Labor, Liberalism and Majoritarian Democracy

Alister McAlister

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol31/iss4/3
LABOR, LIBERALISM AND MAJORITARIAN DEMOCRACY

ALISTER McALISTER*

I. INTRODUCTION

A. The Philosophical Question

The most profound political and legal questions of our day concern the relationship of the individual to the group. Virtually every major social issue involves the problem of reconciling the authority and corporate interests of the group with the dignity and separate personality of the individual. That the group has substantial rights is not to be denied. Yet the group is not entitled to deem its responsibility to the individual fully discharged when it has fulfilled its collective obligation to itself. Our system of constitutional representative democracy includes a very substantial measure of majority rule. Officials are elected largely by popular vote, and laws are adopted by a majority vote of our representatives. Yet our system also embodies a great many constitutional safeguards to prevent majoritarian democracy from degenerating into a people's tyranny. These include the well-known checks and balances, the separation of powers, judicial review, and above all, the Bill of Rights—containing guarantees of personal liberty that were meant to protect the individual from the abuse of any majority, no matter how large. Thus our system is at the same time one of majority rule and minority rights. The never-ending challenge is to maintain the essence of both, while avoiding the fanatical excesses of anarchy and authoritarianism at each extreme.

The problems of reconciling the competing interests of the individual and the group are nowhere more dramatically illustrated than in the area of union political activity. Is the union to be free openly and unhypocritically to enter the political arena to elect its friends and defeat its enemies? If so, is the individual union member who does not agree with the union's political views at liberty to speak and act on behalf of his own political philosophy, without the slightest suggestion of union intimidation or coercion? Can the political liberties of both the union majority and its dissenting minority be consistently honored simultaneously? These questions contain special significance for liberals who generally consider themselves the friends of organized labor, yet who also have historically supported individual civil liberties and the right to be different despite group pressures toward orthodoxy and conformity.

* Member of California Bar.
B. The Facts of the Dispute

The question of the rights of the individual against those of the group has seldom been posed with such crystal clarity as in two recent cases in which the constitutional issue was not actually decided, but only because the Court's majority went to extreme lengths to avoid it. In both cases the constitutional issue was whether first amendment rights are violated when purportedly private organizations (to which individuals are by law compelled to belong in order to hold a certain job) use dues money to promote political candidates and programs. In *International Ass'n of Machinists v. Street,* six railroad employees sued in a Georgia state court to enjoin enforcement of a union shop contract executed as authorized according to Section 2 of the Railway Labor Act. The parties stipulated that part of the dues would be used to support ideologies, political programs and candidates in which the plaintiffs did not believe. In *Lathrop v. Donohue,* an attorney sued to recover dues paid to the integrated Wisconsin State Bar. He alleged that the State Bar used his moneys to promote and oppose various legislative objectives and that he disagreed with the State Bar on many of these issues.

In the *Machinists* case, the defendants argued that the free speech issue had already been determined adversely to plaintiffs by *Railway Employes' Dept v. Hanson,* which upheld the validity of Section 2 of the Railway Labor Act, which authorizes the union shop in the railway industry, even in states with "right-to-work" laws. However, the Court replied that all that *Hanson* decided was that the union shop, per se, is valid. *Hanson* did not rule upon the free speech question because it was not sufficiently raised in the record. In fact, the Court expressly reserved decision of this issue.

In the *Machinists* case, the Court agreed that the record squarely presented the free speech issue. Nevertheless, the majority managed to avoid a decision on this point since it interpreted Section 2 of the Railway Labor Act to forbid railway unions from using dissenters' dues to support political causes or candidates with which the dissenters disagree. The Railway Labor Act does not expressly so forbid unions, nor does it even make any reference to railway unions' political expendi-

6. 351 U.S. at 238.
tutes. However, the majority felt that the legislative history of the act proved that its sole purpose in authorizing compulsory unionism was to compel employees to pay their share of the costs of collective bargaining and the settlement of disputes. The Court held that the expenditure of dues for political purposes is not a part of the collective bargaining process.  

The Court then remanded the case to the Georgia state judiciary to formulate an effective remedy. This remedy, contrary to the original Georgia decision, may not consist of enjoining enforcement of the union shop agreement as to the dissenting workers, but may involve either an injunction against expenditure for political causes of the dues paid by the complaining employee, or restitution to such employee of that proportion of his money which the union would have spent for political purposes. These remedies are available only to employees who have objected in advance to expenditure of their dues for politics. Dissent will not be presumed.

In *Lathrop v. Donohue*, the Court's majority reached even deeper into the grab bag of techniques for judicial avoidance of constitutional issues. It held that the plaintiff's objection to the integrated bar's expenditure of dues money must fail because his pleadings failed to raise properly the constitutional issue. As noted previously, plaintiff had alleged that the State Bar used his moneys to promote and oppose various legislative objectives which were not in accord with his convictions; however, he had neither indicated the nature of the legislation supported by the Bar nor with which particular causes he disagreed. Thus the Court felt that the *Lathrop* case was analogous to *Hanson*; the free speech issue, not being raised in the record, was left open.

The dissenters all rejected this fastidious approach, so reminiscent of the technicalities of common-law pleading, and argued that plaintiff's pleadings fully presented the free speech issue for decision. However, in both cases Justices Frankfurter and Harlan contended that use of compulsory dues for political purposes violates no first amendment right. On the other hand, Justices Black and Douglas maintained that any compulsory political contribution is an infringement of first amendment liberties.

9. Id. at 768.
10. Id. at 775.

11. Mr. Justice Frankfurter stated that avoidance of constitutional issues should "not be pressed to the point of disingenuous evasion." *Lathrop v. Donohue*, 367 U.S. at 799 (dissenting opinion). But see, e.g., *Poe v. Ullman*, 367 U.S. 497 (1961) (birth control appeal dismissed for lack of justiciable constitutional issue—lack of showing that Connecticut statutes would be enforced against plaintiffs).

12. 367 U.S. at 842-46.
II. Political Realism and the Political Pressure Group Theory

A. The Group Process

Mr. Justice Frankfurter's main point in the Machinists case was that unions do and must take part in politics. To the majority's holding that political expenditures are not a part of the collective bargaining process, and hence not contemplated by the Railway Labor Act, he disdainfully retorted:

One could scarcely call this a finding of fact . . . or even one of law. It is a baseless dogmatic assertion that flies in the face of fact. . . . If higher wages and shorter hours are prime ends of a union in bargaining collectively, these goals may often be more effectively achieved by lobbying and the support of sympathetic candidates. . . . The notion that economic and political concerns are separable is pre-Victorian. . . . It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor. It disrespects the wise, hardheaded men who were the authors of our Constitution and our Bill of Rights to conclude that their scheme of government requires what the facts of life reject.13

Mr. Justice Frankfurter's emphasis is on the interest of the group rather than that of the individual. From the standpoint of political science theory, his analysis is closely akin to that of the political pressure group school of political science. Arthur Bentley, a great but little-known political scientist, is the modern father of the pressure group theory.14 His 1908 classic15 paved the way for all subsequent realistic studies of the group process. According to Bentley, first, last and always, the individual is totally insignificant as a social causal agent. For the purpose of studying group activities, the individual does not even exist.16 Everything which can be learned about government or legislation by studying the individual can be learned by studying the group, and much more. To attempt to explain society in terms of individual mental or moral differences is useless. It is basically a question of mathematics—only the group counts for anything.17 Since the individual is discarded, and the group is the all important social factor, the great task of the social analyst is one of measurement.

13. 367 U.S. at 813-15 (dissenting opinion). (Emphasis added.)
14. His collaboration with John Dewey in a series on mathematics, psychology, sociology and logic may give a hint as to his general philosophy. Bentley, Behavior, Knowledge, Fact (1935); Bentley, Linguistic Analysis of Mathematics (1932); Dewey & Bentley, Knowing and the Known (1949).
All political process is simply a balancing of one quantity against another, however evenly matched they may be. In fairness to this school of thought, it should be pointed out that its theory's primary purpose is descriptive. It does not generally purport to deal with morals, metaphysics, religion, ethics, philosophy or value judgments. That is, it is a tool for explaining what life is really like, but not necessarily what it ought to be like. It is a foolproof means of narrating what is happening, not what ought to happen. The major question is, "Does it work?" and not "Is it true?" or "Is it good?" "Bentley's theory does not help the starving Indian to decide whether he will eat the sacred cow or not. Thus it is hard to quarrel with anyone who uses it merely for descriptive purposes. However, there is always the danger that a disciple of this descriptive school may carry its spirit with him when he comes to consider moral and value judgments. Bent-ley himself was not immune from this error, for he tells us that group pressures "not only make but also maintain in value the very standards of justice, truth, or what not that reason may claim to use as its guides." But philosopher and theologian join in asking: "Since when have truth and moral values been determined by majority vote?"

In short, it is undeniably true that unions must engage in politics in order to protect and advance their interests. It is beyond question that the individual worker, as an individual, is helpless to contend with the immense economic and political forces arrayed against him. But this realistic political analysis hardly settles the moral, philosophical or constitutional question of the rights of the minority of workers who do not wish to cooperate with their fellows in political activity. This is not to argue that our moral judgments should not be influenced by realistic analysis. On the contrary, our realistic analysis of the group process goes far towards justifying both the morality and basic legality of unions per se. Morality should not be divorced from pragmatism. Nonetheless, a realistic analysis of the group nature of society does not justify riding roughshod over the basic political convictions of dissenting workers.

