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THE NATIONAL LABOR RELATIONS ACT AND THE FORGOTTEN FIRST AMENDMENT

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Constitutional law doctrines ebb and flow. As Justice Frankfurter explained:

> [in the study of the] evolution of social policy by way of judicial application of Delphic provisions of the Constitution, recession of judicial doctrine is as pertinent as its expansion.[1]

Although I am not a labor lawyer, I do see, as a student of constitutional law, the alternate expansion and contraction of constitutional principles through whose application the Supreme Court has sought to resolve labor law problems. For example, the freedom of contract principle, once construed to prohibit legislative restraints on the terms and conditions of employment contracts,[2] has been drained of most of its substantive content.[3] At the same

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1. Frankfurter, *John Marshall and the Judicial Function,* 69 HARV. L. REV. 217, 231 (1955).

2. Adair v. United States, 208 U.S. 161, 174-75 (1908):

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

3. By 1944 the Court had so refined its earlier interpretations of the contract clause that one commentator observed: "[T]he results might be the same if the contract clause was dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property [under the due process clause]." Hale, *The Supreme Court and the Contract Clause: III,* 57 HARV. L. REV. 852, 890 (1944). *See also* Justice Black's dissent in El Paso v. Simmons, 379 U.S. 497 (1965), where he protested

time, the equal protection principle, which Justice Holmes dismissed contemptuously in 1927 as the "usual last resort of Constitutional arguments,"[4] has been expanded enormously.[5] And in at least one area the application of the equal protection principle has produced the same result reached under the old freedom of contract principle: the expanded concept of equal protection precludes the legislative imposition of discriminatory restraints on the terms and conditions of employment contracts.[6] Still another of the recently expanded principles of constitutional law—the freedom of association principle—may also produce results similar to those reached under some of the earlier freedom of contract cases when it is applied, as it inevitably must be, to the labor relations field.

In the succeeding sections of this article several points will be discussed. First, the freedom of association principle,[7] what-

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the Court's interpretation of Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), as "practically read[ing] the Contract Clause out of the Constitution." 379 U.S. at 523.

4. Buck v. Bell, 274 U.S. 200 (1927). As late as 1949 Justice Jackson defined the scope of the equal protection doctrine very narrowly. In Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) Justice Jackson noted in a concurring opinion: "Invocation of the equal protection clause,. . .does not disable any governmental body from dealing with the subject at hand." *Id.* at 112. He added that the clause only prohibited the government from imposing different treatments "except upon some reasonable differentiation fairly related to the object of regulation." *Id.* The classic survey of the pre-Warren Court equal protection doctrine is Tussman & ten Broek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

5. *See, e.g., Developments in the Law—Equal Protection,* 82 HARV. L. REV. 111-24 (1969). The expansion of the equal protection doctrine is reviewed sympathetically in Karst & Horowitz, *Reitman v. Mulkey: A Telephase of Substantive Equal Protection,* 1967 SUP. CT. REV. 39, and Karst, *Invidious Discrimination: Justice Douglas and the Return of the* 'Natural-Law-Due-Process Formula' 16 U.C.L.A. L. REV. 716 (1969). Justice Harlan, in his dissent in Shapiro v. Thompson, 394 U.S. 618, 655 (1969), sharply criticized the expansion of the equal protection doctrine. *E.g.*, Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). Professor Gunther interprets the trend as an expansion of the traditional "rational basis" test. Some observers now perceive a subtle retreat from the expanded concept of equal protection.

6. *See generally* Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).

7. The freedom of association principle, as used in this paper, means that individuals are free to enter into cooperative relationships voluntarily. It necessarily implies that no one may force another into any relationship, however beneficial that relationship might be to either or both parties. Of course, one who insists upon compliance with specific conditions before entering into association with another does not thereby force that other person into an association prohibited by the freedom of association principle so long as the latter person is free not to comply. Thus a worker may insist as a condition of accepting an offer of employment that he be represented by a particular representative. Or an employer may insist that the worker agree to be represented by a particular representative

ever its constitutional paternity, is now treated by the Court as one among first amendment equals. It is thus a fundamental right which the government may limit only for the most compelling reasons and then only in that way which least intrudes upon its exercise. Second, the relationship of an employee both to his employer and to his fellow employees involves associational rights of the kind guaranteed and protected by the first amendment. Third, the exclusive representation rule[8] of the National Labor Relations Act seriously interferes with those associational rights for reasons that cannot be fairly characterized as compelling. Moreover, the exclusive representation rule, hardly the least intrusive means by which the government might solve the problems allegedly mitigated by its observance, may in fact exacerbate those very problems. Consequently, fourth, the Court should strike down the exclusive representation rule as an abridgement of both employees' and employers' freedom of association rights under the first amendment. The freedom of association principle at full tide will thus sweep legal doctrine back to the high water mark reached before the freedom of contract principle began to ebb.

I. THE CONSTITUTIONAL STATUS OF THE FREEDOM OF ASSOCIATION PRINCIPLE

No clause in the Bill of Rights expressly guarantees freedom of association, and the Court has only recently recognized that it nevertheless exists in the interstices of the first amendment.[9] In view of the colonial tradition of voluntary association—a tradition that has led a number of observers to characterize this

as a condition of the offered employment. In either case, the other party remains free to reject the condition and seek or offer employment elsewhere.

