributions after 1970 was to benefit charities.[83] The NYPSC has never made a finding that there is any tangible connection between charitable contributions and the provision of utility services.[84]

This interpretation would establish a per se rule that utility companies

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76. *Id.* at 138-39.

77. *Id.* at 133 (Although certain implications can be gleaned from the decision of *Cahill*, its exact reach is uncertain because the Supreme Court denied certiorari.); *See supra* note 34 (Both the Dissent and the Majority agree that a constitutional right is implicated by such treatment; they differ as to which right is implicated under the Constitution.).

78. Petition for Writ of Certiorari at 5-6, Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 137 (N.Y. 1990) (No. 90-255), *cert. denied*, 111 S. Ct. 344 (1990) (Mr. Cahill objected to the very principle of the utility companies being allowed to subsidize any organization by recovering contributions in rates, not only when contributions supported causes that he disagreed with politically, religiously or personally.).

79. *Id.* at 137.

80. *Id.*

81. Petition for Writ of Certiorari at 6-7, Cahill v. Public Serv. Comm'n, 556 N.E.2d 133, 137 (N.Y. 1990) (No. 90-255), *cert. denied*, 111 S. Ct. 344 (1990).

82. *Cahill*, 556 N.E.2d at 137.

83. *Re* New York Tel. Co., 84 P.U.R.3d 321, 349-50 (N.Y. Pub. Serv. Comm'n 1970) ("Most charities could not function were it not for corporate contributions . . . .").

84. *Cahill*, 556 N.E.2d at 137.

may not recover charitable contributions in rates, and in fact *Cahill* has been interpreted in this fashion by the NYPSC.[85] It is a per se rule against recovery, the NYPSC suggests, because it is inconceivable that charitable contributions could ever produce anything except civic goodwill.

The other interpretation of the court's holding in *Cahill* would mean that although recovery of charitable contributions in rates implicates the First Amendment, a compelling State interest may justify the infringement. The court held that civic goodwill was not a compelling State interest because the ratepayers did not receive any tangible benefits as a result.[86] Presumably a showing of tangible benefits would satisfy the court.

Similarly, the court did not hold that no interest would qualify as "compelling." Therefore, there may be a compelling State interest that could overcome a First Amendment infringement. Although the court did not offer examples of what might constitute a compelling State interest, if utility companies establish that certain recipients of contributions help ensure or improve utility services for all ratepayers, in other words, receive tangible benefits, then utility companies would be allowed to recover the expenditures in rates.

The court in *Cahill* did not offer any examples of how charitable organizations might help utility companies provide utility services to its ratepayers. This interpretation suggests that there may be organizations, charitable or otherwise, that could help utility companies provide utility services. If the court's holding in *Cahill* is interpreted to stand for the proposition that utility companies may not ever recover charitable contributions in rates because they are not indispensable or directly tied to the provision of utility services, in other words, the benefits are intangible, then it effectively precludes recovery of a considerable number of utility expenditures in the name of charitable contributions.

R. PAUL GEE

85. *See supra* note 31.

86. *Cahill*, 556 N.E.2d at 137.