Our pragmatic, sociological analysis of the group may well justify the union shop, wherein workers are compelled to pay dues to the union, regardless of their wishes. This may be justified on the grounds of economic interdependence—all the workers are members of the working force, and, whether they like it or not, they are all dependent upon

---

their relationship to each other and their boss for their very livelihood. The basic union-worker-employer relationship is inevitable in a complex industrial society. The union renders services to the worker which someone must perform lest economic disaster result. At least reasonable men might so believe. Mr. Justice Black's rationale seems the clearest:

The Hanson case held only that workers could be required to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent under authority of Congress, just as Congress doubtless could have required workers to pay the cost of such bargaining had it chosen to have the bargaining carried on by the Secretary of Labor. . . .

In short, the worker is paying for the cost of a service without which, it is arguable, he could not survive. He may not like taxes, yet no one would contend that being compelled to pay them in and of itself violates the first amendment. Involuntary payment of dues is not the same as compelled association; the worker is not forced to attend meetings or to associate with anyone. Of course this reasoning assumes that unions perform at least a quasi-governmental function, a readily acceptable concept when one reflects that modern unionism is almost entirely the product of federal statute and regulation.

B. Legality and Necessity of Union Political Activity

Realistic analysis of the group process teaches us the folly of laws prohibiting union political activity. The Court has studiously avoided deciding the constitutionality of the federal statute forbidding corporations and labor unions to make "a contribution or expenditure in connection with any" federal election. In United States v. CIO, the Court held that the statute did not apply to union periodicals in which the union informed its members of its views concerning various political candidates. The basic idea seemed to be that the act was not intended to apply to union attempts to communicate primarily with its own members. As a subsidiary point, the Court also intimated that communications financed by subscriptions rather than by general dues were not within the scope of the statute. Justices Rutledge, Black, Douglas and Murphy would have stricken the statute as an invalid abridgment of the first amendment.

The lower federal courts have likewise avoided the constitutional

---

21. International Ass'n of Machinists v. Street, 367 U.S. at 787 (dissenting opinion). (Emphasis added.)
22. See text accompanying notes 55-85 infra.
issue. In *United States v. Painters Local 481*, the statute was construed not to prohibit a small union that did not own its own newspaper from using general dues to pay for a political advertisement in a newspaper of general circulation and a political broadcast over a commercial radio station. Judge Hand felt that it was impossible to differentiate between a union-owned publication and an independent paper or radio station. The only way the small union could communicate to its members by newspaper or radio would be through buying newspaper space and radio time.

In *United States v. Construction Local 264*, the court held that the law was not violated when a union paid three of its own employees for time spent in a congressional campaign in passing out political literature, putting up posters, driving voters to register and to vote and driving a campaign van.

In *United States v. UAW*, the Supreme Court finally decided that it had found a situation to which the act applied, holding that the law was intended to prohibit a union from using general dues to sponsor commercial television broadcasts favoring election of certain candidates to Congress. Speaking for the majority, Mr. Justice Frankfurter observed that in *CIO* the union had "merely distributed its house organ to its own people," whereas in *UAW* it was charged that they were using "union funds to influence the public at large to vote for a particular candidate or a particular party." It would seem that the *UAW* case draws an extremely unrealistic line when it construes the statute to prohibit union expenditures for electioneering the general public while permitting the union to spend money to influence its own members. Any television broadcast would obviously be intended to influence both groups; in any event both would see it.

However, once again the Court refused to pass on the statute's validity, pending "the elucidation of a trial," preferring to let the district court first rule on the constitutional issues. Mr. Justice Douglas, joined by

25. 172 F.2d 854 (2d Cir. 1949).
28. Id. at 589. (Emphasis added.)
29. Id. at 592.
30. On remand, the district judge interpreted the Court's opinion to mean that the law was not violated by a broadcast intended primarily to reach union members. The jury found the UAW not guilty. 41 L.R.R.M. 52 (1957). UAW President, Walter Reuther, and other union witnesses testified that the Detroit television programs were aimed primarily at UAW members; any impact on others was purely incidental. Joseph L. Rauh, Jr., Washington, D.C., Counsel, UAW, surmises that, even aside from constitutional questions, the courts will ultimately adopt the district court's interpretation. Rauh, *Legality of Union Political Ex-*
FORDHAM LAW REVIEW

Chief Justice Warren and Mr. Justice Black, dissented, contending that the district judge's dismissal of the indictment should be affirmed on the ground that the statute flagrantly violated the first amendment.  

Of course, this statute is out of touch with reality. Certainly no disciple of Arthur Bentley and the theory of the group process would do anything more than sneer at a law that attempts to sterilize politically a major social and economic group. If unions and other organized groups were really removed from the political arena, who would be left? The most intimate interests of millions of persons are directly dependent upon the attainment of their political objectives. Since all realistic political theorists agree that politics is a group activity, it is ridiculous to prohibit any legitimate group from political participation.  

penditures, 34 So. Cal. L. Rev. 152, 160-61 (1961). If so, the law will become an even more deeply buried dead letter. In fact, how could a union conceivably violate the law, except by direct contributions to candidates or possibly by political mailings to an exclusively non-union list? Broadcasts will reach everyone, but this will be legal because their "primary" purpose will be to influence union members. It would seem, however, that the law was stripped of any real meaning from the very beginning when interpreted not to apply to union attempts to communicate with their own members. If unions are effective enough in influencing their own members, the result of most elections is already a foregone conclusion, as witnessed by the spectacular success of union-endorsed candidates in 1958, when unions exhorted their members to the polls under stress of a general economic recession and "right-to-work" proposals in California, Ohio, Washington and Idaho. One wonders if the bill's Senate spokesman, Robert Taft, who declared that "labor unions are supposed to keep out of politics," 93 Cong. Rec. 6440 (1947), would have agreed that the law left unions free to electioneer their own people. (However, Senator Taft was a realist, and after he saw what the courts had done to the law, he obtained Senate repeal of the "expenditure" prohibition. S. 249, 81st Cong., 1st Sess. (1949), as amended and adopted July 1, 1949. The repeal died in the House of Representatives.) In any event, the distinction between union electioneering of its own members and the general public would seem devoid of any meaning in heavily industrialized and unionized communities such as Detroit or Pittsburgh or any coal mining town.

31. 352 U.S. at 598.

32. Rauh suggests that restrictions on corporate political spending may be more justifiable than similar restrictions on unions. "Corporations are state-created entities deriving funds from widespread ownership and business activities. They are not associations of individuals formed to promote common group interests through social, educational, political and other means. The only common bond of the stockholders is their hope of profits; no remotely implied consent is given to the expenditure of these profits for election purposes. The majority rule in corporate decisions is the rule of the majority of stock voted, not the majority of individual holders. Nor does the buying public, which brings about these profits, have any common interest warranting political utilization of the profits they create. Unlike labor unions . . . corporations do not enjoy constitutional liberties guaranteed to individuals and their associations. . . . Union members, unlike corporate stockholders, do have common social, economic and community interests requiring the common political action for which they have banded together. Thus, unions and corporations are not comparable entities with
In short, Mr. Justice Frankfurter's argument of political realism based upon the nature of the group process is irrefutable, but only if it is used to prove the right conclusion. It is quite persuasive in contending for the validity of a union shop in a democratic society. It is absolutely unchallengeable if aimed at invalidating the law purporting to forbid union political expenditures. The unions' right to engage in politics is buttressed by both the idealism of the first amendment and the Bentley-Frankfurter political realism which tells us that no significant social or economic group can be politically sterilized. But the trouble is that Mr. Justice Frankfurter carries his group process argument too far. Merely because it proves the right of a group to active political participation, does not mean that this group thereby has a right to coerce its dissenting members likewise to participate, either by financial contribution or otherwise. Can we not protect both the union and its dissenting members in their respective political opinions? It is the contention of Justices Black and Douglas that we can.

Despite his flair for political realism, in both CIO and UAW Mr. Justice Frankfurter avoided decision of the constitutional issue, even though it is inconceivable that one who so strenuously believes that political activity is often the very best way of achieving union economic respect to the exercise of political activities." Rauh, supra note 30, at 162 n.49. The different standards of majority rule are true enough. However, one might question whether the purposes are really so very different—both unions and corporations exist primarily to advance their members' economic interests. To be sure, unions historically have had more of an all-pervading interest in their members' welfare, education and social life. Also, a union is community-based, whereas shareholders commonly hail from many states and even foreign countries and have never even met one another, hence may well lack the common bonds of union membership. On the other hand, stockholders undoubtedly tend toward membership in a common social class, with fairly common political philosophies. Of course, as a matter of political reality, conservative candidates do not need support from corporations per se, whereas liberals do need union support. Members of the business class have been taught by their chambers of commerce and trade associations about the need for supporting friendly candidates. Well-to-do stockholders are far more likely to contribute handsomely to their political causes than are individual workers to give at all. Union support of friendly candidates is almost a must if they are to have any chance of success, whereas business-oriented politicians will normally be adequately supported by individual members of the business and professional community. Therefore, if preserving freedom of speech depends upon maintaining a fair balance of power between business and labor support of candidates, there is something to be said for the idea that corporate and union political contributions are constitutionally distinguishable. However, despite these sociological differences between corporations, unions, stockholders and workers, the author would feel distinctly uncomfortable in asserting that they afford a constitutional basis for prohibiting corporate political expenditures while permitting the same by unions. For an excellent defense of the constitutional right of corporations to spend money for politics see King, Corporate Political Spending and the First Amendment, 23 U. Pitt. L. Rev. 847 (1962).
objectives could ever vote to flatly uphold legislation forbidding such political activity. Justices Black and Douglas, on the other hand, voted on both occasions to invalidate the act. Mr. Justice Frankfurter's thesis is unimpeachable; his only mistake is that he ignores it where it is most applicable and employs it where it does the most violence to the rights of the minority.