8. Labor Management Relations (Wagner) Act § 9(a), 29 U.S.C. § 159(a) (1970). The exclusive representation rule provides that whenever a majority of workers in a designated bargaining unit agree to be represented by a particular union, then that union becomes the bargaining agent for *all* the employees within the unit.

9. NAACP v. Alabama, 357 U.S. 449 (1958), is generally conceded to be the first case in which the Court recognized freedom of association as a separate and distinct first amendment right. However, earlier cases had mentioned or vaguely suggested its existence. *See* Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); AFL v. American Sash & Door Co., 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring).

country as "a nation of joiners"[10]—the Court might more accurately have found the right among those "others retained by the people."[11] The Court's persistent refusal to give significant substantive content to the strictures of the ninth amendment is, of course, a matter of historic record,[12] and its preference for a first rather than ninth amendment elucidation of the freedom of association right was predictable.

The Court might also have construed the word "liberty" to include freedom of association.[13] Liberty has been defined as "freedom from external restraint or compulsion; power to do as one pleases,"[14] a definition which would embrace the right to enter into voluntary relationships with others. The modern Court, however, has generally considered the liberty which is guaranteed in the fifth and fourteenth amendments as a shorthand expres-

10. Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1 (1944), de Tocqueville had observed a century before: "In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 191 (Bradley ed. 1956). In Wieman v. Updegraff, 344 U.S. 183 (1952), Justice Frankfurter in a concurring opinion called the right of association "peculiarly characteristic of our people." *Id.* at 195. Professor Emerson begins his classic article *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1965), with the assertion: "Freedom of association has always been a vital feature of American society."

11. Justice Douglas reminds us, for example, that "[i]n the beginning we had our Committees of Correspondence." Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1373 (1963). John Locke, whose work so influenced the colonists, held that the individual had an inalienable right of association. *See generally* J. LOCKE, A LETTER CONCERNING TOLERATION (rev. ed. 1948).

12. B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955). *But see* Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965): The language and history of the ninth amendment reveal that the

> Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

Id. at 488.

13. Justice Harlan, who never accepted the incorporation argument, did not construe "liberty" in NAACP v. Alabama, 357 U.S. 449, 460 (1958) (though he muddled the exact source from which he derived the right to association by coupling his definition of liberty with the observation that it embraced freedom of speech, thereby implying that freedom of association was subsumed within the free speech guarantee). *Cf.* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Liberty "denotes not merely freedom from bodily restraint but also the right . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."). Professor Emerson has concluded: "Associational rights, to the extent they exist, are not derived solely from the First Amendment. Rather they are implied in the whole constitutional framework for the protection of individual liberty in a democratic society." Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L. J. 1, 5 (1964).

14. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1424 (2d ed. 1936).

sion for those specific rights enumerated elsewhere in the Constitution.[15] Thus considered, liberty does not include the right to associate freely unless that right is fairly deducible from some other specified right. Since freedom of association may plausibly be deduced from specific first amendment rights,[16] the Court again predictably chose to focus on it as the source of the right.

Locating freedom of association in the first amendment has generated some definitional problems because traditional first amendment interpretations initially hampered its elaboration.[17] For example, the Court first hinted that freedom of association did not extend beyond insuring freedom of assembly.[18] Later the Court intimated that only those who associate for political or religious purposes might invoke the first amendment guarantee of freedom of association.[19] On the whole, however, the Court has

15. Justice Black, of course, was the foremost proponent of "incorporation." Although a majority of the Court has never agreed with his argument that the fourteenth amendment embraces all (but only) those rights specifically enumerated in the first eight amendments, it has virtually acquiesced in that interpretation. One surmises that only a reluctance to fasten upon the states the jury amount of the seventh amendment and the grand jury requirement of the fifth amendment has prevented the Court from explicitly adopting Justice Black's incorporation theory.

16. *See* Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960).

17. For example, Mr. Robison in *Protection of Association from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 621-22 (1958), argued for "liberty" as the source of the right because its definition might otherwise be restricted to auxiliary elaboration of specific first amendment rights.

18. *Cf.* De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("[P]eaceable assembly for lawful discussion cannot be made a crime."). *See also* Healy v. James, 408 U.S. 169, 181 (1972) ("While the freedom of association is not explicitly set out in the [first] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition."); Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (Black & Douglas, J.J., concurring) ("One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right.").

19. Mr. Justice White sympathetically summarized the precedents on this point of view in his dissent in United States v. Robel, 389 U.S. 258 (1967):

> If men may speak as individuals, they may speak in groups as well. If they may assemble and petition, they must have the right to associate to some extent. In this sense the right of association simply extends constitutional protection to First Amendment rights when exercised with others rather than by an individual alone. In *NAACP v. Alabama,* the Court said that the freedom to associate for the advancement of beliefs and ideas is constitutionally protected and that it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . ." 357 U.S. 449, 460 (1958). That case involved the propagation of ideas by a group as well as litigation as a form of petition. The latter First Amendment element was also involved in *NAACP v. Button*, 371 U.S. 415 (1963); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964); and *United Mine Workers v. Illinois Bar Assn., ante,* p. 217. The activities in *Eastern R. Presidents Conference v. Noerr Motor*

construed the right expansively without establishing parameters as to its scope. For example, when asked to limit first amendment protections to political activities in *United Mineworkers v. Illinois Bar Association,*[20] the Court responded that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political."[21] Furthermore, the Court has recognized association claims in other nonpolitical contexts.[22]