Mr. Justice Black replied that of course a union or other private group may spend its money for political causes if its members voluntarily join it and can voluntarily get out of it. Then the dissenter has no right except to disagree with the majority and to leave the organization if conditions become bad enough. But it is entirely different "when a federal law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do."\(^3\) Since the union shop member must remain a member or lose his job, any use of his dues for political purposes violates the first amendment.

And it makes no difference if, as is urged, political and legislative activities are helpful adjuncts of collective bargaining. Doubtless employers could make the same arguments in favor of compulsory contributions to an association of employers for use in political and economic programs calculated to help collective bargaining on their side. But the argument is equally unappealing whoever makes it.\(^4\)

Mr. Justice Douglas expresses the same thought in different words:

Some forced associations are inevitable in an industrial society. . . . [However,] once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation. . . . If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical. . . .\(^5\)

C. Is the Distinction Between Voluntary and Involuntary Membership Realistic?

Mr. Justice Black concedes that a voluntary union may spend its money as it pleases, regardless of the minority's objections.\(^6\) However, some may question whether the rights of a minority to object to expenditure of their dues for the majority's political purposes should depend upon the voluntariness of their affiliation. It can be persuasively

\(^3\) International Ass'n of Machinists v. Street, 367 U.S. 740, 789 (1961) (dissenting opinion).
\(^4\) Id. at 789-90 (dissenting opinion).
\(^5\) Id. at 775-76 (concurring opinion). (Emphasis added.)
\(^6\) Id. at 788-89 (dissenting opinion).
argued that many "voluntary" affiliations are practically obligatory. The member of an open shop union may, as a practical matter, have no real choice. In order to maintain the respect of his associates, membership may be a virtual necessity. For that matter, membership in other organizations, although not technically compulsory, may be practically essential because of family ties, community or religious tradition or economic pressure. Moreover, a Republican worker may sincerely believe in unionism, as such, and hence will join the union for the sole purpose of improving his economic position; yet he will be violently opposed to the union's pro-Democratic political sympathies. True, he can get out of the open shop union, yet were it not for its political activity he would have no desire to do so. Moreover, since the union by law is the worker's sole bargaining agent, what it does will have a profound impact upon his welfare, and no worker can be blamed, in fact he should be encouraged, for wishing to belong to the union so that he will have a voice in the formulation of its policies.

It can, therefore, be strongly argued that even in the voluntary union the dissenting worker should be entitled to proportional restitution when his dues are spent for political purposes. Many of the arguments to the effect that union action is governmental action\(^37\) apply just as forcefully to voluntary as to compulsory unions. In fact, the only difference is the absence of absolute compulsion to join, and, as shown above, this difference is often more apparent than real. Moreover, should even a more or less "voluntary" organization, especially one fraught with as many compulsory and governmental overtones as a labor union, be entitled to enter forcefully every phase of a man's life? Is there no freedom somehow, somewhere, from encroaching, all-pervading institutionalism?\(^38\) To be sure, were this point once conceded, it is hard to see where it would stop. Would a Republican who is a Presbyterian by birth, family association, social ties and perhaps almost by economic necessity, be entitled to proportional restitution of his tithe if his church were to endorse minimum wage laws, to which he is opposed, or even if it contributed money to a Democrat's campaign? Well, perhaps this only illustrates the limits of the law—it cannot provide a remedy for every wrong! Even so, it should not be forgotten that the practical necessities that often dictate affiliation with a "voluntary" union are today largely governmentally created—favorable labor laws and Government support have strongly assisted in the formation of strong unions with substantial responsibility for the worker's

37. See text accompanying notes 55-85 infra.
38. See generally Whyte, The Organization Man (1956).
welfare, thus encouraging union membership—whereas in the case of
the church or social organization the "necessities" compelling member-
ship are mostly the product of purely private pressures.

D. *Majoritarian Democracy and the Integrated Bar*

It may be argued that the minority in any democratic organization
should submit to the will of the majority. Again, anyone who believes in
the Bentley-Frankfurter realistic analysis of the group process will
recognize that group action cannot be stymied merely because of a
minority's opposition. The group is an entity and it must stand as an
entity. But "majoritarian" democracy does not sum up the whole of
western democratic theory and practice. The "corporate veil," so to
speak, must be sufficiently pierced to protect the minority from the
oppression of the majority. This is the whole purpose of the many formal
and informal checks and balances in our constitutional system. It is the
*raison d'être* of the Bill of Rights. Conservatives have long been con-
cerned over the abuses of majoritarian democracy. Yet in the *Machinists*
and *Lathrop* cases it is the most liberal members of the Court who were
the most concerned over the abuses of majority power.

Mr. Justice Douglas expressed a special interest in this problem in
*Lathrop* in which he opposed the whole concept of the integrated bar. He quoted Guthrie, who charges that under the integrated bar

the traditions and ethics of our great profession would be left to the mercy of mere
numbers officially authorized to speak for us! This would be adopting all the vices
of democracy without the reasonable hope . . . of securing any of its virtues. *It would
be forcing the democratic dogma of mass or majority rule to a dangerous and per-
nicious extreme.* Although in political democracy the rule of the majority is necessary, the American
system of democracy is based upon the recognition of the imperative necessity of
limitations upon the will of the majority.

Mr. Justice Douglas is deeply troubled over the whole problem of
compulsory association. In fact, he is apparently the only member of
the Court who believes the integrated bar to be invalid per se. He

---

39. See generally de Tocqueville, Democracy in America (1945).
40. 367 U.S. at 880-83 (dissenting opinion).
41. Guthrie, The Proposed Compulsory Incorporation of the Bar, 4 N.Y.L. Rev. 223
(1926).
42. Id. at 234-35. (Emphasis added.)
43. His concern was expressed in another context in his dissent to the holding of Public
Util. Comm'n v. Pollak, 343 U.S. 451, 468 (1952), that a "captive audience" could validly
be subjected to radio programs on street cars and busses.
44. All the state decisions have upheld the integrated bar. Herron v. State Bar, 24 Cal.
2d 53, 147 P.2d 543 (1944); Carpenter v. State Bar, 211 Cal. 358, 295 Pac. 23 (1931);
points out that while in *Railway Employes’ Dept v. Hanson* the union shop was held valid on the ground that those who enjoy the fruits of collective bargaining may reasonably be compelled to contribute to its costs, the integrated bar’s principal purpose is not to perform economic services for its members but rather to police the members of the profession, and to promote legislation favored by the majority of the bar. True, the integrated bar performs some economic services for its members by establishing minimum fee schedules and fighting unauthorized practice of law by laymen, “yet this is a far cry from the history which stood behind the decision of Congress to foster the well-established institution of collective bargaining as one of the means of preserving industrial peace.”

Mr. Justice Douglas reminds us that none of the bar’s objectives are truly “nonpartisan.” Even when the bar is working for statutory revision or procedural “reform” there are many lawyers who are opposed to it. Right or wrong, that is their privilege.

Once we approve this measure [the integrated bar], we sanction a device where men and women in almost any profession or calling can be at least partially regi-

Petition of Fla. State Bar Ass’n, 40 So. 2d 902 (Fla. 1949); In re Mundy, 202 La. 41, 11 So. 2d 398 (1942); Ayres v. Hadaway, 303 Mich. 589, 6 N.W.2d 905 (1942); In re Platz, 60 Nev. 296, 105 P.2d 858 (1940); In re Scott, 53 Nev. 24, 292 Pac. 291 (1930); In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931); Kelley v. State Bar, 143 Okla. 282, 298 Pac. 623 (1931); Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960). See also Application of Mont. Bar Ass’n, 368 P.2d 158, 162 (Mont. 1962) (dictum); Comment, 30 Fordham L. Rev. 477 (1962). However, only in Lathrop were first amendment objections raised. In In re Integration of the Bar, 249 Wis. 523, 25 N.W.2d 500 (1946), the court had earlier noted the free speech problem on its own motion in declining to order integration, stating that integration would require it to censor the budgets and activities of the bar after integration, and that “it requires a very short look at some of the possible activities of the bar to make it clear that this court would have to insist upon scrutinizing every activity for which it is proposed to expend funds derived from dues, and that a series of situations would arise that would be embarrassing to the relations of bench and bar.” Id. at 529-30, 25 N.W.2d at 503. However, in Lathrop the court dismissed the first amendment problem, stating: “We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar... on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function that an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association.” Lathrop v. Donohue, supra at 239-40, 102 N.W.2d at 409.