Even in the bulk of freedom of association cases in which the associational claim arose in a political context, the Court frequently has expressly defined the right in terms outside of a narrow political context. In *NAACP v. Alabama,*[23] for instance, Justice Harlan said pointedly that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ."[24] Justice Douglas, in a concurring opinion in *Gibson v. Florida Legislative Investigation Committee,*[25] echoed the foregoing conclusion of the more conservative Justice Harlan by asserting that "the associational rights protected by the first amendment are . . . much broader and cover the entire spectrum in political ideology as well as in

Freight, Inc., 365 U.S. 127 (1961), although commercially motivated, were aimed at influencing legislative action. Whether the right to associate is an independent First Amendment right carrying its own credentials and will be carried beyond the implementation of other First Amendment rights awaits a definitive answer. In this connection it should be noted that the Court recently dismissed, as not presenting a substantial federal question, an appeal challenging Florida regulations which forbid a Florida accountant from associating in his work, whether as partner or employee, with any nonresident accountant; out-of-state associations are barred from the State unless every partner is a qualified Florida acccountant, and in practice only Florida residents can become qualified there.

Id. at 283 n.1. *See also* Brotherhood of R.R. Trainmen v. Virginia Bar, 377 U.S. 1, 10 (1964) (Clark, J., dissenting).

20. 389 U.S. 217 (1967).

21. *Id.* at 223.

22. *See* Moose Lodge v. Irvis, 407 U.S. 163 (1972) (association for social purposes); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971) (association for the prosecution of personal injury claims); Thorpe v. Housing Auth. of City of Durham, 386 U.S. 670, 674 (1967) (Douglas, J., concurring) (association by tenants for protection of housing rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (association within the marital relationship); and Brotherhood of R.R. Trainmen v. Virginia Bar, 377 U.S. 1 (1964) (association to help employees assert legal claims).

23. 357 U.S. 449 (1948).

24. *Id.* at 460.

25. 372 U.S. 539 (1963).

art, in journalism, in teaching, and in religion."[26] The Court's refusal to limit the right of association to political affairs is consistent with (and arguably dictated by) its analogous refusal to limit other first amendment rights such as free speech, free press, and the right to assemble to political affairs.[27]

Although the precise scope of the right of association may be uncertain, it is indisputably a first amendment right,[28] and like other first amendment rights, it is thus both fundamental and preferred.[29] de Tocqueville perceived how fundamental the right of association was to freedom:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[30]

And Harold Laski recognized, before the Supreme Court did, that the right to associate freely is a fundamental right in any democratic society.[31]

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26. *Id.* at 565 (Douglas, J., concurring).

27. In Thomas v. Collins, 323 U.S. 516 (1945), the Court noted:

> Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the right of free speech and a free press are not confined to any field of human interest.

Id. at 531.

28. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 543 (1963). ("[R]ights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments."); Gremillion v. NAACP, 366 U.S. 293, 296 (1961) ("[F]reedom of association is included in the bundle of First Amendment rights made applicable to the states by the Due Process Clause of the Fourteenth Amendment."); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("[I]t is now beyond dispute that freedom of association . . . is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the states.").

29. Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("freedom of association ranks among our most precious freedoms"). Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544 (1963) ("The First and Fourth Amendment rights of free speech and free association are fundamental and highly prized, and 'need breathing space to survive'."); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (the "right of free association . . . lies at the foundation of a free society."); Sweezy v. New Hampshire, 354 U.S. 237, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage

30. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 196 (Bradley ed. 1948).

31. H. Laski, *Freedom of Association,* VI ENCYCLOPEDIA OF THE SOCIAL SCIENCES 477-50 (1931); *accord* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (dictum) (freedom of association is a fundamental right); Solter, *Freedom of Association—A New and Funda-*

Such rights, though not absolute may not usually be abridged or infringed.[32] Any legislation that does so carries an enormous burden of justification. First, it must meet some compelling need.[33] Second, it must satisfy that need in the manner that demonstrably intrudes least upon the exercise of the right.[34]

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mental Civil Right, 27 GEO. L. REV. 653, 672 (1959) (where Solter claims that a "reading of NAACP v. Alabama in conjunction with Sweezy v. New Hampshire . . . affords more than adequate support for the conclusion that the new freedom of association is a cognate of these first amendment freedoms and enjoys coordinately their preferred status."). *But see* Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730 (1960) (freedom of association is not an independent constitutional right but simply a new judicial technique for restraining a particular kind of arbitrary government action).

32. The courts have sustained numerous laws that regulate associations, such as registration and disclosure statutes. These cases are analogous to those court decisions permitting "Roberts Rules of Order" regulation of speech and assembly rights. Indeed, the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§401-531 (1970), constitutes, in the words of one observer, "an extraordinary amount of governmental intervention into the affairs of voluntary associations." This perhaps unjustified intrusion would be largely unnecessary, of course, if the government did not reinforce union compulsion in the first place.

Freedom of association is not absolute in yet another sense, for it does not prevail against the assertion of a compelling state interest. *See* Uphaus v. Wyman, 360 U.S. 72 (1959) (a state government's interest in self-preservation outweighs tenuous individual rights in associational privacy). There are doubtless numerous situations in which a government might justifiably assert a compelling interest in either prohibiting or compelling association. The state's interest in national defense would presumably sustain a compulsory draft. The state's interest in the integrity of its judicial system is probably compelling enough to justify the traditional bar prohibiting a judge from associating with litigants. Even in such cases, the state must of course draw its regulations as narrowly as possible. *See* Arciniego v. Freeman, 404 U.S. 4 (1971) (parole prohibitions on personal associations may not be unduly restrictive).

33. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963) ("[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of . . . association . . . that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."); NAACP v. Button, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling.").

34. United States v. Robel, 389 U.S. 258, 268 (1967) ("[W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."); NAACP v. Button, 376 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in area[s] so closely touching our most precious freedoms."); Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

While the Court often submissively defers to any arguably rational legislative judgment in other areas,[35] it vigilantly guards against even putatively rational legislative infringements of "fundamental" or "preferred" freedoms such as the freedom of association.[36] Indeed, the Court has recently reminded authorities that if they seek to limit associational freedoms, they must bear the burden of proving the necessity for the limitation.[37] Judged by such stringent standards, the legislation in question usually fails.[38] Indeed, the Court has repeatedly struck down legislation based on claims of national security when it abridged associational rights.[39] Only when the Court inexplicably fails to apply its

35. The Court has since 1937 consistently sustained state legislation against claims that it violated property rights or infringed upon "economic" rights. Professor McCloskey traces this development in *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34. Some observers are now questioning the wisdom of the Court's permissive attitude which has created a state of judicial laissez-faire concerning state legislative regulation of economic interests: the state may do whatever it wishes in the "economic" sphere.

36. In contrast to its permissive attitude toward "economic" legislation, the Court has looked increasingly askance at state (as well as federal) legislation that infringes upon "fundamental" rights. While the cases discussed at notes 26-27 and accompanying text *supra,* are all association cases, the analytical framework which they reflect is identically reflected in other cases in which the Court has dealt with first amendment rights other than freedom of association. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (compelling state interest required to justify infringement of first amendment right to freedom of worship); Braunfield v. Brown, 366 U.S. 599 (1961) (least restrictive means test required where statute may violate establishment clause in furtherance of some legitimate state activity). In many of the cases in which the Court reversed the conviction of protesters for violating trespass and other general statutes, the Court was, in effect, applying a least restrictive means test. *See* Coates v. Cincinnati, 402 U.S. 611 (1971) (a statute making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by" was struck down because it was unconstitutionally vague and violated petitioners' right to freedom of association); Brown v. Louisiana, 383 U.S. 131, 143 (1966) (The state "may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."); Edwards v. South Carolina, 372 U.S. 229, 236 (1963) ("We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed."). As the Court explained in NAACP v. Button, 371 U.S. 415, 438 (1963): "[W]e cannot assume that in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights."

37. Healy v. James, 408 U.S. 169 (1972).

38. Referring to the Court's use of the compelling interest/least restrictive means test in equal protection cases, Professor Gunther characterized the scrutiny as "strict in theory and fatal in fact." Gunther *supra* note 5, at 8.

39. United States v. Robel, 389 U.S. 258 (1967) (A statute which prohibited any member of a Communist-action organization from working at any defense facility cannot be justified on grounds of national defense if it infringes too broadly on first amendment

own constitutionally mandated analysis, as in several labor cases, does legislative infringement of associational rights usually prevail.[40]

The Court's "inexplicable" failure to judge the constitutionality of the National Labor Relations Act's (NLRA) exclusive representation rule by the traditional first amendment tests probably stems from its initial perception of the NLRA as a species of "economic" legislation.[41] As already pointed out, the Court has, since the judicial revolution of the late 1930's, refused to apply the least restrictive means test to "economic" legislation. Indeed, it has even refused to pass upon the actual rationality of "economic" legislation. As the Court reduced to the vanishing point its scrutiny of economic legislation, it intensified its scrutiny of political and social legislation that touched upon first amendment and other fundamental rights.[42] Consequently, the Court must necessarily categorize challenged legislation as either "economic" or "socio-political" before it knows by which standard to judge its constitutionality.

All legislation, however, cannot be neatly divided into such categories. The NLRA is a prime illustration. It is admittedly "economic" legislation, but it is also political and social legislation. Thus the Justices cannot honorably escape their obligation

rights.); *accord*, Aptheker v. Secretary of State, 378 U.S. 500 (1964) (A statute which forbade a member of a Communist organization from securing and using his passport was unconstitutional even though it was passed to protect national security because it infringed too broadly on association rights.). *But see* Scales v. United States, 367 U.S. 203 (1961), where the Court upheld the constitutionality of the membership clause of the Smith Act over the vigorous dissents of Justices Black, Douglas, and Brennan, who protested that the statute violated petitioner's first amendment rights, including his right to associate freely. The *Scales* case thus reaffirms the previously conceded point that the right of association is not an absolute right. In *Scales* the Court insisted that the statute was narrowly drawn to reach the particular evil which Congress could legitimately regulate. Moreover, it suggested that some associations (in this case "a combination to promote [the overthrow of the government by violent means], albeit under the aegis of what purports to be a political party") are not protected by the first amendment. *Id.* at 229. This approach bears a close relationship, of course, to the Court's occasional isolation of some kinds of speech—*e.g.*, fighting words, libel and slander, and obscenity—as unworthy of first amendment protection. Associations in the labor relations context, however, presumably would fall within the category of protected associations unless the Court wished to retreat to some of the very early cases which treated unions as criminal conspiracies.

40. The principal labor cases in this area (which are discussed at length at notes 61-69 and accompanying text *infra*) are Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956) and International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

41. In Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) the Court generally deferred to legislative judgment instead of invoking the strict scrutiny standard.

42. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

to judge the constitutionality of the Act's infringement of associational rights by treating it as if it were exclusively "economic" legislation.

II. THE APPLICABILITY OF THE FREEDOM OF ASSOCIATION PRINCIPLE TO EMPLOYEE-EMPLOYEE AND EMPLOYEE-EMPLOYER RELATIONSHIPS

Freedom of association may prove the most comprehensive of the first amendment rights. It would guarantee the right to worship according to the dictates of one's conscience even without the free exercise clause.[43] Similarly, it would subsume the right to assemble peaceably.[44] Whereas most of the other first amendment rights prohibit government intervention in specified areas such as the establishment of churches or the presentation of grievances, freedom of association insulates from government intervention the whole range of unspecified but voluntary relationships. The youngest of the first amendment rights, the right of association, has not yet matured to the full extent of its potential, but its promised breadth has startling implications.

The average individual makes literally dozens of associational decisions daily, many of which occur in a work context. The decision to accept an offer of employment itself necessarily constitutes a two-fold decision to associate: first, to associate himself with his employer and, second, to associate himself with his fellow employees, at least to the extent of working beside them. Since voluntary interaction constitutes the core of any associational relationship, the employer-employee relationship is associational even though one is subordinate to and paid for his services by the other. An individual may choose to work for one employer or not at all, or he may choose to work for employer Smith rather than employer Jones. The employee's decision may well turn on the kind of peculiarly private judgments that the right of freedom of association protects: personal preferences about colleagues, environment, and general working conditions. Similarly, the employer remains free to hire Bob or Jim, or neither, and his decision may also reflect personal judgments upon which he is

43. *E.g.* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 562 (1963) (Black, J., concurring) ("[J]oining a lawful organization, like attending a church, is an associational activity . . . .").

44. *E.g.* Coates v. Cincinnati, 402 U.S. 611 (1971) (statute which prohibited assemblies was found unconstitutional because it denied associational rights).

entitled to act under his right of free association.[45]

Beyond the initial employment decision, the worker must also make decisions about the degree to which he will associate with his fellow employees, since associations range from distant to intimate. Will he chat with them at lunch? Will he join the office bowling team? Will he contribute to the collection for an injured fellow employee's family? And, yes, will he organize with his fellow employees[46] and maintain a common position *vis a vis* their mutual employer?

Although the workers' right to organize is now implicitly authorized by statute,[47] the freedom of association principle would guarantee it even in the absence of statutory authorization.[48]

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45. An employer may hire employees for any number of reasons other than their competence. He might, for example, hire someone because he was the son of a friend, or he might decide not to hire someone because he felt that the prospective employee would not get along with him or the other employees. These are essentially private, subjective judgments whose exercise the right of association protects in other contexts.

46. The urge to join a union, in [the early 1900's] as in other periods, came not only from expectation of economic gain through collective action. The hope that he would attain greater security—a square deal and protection from arbitrary discipline—was always highly important, but there was also an often unconscious desire on the part of the individual wage earner to strengthen his feeling of individual worth and significance in an industrial society. Machinery was more and more making the worker an automatic cog in a process over which he had no influence or control. The complete impersonality of corporate business, with mangement far removed from any direct contact with employees, further accentuated this loss of individual status. The wage earner could find a satisfaction in membership in such a meaningful social organization as a labor union that was denied him as one among many thousands of depersonalized employees. The desire to take part in some group activity was, indeed, particularly strong during the progressive era. It was a period marked by the rapid growth of social clubs, lodges, and fraternal associations. The unions, often including some of the ritual of the fraternal lodges, met a very real need entirely apart from the support they provided for collective bargaining.

F. DULLES, LABOR IN AMERICA 205 (1949).

47. Labor Management Relations (Wagner) Act § 7 (a), 29 U.S.C. § 157(a) (1970).

48. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) ("[E]mployees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."). *See also* American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) ("[L]abor unions . . . when instituted for mutual help and lawfully carrying out their legitimate objects . . . have long been thus recognized by the courts."); Brown v. Stoerkel & Gregory, 74 Mich. 269, 276, 41 N.W. 921, 923 (1889) ([A]n unincorporated local of the old Knights of Labor "was purely a benevolent and social organization, having also in view the protection, benefit, and welfare of its members in their various employments. It must now be considered as well settled that persons have a right to enter into such associations, and to bind themselves as to their membership and rights in such societies . . . ."). Several lower federal courts have expressly held that the freedom of association principle guarantees workers the right to organize as against the state. A.F.S.C.M.E. v. Woodward,

Thus, the courts have agreed that the freedom of association principle does protect the workers' right to organize in occupations not covered by the NLRA.[49] Unfortunately, the courts have not yet made as clear that the freedom of association principle also necessarily guarantees the individual's right not to associate. For example, the mere fact that one has decided to associate with his fellows by accepting common employment with them does not mean that he has thereby committed himself to any more intimate association with them. Again, reflection upon analogous first amendment problems may illuminate the point.

The decision to enter a particular worship hall does not obligate the individual to participate in any or all phases of the service. He may or may not join in singing a hymn; he may or may not take communion. The Constitution guarantees him free choice at every decisional point in the exercise of his religious freedom.[50] Similarly, in the absence of any voluntary agreement or valid legislative command, one presumably remains free not to chat, not to join the office bowling team, not to contribute to the relief fund, and not to join the union. The right not to associate is as necessary a corollary of the right to associate as the rights not to speak, not to assemble, not to petition and not to worship are the necessary corollaries of the other first amendment rights.[51] Just as the government cannot normally command a citizen to speak, or to assemble, or to petition, or to worship, it cannot normally command him to associate with others.

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406 F.2d 137, 139 (8th Cir. 1969); Melton v. City of Atlanta, Georgia, 324 F. Supp. 315, 318-20 (N.D. Ga. 1971); Atkins v. City of Charlotte, 296 F. Supp. 1068, 1075-77 (W.D.N.C. 1969).

49. Note, *Exemption of Nonprofit Hospital Employees from the National Labor Relations Act: A Violation of Equal Protection,* 57 IOWA L. REV. 412, 431-37 (1971); Note, *Constitutional Law—Public Employees—"Freedom of Association" Guarantees Right to Unionize But Not the Right to Bargain Collectively,* 44 TUL. L. REV. 568 (1970).

50. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("[N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'.").

51. *Cf.* Bell v. Hill, 123 Tex. 531, 74 S.W. 2d 113 (1934). The court in *Bell* stated that

> a political party . . . is a *voluntary association;* an association formed of the free will and unrestrained choice of those who compose it. No man is compelled by law to become a member of a political party; or, after having become such, to remain a member. He may join such a party for whatever reason seems good to him, and may quit the party for any cause, good, bad, or indifferent, or without cause. A political party is the creation of free men, acting according to their own wisdom, and in no sense whatever the creation of any department of the government.

Id. at 534, 74 S.W.2d at 114.

Courts in other countries, whose constitutions explicitly guarantee freedom of association, have uniformly implied from that guarantee the freedom of disassociation and have held specifically that union membership may not be compelled.[52] Other countries which guarantee freedom of association have also explicitly protected the right of disassociation,[53] and article 20 of the Universal Declaration of Human Rights states: "No one may be compelled to belong to any association." Mr. Rice, in his book *Freedom of Association,*[54] argues that the Supreme Court, in sustaining the constitutionality of state right-to-work laws,[55] "inferentially placed the freedom not to associate on a plane of equality with the positive freedom to associate."[56]

While associational rights are infringed upon when compulsory association is demanded, such rights may also be violated in a situation where compelled association is less evident. This is especially true under the exclusive representation principle, a rule which is a substantial infringement on associational rights and not merely a minimal encroachment as some commentators intimate.[57] Since the exclusive representation principle precludes direct settlement of grievances between the employer and his unhappy employees, the disgruntled employees must depend upon their union representative, who may not share their griev-

52. *E.g.* Educational Co. v. Fitzpatrick, [1961] 2 I.R. 345 (Ireland); Sithararchary v. Senior Inspector of Schools, [1958] A.I.R. Ajnd. Pra. 78 (India).

53. *See generally* Casey, *Some Implications of Freedom of Association in Labour Law: A Comparative Survey with Special Reference to Ireland*, 21 INT'L & COMP. L.Q. 699 (1972).

54. C. RICE, FREEDOM OF ASSOCIATION 88 (1962).

55. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Specifically, Justice Black said in this case:

> There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies. The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.

Id. at 531.

56. Rice, *supra* note 54, at 531.

57. For example, Justice Frankfurter characterized the petitioners' associational claims as "miniscule" in International Ass'n of Machinists v. Street, 367 U.S. 740, 818 (1961) (Frankfurter, J., dissenting).

ances. The facts of *Emporium Capwell Co. v. Western Addition Community Organization*[58] illustrate how the exclusive representation rule isolates the employee from his employer and prevents like-minded employees from associating in any common effort unsanctioned by the union.

A group of black workers felt that their employer discriminated against minorities in hiring and promotion policies. Not satisfied with union efforts on their behalf, they sought to negotiate directly with the company president. In order to reinforce their demands, the employees picketed the store and distributed handbills urging consumers not to patronize the store. Although their actions thus constituted a classic exercise of first amendment freedoms, the Court affirmed the National Labor Relations Board decision that the employees were properly discharged because their actions would undermine the statutory system of bargaining through an exclusive, elected representative. On the Supreme Court, only Justice Douglas protested against making "these union members . . . prisoners of the union."[59] Similarly, Judge Wyzanski, sitting by designation on the court of appeals, had perceived the constitutional question raised by any decision which construed the exclusive representation rule as a bar to a minority's prosecution of its entitlement to nondiscriminatory treatment.[60]

Unfortunately, *Emporium* is not an exceptional case, either in illustrating the degree to which the exclusive representation rule infringes upon freedom of association and the other first amendment rights or in demonstrating how cavalierly the Court dismisses associational claims in that context. The grant of exclusive authority to represent all workers leads naturally, for example, to union demands that all workers be required to join the union and pay dues since all are said to benefit from union efforts. In *Railway Employees Department v. Hanson*,[61] the Court overturned the state court's ruling that a union shop agreement deprives the employees of their freedom of association, noting that "[t]he choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one."[62] That description—

58. 420 U.S. 50 (1975).
59. *Id.* at 73 (Douglas, J., dissenting).
60. 485 F.2d 917, 933-37 (D.C. Cir. 1973) (Wyzanski, J., dissenting).
61. 351 U.S. 225 (1956).
62. *Id.* at 233.

that the Congressional judgment is an *allowable one*—reflects a judicial deference characteristic of the Court's decisions on the constitutionality of "economic" legislation rather than the close scrutiny with which it usually reviews legislation impinging upon first amendment freedoms.