46. This is the “free-rider” argument in judicial language.
47. Lathrop v. Donohue, 367 U.S. at 880 (dissenting opinion).
48. Jeremy Bentham’s nineteenth century vitriolic attack on the lawyers’ vested interest in the legal status quo could be justifiably repeated today, but this also proves that procedural reform is far from noncontroversial. Bentham, Rationale of Judicial Evidence (1827).
mented behind causes which they oppose. I look on the Hanson case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades. . . . While the legislature has few limits where strictly social legislation is concerned . . . the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.40

III. Compulsory Dues and Taxes

Justices Harlan and Frankfurter contend that merely taking a man's money does not violate his freedom of speech.60 This would be a tough idea to sell to a union shop member who is also a Republican precinct committeeman and who is compelled to contribute to the Democratic campaign chest. Nonetheless, they make a forceful argument. Their principal analogy is the use by government of tax revenues to promote controversial ideas51 (a tacit admission that union action is government action, since no one doubts that collecting and spending taxes are government functions). The states use tax money to buy school textbooks and finance instruction with which many taxpayers are in violent disagreement. The federal government expends tax moneys to propagandize ideas opposed by many taxpayers. Government agencies, at public expense, lobby for their controversial programs in Congress. The United States Information Office expresses many views rejected by countless taxpayers. The public relations officer of every government department does likewise. Yet the conscientious objector cannot object to the study of military science under the ROTC program even though such study offends his religious scruples,52 nor can he "refuse to contribute taxes

49. Lathrop v. Donohue, 367 U.S. at 884-85 (dissenting opinion).
50. Mr. Justice Frankfurter also compares this case to Everson v. Board of Educ., 330 U.S. 1 (1947), in which the Court sustained the state's power to subsidize bus service to parochial schools. He contends that it makes no difference whether Everson is justified on the ground that there was no establishment of religion, "or whether it be more forthrightly stated that the merely incidental 'establishment' was too insignificant." Lathrop v. Donohue, 367 U.S. at 818 (dissenting opinion). Here, likewise, he feels the amounts used for politics may be de minimis. The Everson analogy seems farfetched. The trouble with it is that de minimis was not Everson's basic rationale, but rather the "child welfare" theory, or the distinction between invalid, direct aid to religion, and presumably valid indirect aid to religion which directly and primarily benefits the child. Besides, and more to the point, if a small amount of the dissenter's money can be spent for politics, why not a larger sum? Moreover, should the de minimis doctrine, properly applicable to commercial cases involving nothing more important than money, ever be applied to a case where first amendment principles are at stake?
52. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).
in furtherance of a war . . . or . . . any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers . . . of the agencies of government.\textsuperscript{53}

One wonders if these are apt analogies. After all, is it not an absolute practical necessity for government to do all these things? Certainly there must be an interchange of views between executive and legislative branches. It may be said that this is the propagation at public expense of ideas rejected by many taxpayers, hence arguably a violation of their freedom of speech; yet without it government could not exist. Self-preservation is a basic human instinct; society must have the right to protect itself against enemy attack, even if pacifists are thereby offended. Certainly education is a public necessity, yet, inevitably, ideas will be taught which many people reject. The teaching of the theory of biological evolution will deeply offend many religious sects. Some theories of history, economics and sociology studied in the schools will evoke the most violent reactions from segments of the populace. However, if these instances of governmental propagation of ideas constitute indirect infringements of freedom of speech, then we will simply have to learn to live with them, for the alternative is anarchy. On the other hand, it certainly cannot be maintained that society will disintegrate if unions and other organizations cannot compel their unwilling members to contribute funds to promote political causes in which they do not believe. There is no social necessity for this kind of arrangement, hence any comparison to the typical purposes for which tax money is spent is thoroughly superficial.

Moreover, these tax analogies overlook the exact nature of what the union is doing. The union is spending dues money to finance the campaigns of candidates for public office. Even Justices Frankfurter and Harlan do not suggest that Congress may appropriate money for the direct, express purpose of creating an election campaign fund for the purpose of re-electing the President of the United States. Yet that is exactly what many unions are doing with dues money collected from involuntary members. To make glib but transparently superficial comparisons with government expenditures for education, national defense and public information programs is but to beg the question. Mr. Justice Black puts it well:

Probably no one would suggest that Congress could, without violating . . . [the first] amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups

\textsuperscript{53} Id. at 268 (concurring opinion).
To be sure, it may be argued in rebuttal that most congressional appropriations serve a political purpose. Farm subsidies, power dams, reclamation projects and defense contracts all have a substantial impact on the voter. But from both the legal and philosophical points of view, the political purpose is incidental to the basic objective of serving the nation's best interests. There would seem to be a basic distinction between an appropriation with a valid public purpose entirely aside from political aggrandizement, even though it incidentally contains substantial political implications, and an appropriation with no conceivable objective except to maintain a given political party in power. As realists, we recognize that no effective public servant can ever afford to forget the political implications of anything he does; we only have a right to expect that our laws have a valid basis above and beyond the mundane considerations of political survival. Regardless of the political motivations that stand back of virtually all government appropriations, reasonable men may well believe that government could not function effectively without them. This is not true of an appropriation with the sole and express purpose of promoting the favored political party.

IV. IS UNION ACTION GOVERNMENT ACTION?

A. The Basic Question

In order to sustain the dissenting union members' position, union political action must be held to constitute governmental action. As a generality, constitutional limitations do not apply to private organizations, but only to government. This is a point that is often overlooked by civil-liberties minded laymen. A church, for example, may condemn a book as immoral and forbid its members to read it. Many a layman of a different religious, moral or literary persuasion may denounce the church's action as "unconstitutional," or at least as "un-American," without realizing that the church is only exercising its own constitutionally guaranteed freedom of speech and religion. True, the author, the publisher and the book dealers may be injured by the church's edict. Nevertheless, whether it is wise or unwise in its opinions, the church is not a public body. It is not subject to the limitations of the


MAJORITARIAN DEMOCRACY

1963]

constitution; rather it is entitled to its guaranties, including the freedom to say what it pleases about allegedly immoral books.56

However, the question is whether a labor union, especially when operating under a union shop contract, is the same kind of private organization as a church.57 True, technically a union is not a governmental entity. It is not a state or local government, nor is it a formal branch of the federal government. But if we look to its substance rather than to its form, we can readily see that a union does in fact exercise governmental or at least quasi-governmental functions and powers. It is simply shutting one's eyes to reality to say that an organization is not a government and, therefore, is not subject to constitutional limitations on the exercise of power by government when in fact it exercises greater power in many people's lives than all the other governmental and non-governmental institutions combined. Such an organization, if not a de jure, is most assuredly a de facto government. If not, then the Constitution's application is withheld because of a shallow and hypocritical label.

B. The Contract Theory and Free Agency

Summers58 and Williams,59 two of the most outstanding authorities in the field, have long contended that unions are governments and should

56. Many a liberal would concede the church's constitutional right, but would still denounce its exercise of that right as poor policy. Query: Does even this "liberal" hypothesis not miss the point of freedom of expression? If the message of constitutional liberalism is that every idea must fight it out in the "market place of ideas," what is so very wrong with a church entering the fray with the objective of combating "immoral" ideas? Maybe some ideas in books are immoral and need to be fought. After all, the church has its own obligations to its own convictions and to its own members. To argue that the church should keep quiet in order to protect the "spirit" of freedom of expression for the author and readers of an "immoral" book, is but to deny freedom of speech to one group in the guise of guaranteeing it to another. To be sure, there are potential hazards to free speech in the actions of private groups. If all members of a large church were to follow its literary dictates like sheep, one might begin to wonder just where the true seat of power was located. But this seems a rather farfetched hazard in the context of our pluralistic, individualistic society, where hardly anyone feels he has to do anything just because he is told to do it, and where no one private group is powerful enough to dominate our culture. The private action that seems to pose the greatest threat to free speech is the economic boycott of a businessman because of disapproval of his political views. Yet, strangely, many liberals seem not in the least disturbed over the suggestion of boycotting Richfield Oil Company for its sponsorship of allegedly ultra right wing public rallies.

57. For an argument by J. Albert Woll, AFL-CIO General Counsel, that labor unions are essentially private organizations, at least for purposes of their political activities, see Woll, Unions in Politics: A Study in Law & the Workers' Needs, 34 So. Cal. L. Rev. 130, 138-41 (1961).

58. Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951).

be treated as such. Williams points out that the courts have often reasoned\(^6\) that a union is an unincorporated benevolent association, hence they have concluded that it may set up any conditions of membership it pleases, under the ordinary common-law rules affecting voluntary associations, just as may churches, social groups and political clubs.\(^61\)

This is the contract theory—the theory that the union constitution is a contract, and if the prospective union member accepts membership, he accepts these terms. It is this omnipotent analogy that leads the courts astray. It is true that unions have resemblance to fraternal organizations, churches, political clubs and the like. But it has now been often enough said that unions are powerful political and economic governments. We make them exclusive bargaining representatives by statute thereby giving them far-reaching control over a critical segment of the members' lives—their working conditions and opportunity to earn a living.

With such power there must be responsibility—governmental responsibility, if you will. . . .\(^62\)

One would think the contract theory would have been discarded by now since it was completely discredited long ago. In the case of the union shop, at least, the "contract" is a decidedly coerced one, and every student of contracts or of constitutional law should be suspicious of the validity of a coerced agreement to relinquish constitutional liberties.\(^63\) In addition, it is just a trifle ironic to see labor unions rely on the contract theory—a theory which in essence is but a revival of the old doctrine of liberty of contract that was long employed to suppress union-sponsored labor legislation.

In *Lochner v. New York*,\(^64\) the Court invalidated a New York maximum hours statute that limited bakery employees to a sixty-hour week and a ten-hour day. The majority held that statute to be an unjustifiable interference with the liberty of contract which it read into the fourteenth amendment.\(^65\) Workers and their employers should have the

\(^60\) Usually in union expulsion cases.

\(^61\) Williams, supra note 59, at 828-29.


\(^63\) But see Regan v. New York, 349 U.S. 58 (1955), in which an alternate ground for affirmance of a contempt conviction for refusal to testify before the grand jury is the tentative proposition that a policeman can validly agree to waive a statutory immunity to prosecution for crime disclosed in testimony concerning bribery under pain of losing his job and being disqualified from future employment with the city.

\(^64\) 198 U.S. 45 (1905).

\(^65\) Id. at 64.
right to contract to work as long as they please. This is true equality and the general public has no concern with such contracts.

In *Coppage v. Kansas*, and *Adair v. United States*, the Court struck down state and federal enactments forbidding any employer from requiring that his employees agree not to become or remain union members as a condition of their employment. Again the majority declared that this legislation offended its conception of liberty of contract which it had discovered in the due process clauses of the fifth and fourteenth amendments. After all, it is axiomatic that the employer has the right to hire anyone he pleases under any conditions he can manage to negotiate with his employees. Likewise, the employee is at liberty to work for anyone he pleases under any conditions he and his employer can agree upon. If the employee does not wish to agree not to join the union, he remains perfectly free to quit any employer who requires such a condition.

The only thing wrong with this theory was that it overlooked the immense disparity in bargaining power between the employer and the individual worker. Free agency—a glorious religious and political ideal—is but a hypertechnical, legalistic theory when interjected into the employment relationships of a million-dollar corporation and the individual wage earner. The only way the worker’s freedom of choice can become anything more than a misty theological doctrine is through union with his fellow workers.

In an historic dissent, Mr. Justice Holmes pointedly reminded his brethren:

> This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.68

And again,

> In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins.69

The *Coppage* and *Adair* rationale was utterly repudiated in *Lincoln*

---

66. 236 U.S. 1 (1915).
67. 208 U.S. 161 (1903).
69. *Coppage v. Kansas*, 236 U.S. 1, 26-27 (1915) (dissenting opinion). (Emphasis added.)
Fed. Labor Union v. Northwestern Iron & Metal Co., 70 sustaining state "right-to-work" laws against union contentions that they constituted an unconstitutional deprivation of liberty of contract. "Right-to-work" laws forbid employers to fire or refuse to hire workers on the grounds of either union membership or nonmembership. They are often advocated by employer groups who formerly insisted religiously on the sanctity of liberty of contract, yet such laws certainly abridge liberty of contract—and in both directions—for they outlaw both the union shop, in which all workers must join the union or be fired, and the yellow-dog contract, under which the worker must stay out of the union or be fired. They are usually opposed by labor groups, who formerly denounced the judicial doctrine of liberty of contract as a device designed to enslave the workers, but who in Lincoln Fed. attempted to resurrect this dead doctrine and muster it into the service of compulsory unionism. However, the Court apparently felt that the doctrine should stay dead, regardless of the identity of its mourners.

For us, the significant point is that the "contract theory" of union membership is nothing more than "liberty of contract," albeit in rather unfamiliar garb. The same arguments that led to the demise of liberty of contract as applied in Lochner, Coppage and Adair, apply just as effectively to the contract theory. If the worker's ridiculously unequal bargaining position, relative to his employer, translated his "liberty of contract" into nothing more than a grim joke, the union member's proportionately unequal bargaining position, relative to his union, just as surely undermines the contract theory of union membership. In either case, it is the helpless individual versus the all-powerful group. It can no more be rationally argued that the worker has any meaningful choice in his "acceptance" of the union constitution than he had any real freedom of choice in his "acceptance" of the employer's contract. Where compulsory unionism prevails, this should be so clear as to require no argument. But even where there is an open shop it strains the imagination to think of the worker "bargaining" over the terms of his union membership. With the open shop, union membership may be so desirable, either because of social relationships or the desirability of having a voice in the government of an organization that is the worker's exclusive bargaining agent, that the "voluntary" membership is practically obligatory. In short, both liberty of contract and the contract theory amount to nothing more than shrewd and legalistic attempts to employ a formalistic freedom of choice as a weapon to destroy any true and realistic liberty.

70. 335 U.S. 525 (1949).
Summers concisely concludes:

If unions are recognized as a form of industrial government, then the rights of a member within the union should be equivalent to the rights of a citizen within a democratic society. Unions should have no more power to punish individuals for exercising free speech than civil governments. . . .

In the constitutional limitations on the power of government, the courts can find familiar guides for marking the minimum of decency which union discipline must maintain.71

C. Union Expulsion and Political Endorsements

In Mitchell v. International Ass'n of Machinists,72 the California District Court of Appeal recently applied the foregoing reasoning to justify judicial reinstatement to union membership of two workers following their outrageous expulsion by the union. The court concluded that a union is not a private organization and that its actions are actions of government and hence subject to constitutional limitations.

Mitchell and Mulgrew were IAM members, whose employer, Lockheed Aircraft, had a union shop agreement with IAM. They were tried by the union on the charge of conduct unbecoming a member, found guilty as charged, and expelled from the union. Their offense was that in the 1958 California general election they had made television speeches and issued press releases in favor of initiative Proposition 18, a "right-to-work" measure which would have outlawed both closed and union shops.73 They did not purport to represent the union; however, they were aware that the union had urged all members vigorously to oppose adoption. The trial court denied their petition for a writ of mandamus compelling their reinstatement, finding that their jobs at Lockheed were not jeopardized by their union expulsion.74

In reversing the trial decision, the court relied upon both Williams75 and Summers,76 and declared:

It would seem proper to begin by dispelling two troublesome illusions. The first is that unions are purely voluntary organizations like Republicans, Democrats, Elks, and church groups. A modern labor union, both in structure and in function, bears little resemblance to other voluntary associations. . . . Unions can be distinguished from other voluntary organizations in many respects. Most importantly, a large part of their power and authority is derived from government. . . . Further, they are not primarily social groups which require homogeneous views in order to retain

71. Summers, supra note 58, at 1074. (Emphasis added.)
73. Proposition 18 was defeated by a vote of 3,070,376 to 2,079,975. Secretary of State Jordan, State of California Statement of Vote General Election, November 4, 1958 (1953).
74. See note 72 supra.
75. See note 59 supra and accompanying text.
76. See note 58 supra and accompanying text.
smooth functioning. They are large, heterogeneous groups, whose members may agree on one thing only—they want improved working conditions and greater economic benefits. The union's power, when considered together with its source, imposes upon it reciprocal responsibilities toward its membership and the public generally that other voluntary organizations do not bear.

Secondly, it cannot be assumed that the only value in membership is job retention. Even though a member may keep his job when expelled, his expulsion causes him to suffer a detriment the apprehension of which would no doubt have a coercive effect on the membership. First of all, it is not clear what his rights would be if he quit his job to seek another, at least in intrastate commerce. Also, he has a financial stake in the strike fund, perhaps a pension fund, and other funds to which he has contributed. Further, he is denied the right to participate in his union "government." Although the union is required by law to represent him impartially... he has no voice in how that representation is to be conducted. In addition, there are frequently social ramifications for a non-member working among members that cannot be overlooked.77

The court also cited Archibald Cox78 to the effect that it is not sufficient for the union to argue that, although a man may have a constitutional right to talk politics, he has no right to be a union member. The point is that if people's economic well-being depends upon their entertaining the "right" views, or at least keeping quiet about the "wrong" ones, most of them will quickly learn to conform, and we shall become a nation of pitiful puppets, dancing to whatever political tune is preferred by the dominant economic interest groups. Indeed, just where would we be if all the strong economic groups took the attitude that although their members may have a right actively to entertain unpopular political views, they have no corresponding right to remain members of the group? With most of the millions of public employees already politically sterilized by the federal Hatch Act79 or its local equivalents, if the large, so-called "private" occupational groups are to insist on political conformity as a condition of membership, whence comes the continued originality and vitality of new and controversial ideas so essential to our free political system's viability? Certainly there are already enough formal and informal discouragements to political activity to make one ponder. Although in most states political activity by a

---

teacher is legally permitted, local custom often frowns upon it as too "controversial." The teacher in a private school will often be discouraged or forbidden from politics either because of the school's reprehensible fear that controversy may frighten away contributors or because the teacher belongs to the "wrong" political party. To be sure, such an attitude is utterly degrading to a college or university—whose highest function always ought to be the quest for truth, regardless of consequences—but it exists nonetheless. The corporate executive is often likewise discouraged from anything more controversial than boy scout or community chest activity. This craven fear of taking unpopular stands has even infiltrated the legal profession, historically the greatest single source of politically conscious citizens; in some large law firms politics by junior members is definitely taboo. Who, then, really is free?

Well, at least the California court has done what it could to draw the line against union expulsion for the attempted exercise of one's constitutional liberties. Had this case gone the other way, one might well wonder where the line would be drawn—or whether any line would be drawn at all. Would a Nixon campaign worker be safe from expulsion by a rabidly pro-Democratic union?

D. Government Action—Compulsion and Permission of the Union Shop

Mr. Justice Frankfurter argued that even if plaintiffs were correct had Congress ordered a union shop, they would have had no case where Congress has merely authorized it. Thus, it is contended that government action is lacking where Congress merely permits, rather than compels, private action.80

One simple answer to this reasoning is to point to the fact that modern trade unionism, be it compulsory or voluntary, is largely the product of federal statute and encouragement. It would seem that there is such substantial federal involvement in union affairs that virtually anything a union does is government action.

But perhaps an even more compelling answer is to be found in

80. If a union is in effect a government, it should be too clear for argument that an integrated bar is likewise governmental. This follows logically where membership in the bar is an absolute prerequisite to service as an officer of the court, and where the bar is authorized to sit, in effect, both as prosecutor and trial court in disciplinary proceedings.

81. This argument is offered rather half-heartedly; in the rest of his substantial dissent, Mr. Justice Frankfurter silently assumes that government action is involved, and his major arguments are directed towards proving the validity of the union action, even though it be government action. In fact, the underlying implicit assumption running through the entire case seems to be that union action is government action.
Shelley v. Kraemer, holding that judicial enforcement of racial restrictive covenants in private deeds constitutes invalid state action in violation of the equal protection clause of the fourteenth amendment, and Barrows v. Jackson, holding that the judicial award of damages for breach of such a covenant again constitutes invalid state action. We know that union contracts, as well as union expulsions and many other official union acts, are enforceable in court, if otherwise valid. What then is the difference between judicial enforcement of privately negotiated racial covenants and judicial enforcement of union contracts or other union acts involving a very substantial degree of public involvement? In either case, judicial recognition and enforcement of the allegedly "private" arrangements is eventually necessary for their enforcement. Indeed, it would seem that the racial covenant is far more "private" and less "governmental" than the union's political activities. In fact, the Court in Shelley went so far as to concede that the privately negotiated racial covenant was valid, but it was nonetheless unenforceable because enforcement would require action by an organ of the state, the judiciary. It is doubtful that what the union is doing can be characterized at any stage as anywhere near so "private" as the racial covenant between strictly private parties. In any event, such union contracts are effective only if judicially enforceable, and the Shelley analogy actually seems to make an even stronger case for the dissenting worker than the oppressed Negro.