Had the Court strictly scrutinized the provisions of the Railway Labor Act at issue in the *Hanson* case, it would presumably have had to characterize elimination of the "free rider" as a compelling state interest. It would then have had to conclude that authorization of the union shop (rather then, say, the simple imposition of a negotiating fee)[63] constituted the least intrusive means of eliminating the free rider evil. Such an analysis, though difficult to sustain either plausibly or persuasively, would at least have limited *Hanson* to its peculiar facts. The Court's rationale, however, suggests "a broad rule of law, one laden with precarious implications for personal liberty. The rule may be stated thusly: forced association, confined to mandatory financial support, is valid whenever the legislature is acting pursuant to its constitutionally authorized powers, and it is not for the judiciary to evaluate the merits of the policy reasons motivating the law making body."[64]

Although Justice Black, in lonely dissent, subsequently repudiated any such rule,[65] the Court's decision in *Lathrop v. Donohue*[66] reflects a similar rationale. In *Lathrop* the petitioner challenged the mandatory fee imposed by the integrated bar of Wisconsin on the ground that it violated his right of association. The plurality opinion declined to pass upon the constitutional issue of whether the integrated bar could compel a member to support political causes repugnant to him because the record was

63. The Court does intimate that union fees may only be imposed for purposes "germane to collective bargaining" although such agreements explicitly include initiation fees and periodic dues, as well as assessments. *Id.* at 235. Moreover, the Court recognized that many of the "appellant unions have broad powers to levy assessments for unspecified purposes." *Id.* at n. 7. Since the Court refused to inquire into whether such fees where in fact spent exclusively for collective bargaining purposes, the *Hanson* case does not present the case where the union has simply imposed a negotiating fee.

64. Comment, *Freedom from Political Association: The Street and Lathrum Decisions*, 56 NW. U.L. REV. 777, 780 (1962).

65. In his *Street* dissent, Justice Black argues: "The *Hanson* case did not hold that railroad workers could be compelled by law to forego their constitutionally protected freedom of association by participating as union 'members' against their will." International Ass'n of Machinists v. Street, 367 U.S. 740, 787 (1961) (Black, J., dissenting).

66. 367 U.S. 820 (1961).

too vague to permit adjudication. Nevertheless, the Court did hold that membership and fees could be compelled for "elevating the educational and ethical standards of the bar."[67] Such a conclusion can only be sustained on the premise that the legislature may pursue by any means a legitimate aim—regulation of the practice of law in this instance.

Justice Douglas, dissenting, sought to distinguish *Lathrop* from *Hanson,* (which opinion he had written for a unanimous Court) on the ground that the state interest in the latter was compelling, whereas the state interest in *Lathrop* was not. However mistaken Justice Douglas may have been in his factual assessment of the "compellingness" of the state interest in eliminating so-called "free riders," his *Lathrop* dissent at least recognized the applicability of the traditional first amendment analysis to the NLRA. His concurring opinion in *International Association of Machinists v. Street,*[68] discussed below, reinforces this conclusion although he offers no more evidence there than he did in *Hanson* to support his assessment that the state has a compelling interest in eliminating "free riders." Instead, he relies on *ipse dixit*: "Some forced associations are inevitable in an industrial society."[69]

At the same time the Court decided the *Lathrop* case, it decided a second labor case that explicitly raised issues that the Court had refused to pass upon in *Hanson.* Unions use dues for purposes other than defraying the cost of negotiating collective agreements and processing grievances. Among such other purposes are lobbying for particular legislation and financing political campaigns.[70] Although forcing an individual worker to defray the cost of bargaining in his behalf might not violate his freedom of association, forcing him to finance the election of candidates and the passage of legislation he opposed surely would.[71]

What compelling state interest would justify forcing an individual to support financially political causes and candidates with

67. *Id.* at 843.

68. 367 U.S. 740, 775 (1961) (Douglas, J., concurring).

69. *Id.*

70. *See generally* D. CADDY, THE HUNDRED MILLION DOLLAR PAYOFF (1974). Justice Frankfurter summarized the long history of union political involvement in his dissenting opinion in International Ass'n of Machinists v. Street, 367 U.S. at 797 (1961).

71. *See* C. RICE, FREEDOM OF ASSOCIATION 88 (1962). Furthermore, Justice Black argued in *Street* against "[c]ompelling a man by law to pay his money to elect candidates or advocate doctrines he is against . . . ." 367 U.S. at 788.

which he disagrees? Presumably, a "this-is-the-house-that-Jack-built" argument would be needed: collective bargaining facilitates the movement of goods in interstate commerce; strong unions are a necessary prerequisite for collective bargaining; sympathetic legislators and preferential legislation encourage strong unions; substantial union financial support procures sympathetic legislators and preferential legislation; and coerced financial contributions from all workers uniquely insures this substantial union financial support. Even assuming that proponents could sustain every one of the preceding propositions, they would still have to show that the end sought here—unions strong enough to participate effectively in the collective bargaining process—could not be accomplished by less drastic means.

The Court, however, side-stepped the constitutional issue in the *Street* case. Instead, it construed the statute to preclude use of exacted funds for political purposes to which a member explicitly objects, although Mr. Justice Black may have been more sanguine than correct when he asserted that the majority's analysis necessarily stemmed from its fear that such coerced contributions were unconstitutional. The Court's refusal to recognize that fact, as it would probably have had to if it had used the compelling interest/least restrictive means analysis, led to unsatisfactory results.