V. BALANCING AWAY THE FIRST AMENDMENT

In recent years, free speech disputes have been largely centered in the areas of Communism and national security. In this area the most bitter controversy has concerned whether the Court, and indeed society itself, should adopt a so-called balancing test, in which the validity of any restriction on free speech is tested by balancing society's right of self-preservation against either the individual's or society's interest in unfettered free speech. Even if the balancing test is accepted, there is always a further dispute over which way the balance tips. Apparently, a majority of the Court accepts the balancing test, as propounded by Mr. Justice Frankfurter. Justices Black and Douglas, however,

82. 334 U.S. 1 (1948).
83. 346 U.S. 249 (1953).
84. 334 U.S. at 13.
85. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), wherein invalid state action was found in Delaware's merely "permitting" a restaurant lessee of state property to refuse to serve a Negro. Certainly, state property was being used, thereby furnishing the Court with an even more solid element upon which to base its finding of state action.
reject this criterion, maintaining that the first amendment freedoms are absolute.\textsuperscript{86} It is not perfectly clear whether Mr. Chief Justice Warren and Mr. Justice Brennan reject the balancing test in principle, or whether they simply believe that the balance almost always lies in favor of freedom.\textsuperscript{87} In any event, they almost invariably stand with Justices Black and Douglas.

The argument in favor of the balancing test is, of course, strongest where national security is at stake. However, it appears that this test has not been confined to national security, but that it is applied in virtually all fields where free speech is in issue. This is pointed out in the integrated bar case by Mr. Justice Black, who vigorously denounces the Frankfurter-Harlan position, and to a lesser extent the majority's holding, as simply another application of the balancing test which has customarily been employed in national security cases.

The "balancing" argument here is identical to that which has recently produced a long line of liberty-stifling decisions in the name of "self-preservation." The interest of the State in having "public expression of the views of a majority of the lawyers" by compelling dissenters to pay money against their will to advocate views they detest is magnified to the point where it assumes overpowering proportions and appears to become almost as necessary a part of the fabric of our society as the need for "self-preservation." On the other side of the "scales," the interest of lawyers in being free from such state compulsion is... characterized as being of a purely "chimerical nature." As is too often the case, when the cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales. ... This case ... shows that the balancing test cannot be and will not be contained to apply only to those "hard" cases ... involving the question of the power of this country to preserve itself.\textsuperscript{88}

If the balancing test is to be applied to this type of case, the Court can justify any first amendment infringement. It is true that Mr. Justice Black goes on to argue that even if the balancing test is used, the rights of the dissenting lawyers should weigh much heavier on the scales than


\textsuperscript{87} See note \textsuperscript{88} infra.

\textsuperscript{88} Lathrop v. Donohue, 367 U.S. at 872-74 (dissenting opinion). (Emphasis added.)
any state interest in compulsory contributions to the bar’s political program. This is a double-barreled argument to which Mr. Justice Black has referred on several occasions, including *Barenblatt v. United States*, where he argued first, that the balancing test should not be employed because the first amendment liberties are absolute, but second, that even if the test were to be applied the Court had misapplied it in weighing against society’s interest in self-preservation merely the individual’s interest in self-expression, when the real competing interest was that of society itself in free speech. Here he argued that even if the balancing test is used, the interest in total freedom of the individual lawyers of Wisconsin far outweighs any imaginary state interest in compelling them to pay money to support views they abhor. It has been recently contended that Mr. Justice Black’s alternative view makes far more sense than his primary emphasis on the absolute right of free speech. In other words, we should recognize that the right of free speech is relative to other interests, but that the burden should always rest on those seeking to sustain any infringement of speech.

At first blush, this sounds like a reasonable view. Few persons raised in the tolerant, easygoing American tradition feel comfortable in asserting their allegiance to any rigid legal “absolute,” even though that absolute be enshrined in the Constitution. Yet, as a practical matter, it is a fact that those who support the balancing test are the very same people who almost invariably find freedom to be outweighed in the balance. A test that appears moderate and impartial on its face, yet the authority of which is almost never invoked except as justification for the suppression of freedom, would seem to be more of an excuse for a result already determined, than a meaningful tool to determine the result in the first place.

89. 360 U.S. 109, 144-45 (1959) (dissenting opinion) (authority of House Un-American Activities Committee to inquire into witness’ past and present Communist affiliations sustained).

90. In effect, this is suggested by Bachrach, who advocates a “balance of interest” test. Bachrach, The Supreme Court, Civil Liberties, and the Balance of Interest Doctrine, 14 W. Pol. Q. 391, 395, 399 (1961). He believes this to have been Mr. Justice Frankfurter’s test in *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (concurring opinion), that it was in fact applied in *Uphaus v. Wyman*, 364 U.S. 388 (1960), and *Barenblatt v. United States*, supra note 89, and that it is apparently followed by Mr. Chief Justice Warren and Mr. Justice Brennan, although they, unlike Mr. Justice Frankfurter, usually conclude that the “balance of interest” lies with freedom rather than restraint.

91. It is all a question of which way you lean. The mere statement of a “balancing” test sounds reasonable in the extreme. The trouble is that it seems to predispose its disciples to an antilibertarian spirit. When they apply the test in this spirit the result is a foregone conclusion.

89. 360 U.S. 109, 144-45 (1959) (dissenting opinion) (authority of House Un-American Activities Committee to inquire into witness’ past and present Communist affiliations sustained).

90. In effect, this is suggested by Bachrach, who advocates a “balance of interest” test. Bachrach, The Supreme Court, Civil Liberties, and the Balance of Interest Doctrine, 14 W. Pol. Q. 391, 395, 399 (1961). He believes this to have been Mr. Justice Frankfurter’s test in *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (concurring opinion), that it was in fact applied in *Uphaus v. Wyman*, 364 U.S. 388 (1960), and *Barenblatt v. United States*, supra note 89, and that it is apparently followed by Mr. Chief Justice Warren and Mr. Justice Brennan, although they, unlike Mr. Justice Frankfurter, usually conclude that the “balance of interest” lies with freedom rather than restraint.

91. It is all a question of which way you lean. The mere statement of a “balancing” test sounds reasonable in the extreme. The trouble is that it seems to predispose its disciples to an antilibertarian spirit. When they apply the test in this spirit the result is a foregone conclusion.
VI. Remedy

A. Proportional Restitution of Dues

From the practical standpoint, this is the toughest problem of all. The Georgia court's remedy was to enjoin defendants perpetually "from enforcing the said union shop agreements . . . and from discharging petitioners, or any member of the class they represent, for refusing to become or remain members of, or pay periodic dues . . . to, any of the labor union defendants . . ." and to declare that the complaining employees who had paid under protest were entitled to repayment of their dues in full. The Supreme Court, however, adopted a far more restrained approach. The Court felt that, even applied to dissenting members, it was not the union shop agreement, itself, that was unlawful; all that was illegal was the expenditure of plaintiffs' dues for politics over their objection. The Court apparently viewed the Georgia remedy as one that would burn down the barn to roast the pig, since in an effort to prevent a small percentage of plaintiffs' money from being spent for political objectives, it forbids the collection of any and all dues money from any member opposed to the political expenditures. In the Supreme Court's view, this would frustrate the basic congressional policy to permit all employees benefitted by collective bargaining to share in its costs.93

The Court suggested that there were at least two more moderate remedies: (1) injunction against union expenditures for political purposes of an amount equal to the complaining member's proportion of the union's planned political expenses;94 (2) restitution to the complaining member of his share of dues money spent for politics.95 Moreover, even these modest remedies were available only to those employees who have made known to the union their objections in advance of the political expenditures.96 Hence this was not a "class" action, and the state decree was in error in running in favor of the alleged class purportedly represented by plaintiffs, a class spread over the entire eastern United States, and whose members had not even objected to the union's political expenditures.97

93. International Ass'n of Machinists v. Street, 367 U.S. at 772.
94. Id. at 774-75.
95. Id. at 774.
96. Ibid.
97. Id. at 774.
B. One Hundred Per Cent Restitution of Dues

Justices Black and Whittaker agreed with the Georgia court that the objecting workers should be repaid all their dues, with interest. They felt that the proposed remedies of proportional relief were impractical because of the extremely difficult accounting problems involved. Proportional relief would require microscopic analysis of the voluminous accounting records of local, national and international unions. Local unions collect the dues, use a portion for political purposes, but turn over another part to the national union which, in turn, spends a portion for politics. The proportional remedy might require so many special masters, accountants and lawyers that it would cost far more to administer than the amounts sought to be recovered. In fact, at the conclusion of this exercise in higher mathematics the worker's claim might well be dismissed as de minimis anyway.

Moreover, Mr. Justice Whittaker pointed out that it is virtually impossible to draw a clear judicial line between proscribed “political” activity and permissible negotiation and administration of collective bargaining agreements. Certainly no one would question the difficulty of distinguishing between “political” and “nonpolitical” union activity. Money contributed directly to a candidate or political party presents a clear case, but what about union “educational” programs, or union literature that presents a candidate's record without directly endorsing or opposing him, but with a clear implication of where the union stands? Indeed, what of a direct political endorsement in a union newspaper? Is the dissenter entitled to some kind of proportional restitution if dues money is used to finance the paper? If so, how do you figure it? What of purportedly nonpartisan voter registration drives when everyone knows that at least seventy-five per cent of the unregistered union members will register with the Democratic Party and will overwhelmingly support the official union political line?

98. Id. at 796 (dissenting opinion).
99. Id. at 780 (separate opinion).
100. However, Mr. Justice Black did not fully support the Georgia decree, for he agreed with the majority that this was not a proper class action. He also felt that the state decree should be modified to make clear that it did not forbid employees from voluntarily contributing to a collective fund to finance political activity, even though the individual might not always agree with the group's choices as to which candidates and causes to support.
101. International Ass'n of Machinists v. Street, 367 U.S. at 796 (dissenting opinion).
102. Id. at 779-80 (separate opinion).
103. AFL-CIO President, George Meany, announcing a $500,000 allotment for a "nonpartisan" drive to register union members, their families and neighbors, declared: "I'm of the opinion that for every four labor people we get to register, at least three of them would
For that matter, what of union activity in many other controversial areas? Suppose a union were to sponsor an exhibition of modernistic art as a civic contribution. Suppose further that some of the union members object on the ground that the pictures convey a Communist and antireligious message. What if they demand a proportional restitution of their dues used to finance the exhibit, on the grounds that it offends both their political and religious convictions? Perhaps the union's art sponsorship would fall under the doctrine of ultra vires, yet in corporate law this doctrine has practically become a museum piece. It can surely be argued that sponsoring an art exhibit would improve the union's public image, just as many a similar corporate charitable contribution is justified by the same rationale.

Beyond a doubt, any scheme of proportional restitution will be hard pressed to hurdle the twin obstacles of accounting impediments and conceptual confusion over just what is political activity. Moreover, there are doubtless at least a few unions where the worker will be strongly discouraged from seeking any proportional exemption. This discouragement will ordinarily take the relatively mild form of social disapproval or ostracism; but occasionally it might conceivably reach the point of physical violence or threats thereof.

However, if proportional remedies seem unworkable, one hundred per cent recovery of dues might well open a Pandora's box full of even more horrendous problems. Is not the one hundred per cent recovery in reality a judicially legislated open shop for a chosen few? Would it not embroil the Court in the political dispute between voluntary and compulsory unionism? A one hundred per cent recovery means, in effect, that even in a union shop those workers who object to the union's political activities need not pay any union dues. Perhaps they may even enjoy the advantages of both voluntary and compulsory unionism—at least neither Justices Black nor Whittaker nor the Georgia court suggest that upon refund of all their dues the complaining members necessarily lose their privileges of union membership, such as voting in union elections or holding union office. In any event, the dissenters would not have to pay any dues, while everyone else would be compelled to do so. Let us reflect for a moment upon the discrimination thus involved. If a person objects

vote consistent with the policies of the trade union movement in regard to Congressional candidates and others, and vote on the basis of their records on legislation in which we are interested." N.Y. Times, Aug. 18, 1960, p. 16, col. 7.


105. Although some states still impose some restrictions on corporate gifts to charity, many statutes specifically authorize them (id. at 359) and the current trend is definitely in favor of their validity. This is well illustrated by A. P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 98 A.2d 581 (1953), sustaining a corporate gift to Princeton University.
to the union's political line, even though he has no objection to compulsory unionism in principle, he would not have to pay dues. On the other hand, one who has no objection to the union's politics, but who is simply strongly opposed to the idea of being compelled to belong to anything, must pay his dues in full. How can we justify such special favor of those who object to a relatively small portion of union activity when we concede nothing to those who oppose the whole concept of compulsory unionism? It can well be argued that if we want voluntary unionism, we should apply it across-the-board to everyone rather than piecemeal to just a few, and that it should be imposed, if at all, by the legislature or by the people, not by the judiciary. At least proportional relief has the shining virtue of maintaining the constitutional principle of political individualism, while leaving the separate issue of voluntary versus compulsory unionism, basically a social and economic, rather than a constitutional civil-liberties question, to the decision of the customary political processes.

C. Injunction Against All Union Political Expenditures

On remand from the United States Supreme Court, the Georgia Supreme Court directed the trial court to receive evidence to determine how much money the union had spent for politics.

106. Moreover, there is a standing invitation to perjury and fraud if all one need do to avoid payment of any dues whatever is to file an affidavit stating one's political disagreement with the union. On the other hand, if the dissenter's remedy is merely proportional, the temptation to fraud is but slight since the amounts involved are not large and the issue then is not money but principle.

107. Yet, the difficulties in administering proportional relief are undeniable. Probably experience will tell whether such a remedy is workable. If it is not, another look at 100% restitution will be in order, since the constitutional principle is too basic to be lost for want of a remedy.

108. The author has never favored the so-called "right-to-work" laws, outlawing the union shop. However, the dilemma of proportional relief versus a judicially legislated open shop for the dissenters, neither of which really appeal to the practical mind, only points up the uneasy legal and moral quandaries in which we are inescapably entangled when we compel membership in a powerful organization with virtual life-and-death power over the individual's economic livelihood, and an expanding interest in practically every phase of its members' lives. It may well be that in our complex industrial civilization compulsory unionism is philosophically justifiable as a means of raising the worker's bargaining power to his employer's level, thus guaranteeing the worker an economically feasible freedom of choice, although at the expense of his legalistic freedom of choice over whether or not to join the union. Nonetheless, the existence of a great many pressures toward union conformity is undeniable. This is all the more reason why liberals who normally support organized labor should bend over backwards to protect the individual worker from the excesses of the union majority.
Should the trial court be able to determine whose money is spent for what... and how the plaintiffs can be saved from harm by any withdrawal from the general fund for political purposes, and be able to formulate a practical method which would afford the relief... which... is due the plaintiffs, then that court is directed to enter a decree accordingly. However, should the trial court be unable to determine a method practical in performance... then it should... [enjoin] the unions from spending any monies for political purposes.¹⁰⁰

The Georgia court appears skeptical of the practicality of the suggested proportional remedies, and almost seems to be inviting a blanket injunction against all union political expenditures. Such an injunction would be patently unconstitutional. As indicated previously,¹¹⁰ the federal law prohibiting union expenditures in federal elections is almost certainly invalid. Furthermore, the suggested injunction would even forbid expenditures in state and local elections. These disbursements are not prohibited by the federal law. Thus, to a large extent, the injunction would not even be supported by any equivalent federal prohibitions, and would collide head-on with the union's constitutional right of political participation. Even to the extent that such an injunction would be coterminous with the prohibition of union expenditures in federal elections, it seems highly doubtful that a state court would have any jurisdiction to enforce such a federal statute. Such a means of enforcement would seem even beyond the power of a federal court since the act makes no mention of injunctive relief. Moreover, it is a criminal statute and equity traditionally does not enjoin the commission of a crime.¹¹² Thus the whole idea is invalid.¹¹³

Even if it were not invalid, it takes little imagination to envision

¹¹⁰ See text accompanying notes 23-35 supra.
¹¹² de Funiak, Modern Equity § 36 (1950).
¹¹³ The Georgia court’s antiunion leanings show through in another spot. Since the Supreme Court had held, contrary to the Georgia decision, that this was not a class action, the Georgia court directed that all nonoperating employees be given a chance to intervene as parties plaintiff, “and that the court in a method and manner it deems most expedient cause written notice to be given to all such employees of their right to intervene. . . .” International Ass’n of Machinists v. Street, 217 Ga. at 353, 122 S.E.2d at 223. The court does not bother to explain just what business a court has in stirring up litigation. One can well imagine a Georgia court in almost any other context stiffly observing the maxim: “It is not the business of the court to inform potential litigants of their rights. All persons are presumed to know the law.” Nor does it bother to explain how the trial court is to give notice to thousands of employees scattered over the entire eastern United States. Nor who is to pay for it. The union? But, this is all a tempest in a teapot since the union members haven’t objected in advance to political use of their dues, a prerequisite for recovery. International Ass’n of Machinists v. Street, 367 U.S. at 775.
the Supreme Court striking down such an extreme remedy as much too excessive, and not contemplated by the Railway Labor Act. After all, if the majority of the Court felt that one hundred per cent restitution of dues was too extreme a remedy, because it would frustrate the purpose of the act, which is to permit all employees benefitted by collective bargaining to share in its cost, what are they going to think about an injunctive remedy that puts a halt to all union political spending just to protect a handful of dissenters? The one hundred per cent restitution would seem a far milder remedy.

D. Contracting Out—A Legislative Remedy?

Perhaps the whole problem could be solved by legislation aimed at providing a systematic remedy for the dissenting worker. In this connection the British "contracting out" system deserves attention. A 1913 law permitted the union member to file an "exemption notice" which would exempt him from paying that part of his dues that would otherwise be used for politics. The Conservative Parliament, frightened by the general strike in 1926, changed the law from "contracting out" to "contracting in," that is, making the individual's consent a condition precedent to political use of his dues. However, when Labor took over after World War II, Parliament returned to the "contracting out" procedure of 1913. The Conservatives, long since returned to power, have left "contracting out" alone.

In effect, the majority opinion in the Machinists case interprets the Railway Labor Act to provide for "contracting out." "Contracting in" is unfair in that it puts the burden on the union when the great majority of workers have no objection to their union's political activity. It requires a great deal of useless paper work, thereby adding to the union's administrative overhead. As Mr. Justice Brennan said: "[D]issent

114. Id. at 772.
115. Furthermore, it is not constitutionally objectionable, although somewhat disruptive of the purpose of the union shop.
116. Trade Union Act, 1913, 2 & 3 Geo. 5, c. 30.
117. Trade Disputes & Trade Unions Act, 1927, 17 & 18 Geo. 5, c. 22.
118. Trade Disputes & Trade Unions Act, 1946, 9 & 10 Geo. 6, c. 52.
119. Some American unions, leaning over backwards to avoid violation of 18 U.S.C. § 610 (1958), forbidding unions "to make a contribution or expenditure in connection with any" federal election, have employed their own version of "contracting in." The union will ask its members to sign a card authorizing expenditure of a given portion of their monthly dues for political purposes. Thus the use of the member's dues for politics is his own voluntary choice, thereby presumably circumventing the prohibition in § 610. See note 24 supra and accompanying text. In United States v. Warehouse & Distribution Workers, 41 CCH Lab. Cas. ¶ 16601 (E.D. Mo. 1960), the district court upheld this plan in acquitting four teamster
MAJORITARIAN DEMOCRACY

is not to be presumed. . . . The union . . . should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities. 120  

Certainly a legislative solution, spelling out a systematic procedure akin to Britain's "contracting out," would be far preferable to leaving the solution up to \textit{ad hoc} judicial improvisation.

VII. Conclusion

There is abroad in the land an erroneous belief that liberals must almost automatically support any action taken by organized labor. This overlooks the very real possibility that labor, itself, may occasionally become reactionary and untrue, either in methods or objectives, to true liberalism. Liberals who share this belief are what the writer would term "economic" or "welfare" liberals—their liberalism goes no deeper than an adherence to the welfare state and a belief in the pattern of social and economic legislation typified by the New Deal. These liberals forget that in the final analysis no truly great or lasting philosophy can be characterized by an attachment to the material interests of any one social or economic group, but that such philosophy can only be immortalized by its consistent devotion to a set of high ideals that are independent of the narrow interests of any one group. 121

officials of violating § 610. However, if the member will not sign, all of his dues are used for nonpolitical activity; he is not refunded any part of his money. Rauh, Legality of Union Political Expenditures, 34 So. Cal. L. Rev. 152, 154 (1961).

120. 367 U.S. at 774.

121. At this point, many disciples of the Bentley-Frankfurter group process theory (see text accompanying notes 13-22 supra) may conclude that the writer has been captured by a hopelessly individualistic and unrealistic idealism. These group-oriented philosophers may feel that the contentions of this article are too close to the individualistic, antigroup philosophy of former American Motors President, Michigan's Governor George Romney. Mr. Romney's philosophy apparently consists of a deep-rooted "distrust of the power groupings in modern America, [and a] belief that broad-based citizen participation is needed to nullify the power blocks. . . ." Novak, Rambling Romneyism, Wall Street Journal, Oct. 15, 1962, p. 12, col. 4. Although apparently basically a conservative in the overall political spectrum, and a moderate Republican, he believes that government should be controlled by neither business nor labor, and that the power of both should be drastically reduced, in part by the vigorous application of antitrust laws to both groups. His philosophy is sometimes criticized as unrealistic, and worse yet, as incipient authoritarianism. Some "critics see in his denunciation of economic pressure groups the denial rather than the advancement of representative democracy." Ibid. The Romney philosophy would be attractive to Robert MacIver, who has criticized Bentley's theory as cynically antidemocratic: "To Bentley . . . a legislative act is always the calculable resultant of a struggle between pressure groups, never a decision between opposing conceptions of national welfare. . . . Nevertheless . . . the whole logic of democracy is based on the conception that there is still a national unity and a common welfare." MacIver, The Web of Government 220 (1943). On the
To compel a man to support political causes in which he does not believe is reactionary, not liberal. To expel a man from union affiliation because he will not pay a special assessment to fight a "right-to-work" law in which he strongly believes, as in DeMille v. American Fed'n of Radio Artists, bespeaks not the historic liberal tolerance of dissent, but the traditional reactionary fear of nonconformity. Finally, to expel a union member because he has actively campaigned in favor of a "right-to-work" law opposed by the union is but to march inexorably to the ultimate extreme of union totalitarianism.

Justices Black and Douglas are true to the traditions of classical liberalism in their defense of the dissenting union members and attorneys. Although both of them are intellectually and emotionally deeply rooted in New Deal and economic liberalism, and can by no shade of the other hand, Dickinson would presumably be quite suspicious of a political theory that attempts to de-emphasize the role of the interest group in democratic society, for he denounces the concept of a mystical "popular will" as a "metaphysical specter": "[D]emocratic . . . (government), in concentrating on the realization of a supposed popular will, is offering vain oblations to a metaphysical specter. . . . The task of government, and hence of democracy as a form of government, is not to express an imaginary popular will, but to effect adjustments among the various special wills . . . which at any given time are pressing for realization. . . . [E]very governmental act can be viewed as favoring in some degree some particular and partial 'will,' or special interest. It is therefore meaningless to criticize government, whether democratic or not, merely because it allows special interests to attain some measure of what they think themselves entitled to. The question is rather whether it allows the 'right' side, the 'right' special interest, to win; and the 'right' special interest means only the one whose will is most compatible with what we, as critics, conceive to be the right direction for the society's development to take." Dickinson, Democratic Realities and Democratic Dogma, 24 Am. Pol. Sci. Rev. 283, 291-92 (1930). The author's position is a moderate one. There can be no doubt of the efficacy of Bentley's theory of the group process as an analytical tool to measure what is happening and to predict what is likely to happen. But it is morally neutral. See note 18 supra and accompanying text. There is no particular point to be served by either denouncing it as an intellectual justification for group selfishness, or in extolling it as the ultimate and noblest definition of democracy. The writer finds much of the Romney philosophy attractive. It is highly attractive in its emphasis on the rights of the individual and the need to protect the individual against the encroachments of the group. It all depends on how far this philosophy goes and what direction it takes. To the extent that it recognizes the rightful and inevitable role of the group in political life, but attempts to maintain a fair balance of power between the competing groups, and to keep any group from growing so strong that it can dominate our society, and endeavors above all to prevent the group from swallowing up the individual, to that extent it is the philosophy of constitutional liberalism.

122. 31 Cal. 2d 139, 187 P.2d 769 (1947), cert. denied, 333 U.S. 876 (1948). The court sustained the expulsion. True, DeMille was not punished for expressing his political views, but he was indeed punished for acting upon them by refusing to support their destruction financially. This is hardly the kind of distinction upon which to base a realistic constitutional jurisprudence. Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1069 n.103 (1951).
imagination be labelled as antilabor, yet both recognize that where there is a clash, "full-belly" liberalism must give way to "civil-liberties" liberalism. Indeed, as onetime "economic" liberals they obviously recognize the relationship between control of a man's purse and control of his thoughts and words. They know that a man's freedom of speech is left no more unfettered by compelling him to pay money to advance political causes to which he is opposed, than his religious freedom remains uncompromised by compelling him to pay taxes for the support of an established church.

Let us hope that, when the time comes for the Supreme Court to face squarely the constitutional issue, unencumbered by problems of common-law pleading and technical statutory interpretation, it will abide not by the group-centered, social class orientation of "economic" liberalism, but that it will follow instead the dictates of historic, classical liberalism, with its predominant emphasis on freedom of the individual to make up his own mind and act on his own beliefs without coercion.

123. This is not the only case in which Justices Black and Douglas have been true to liberal ideals even though the application of those ideals was to the detriment of a group with which liberals are usually in sympathy. In Hannah v. Larche, 363 U.S. 420 (1960), the Court held that the Civil Rights Commission, in an investigation of denial of Negroes' voting rights, could validly deny to witnesses the rights of appraisal of the charges, confrontation and cross-examination because the Commission was not prosecuting or trying persons for crime, but existed solely to ascertain facts that might be used as a basis for legislative or executive action. Justices Black and Douglas dissented, contending that witnesses were entitled to all the safeguards of procedural due process, since these investigations could lead to criminal prosecutions and other sanctions. Id. at 493 (dissenting opinion). In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court upheld defendant's conviction for distributing leaflets maligning the Negro race as rapists, robbers and marijuana addicts, under a criminal group libel statute prohibiting distribution of lithographs exposing a class of citizens of any race, color, creed or religion to contempt or making them appear to lack virtue. Justices Black and Douglas, dissenting, denounced the statute as a deprivation of freedom of the press. Mr. Justice Black pointed out that the same kind of a law in another area could send one to jail for advocating racial equality. "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'" Id. at 275 (dissenting opinion). No one can challenge the loyalty of Justices Black and Douglas to civil rights for the Negro. Yet in Hannah and Beauharnais they took stands that on their face were opposed to the "pro-Negro" position, because they believed that support of civil liberties principles was more important than blind allegiance to groups who are the usual beneficiaries of these principles.

124. Perhaps Mr. Justice Harlan enunciated a more potent argument than he realized when he attempted to pass off his own tentative suggestion that a "state-created integrated bar amounts to a governmental 'establishment' of political belief." Ridiculous, he replied. Everyone must "recognize the clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against 'establishment.'" Lathrop v. Donohue, 367 U.S. 820, 852 (1961) (concurring opinion).
from any group endowed by government with virtual life-and-death powers over his economic or professional well-being.

Certainly those who believe that the freedoms of the first amendment are absolute have no alternative but to protect both the rights of the union majority to participate in politics and the rights of the union minority to refrain from contributing to the support of causes in which they cannot believe. Even if the balancing-of-interests test is to be applied to these problems, the same results should obtain. Surely there is no compelling social interest in forbidding union political activity, or political activity by any group. Yet neither is there any compelling social interest in forcing dissenting members of any group to contribute to political causes which they abhor. All of the social and individual interests here lie in one direction—freedom for the majority to act; freedom of the minority from coercion.