While the Court purportedly protected the right of dissenting union members to withhold financial contributions, its proffered protection is illusory because of (1) the difficulty of ascertaining the percentage of any member's dues being used for political purposes and (2) the "chilling" burden placed on the individual who can only secure relief by identifying himself and thereby perhaps subjecting himself to obloquy and ostracism. It is perplexing that a Court which has been so sensitive and apprehensive about such "chilling" burdens in other contexts would so willingly impose them in this one.

One explanation is that the Court stubbornly refuses to balance such first amendment claims against what it perceives as Congress' "national labor policy." In *NLRB v. Allis-Chalmers Manufacturing Co.*[72] Justice Brennan, speaking for the majority, did not mince words: "National labor policy . . . extinguishes the individual employee's power to order his own relations with his

72. 388 U.S. 175 (1967).

employer and creates a power vested in the chosen representative to act in the interest of all employees."[73] The Court has certainly construed the exclusive representation rule to that end: it prohibits a willing employee from working for an obliging employer; it prohibits an aggrieved employee from negotiating directly with his employer; and it compels the employee to associate with his fellows, even to the point of requiring him to support causes with which he disagrees but which a majority of his brethren approve. The Court has thus insured that section 9(a) of the NLRA fulfills Mr. Justice Brandeis' prophecy about the closed shop: it has simply substituted the "tyranny of the employee" for the "tyranny of the employer."[74]

Rather than scrutinize section 9(a) carefully to ascertain whether it infringes on associational rights, the Court has sought to accommodate the interests protected by the freedom of association principle and those infringed on by the exclusive representation rule by developing the fair representation doctrine. The duty of fair representation, which allegedly insures that the union will work earnestly on behalf of every employee it is statutorily authorized to represent, cannot work because differences among employees are often irreconcilable.[75] Judge Wyzanski identified just such a conflict in his dissenting opinion to the court of appeals' decision in the *Emporium* case:

> When the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that their position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit. Even if we assume that the whites are tolerant, nay generous, their short-term interest is in conflict with the short-term interest of the non-whites. Nothing—except perhaps a philosophy founded upon long-term interests—can eliminate that basic conflict. Hence it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial issues . . . .[76]

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73. *Id.* at 180.

74. A. MASON, BRANDEIS, A FREE MAN'S LIFE, 303-04 (1946).

75. The Court has conceded as much: "The complete satisfaction of all who are represented is hardly to be expected." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). *See also* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

76. Western Addition Community Organization v. NLRB, 485 F.2d 917, 938 (D.C. Cir. 1973) (Wyzanski, J., dissenting).

The range of potential conflicts among employees is enormous and extends far beyond racial disagreements, though those may be especially acute. Lacking the wisdom of Solomon, union officials have discovered that one cannot serve two masters. Moreover, commentators, even those sympathetic with the exclusive representation rule, concede that employees cannot easily or effectively enforce the union duty of fair representation.[77] This guarantee has thus become largely illusory—a promise kept to the ear of the aggrieved employee but broken to his hope.

Finally, the dissident employee is entitled to exercise his first amendment rights even if he is mistaken about how his real interests might best be advanced. On more than one occasion, when it has denied the employee the right not to associate, the Court has assuaged its conscience by observing that only through pooling their collective strength can employees hope to gain substantial improvements in wages, hours, and working conditions.[78] Implicit in such observations is the conclusion that Congress may deny the individual associational rights because their exercise would not in fact benefit him so much as would foregoing their exercise. Such reasoning, even if correct, is an anathema to traditional first amendment analysis, which does not judge subjective beliefs by tests of accuracy or effectiveness.[79]

The Court also comforts its conscience by pointing out that every individual union member may participate effectively in union affairs as a result of Congressional efforts to promote and insure "industrial democracy." This majoritarian rationale, when

77. *See, e.g.*, Cox, *supra* note 75, at 634.

78. Most recently in the *Emporium* case, the Supreme Court offered its own estimate of the petitioners' likely success if they were permitted to exercise their first amendment rights:

> With each group able to enforce its conflicting demands—the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strife and deadlock, is high; the likelihood of making headway against discriminatory practices would be minimal.

420 U.S. at 68-69. As the Court had pointed out earlier:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees . . . have the most effective means of bargaining for improvements in wages, hours, and working conditions.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

79. Would the Court, for example, seriously entertain an argument that since civil rights activists had little chance of persuading their fellow citizens to adopt an open housing law, they could be denied their right to hold a rally in favor of the law? The Court has, of course, already rejected the argument that a speaker may be silenced simply because he irritates his audience. Feiner v. New York, 340 U.S. 315 (1951).

analyzed under traditional first amendment jurisprudence, is equally untenable. That argument, to repeat, is that the employee may be compelled to join or support an organization because he is entitled to participate democratically in its deliberation. But first amendment freedoms are the very ones that are put beyond majoritarian denial.[80] The minority remains free to exercise them even though the majority would prefer that they would not. Thus Congress could not compatibly with the Constitution pass a law requiring evey citizen to contribute to the Republican Party. Yet a union may accomplish just that result because of its status as the exclusive representative of all employees. Congress could not constitutionally pass a statute forbidding all employees from picketing or distributing handbills criticizing their employers. Yet a union apparently has that power, again by virtue of its exclusive status. The Court has unfortunately forgotten Justice Douglas' admonition that Congress cannot delegate to a private organization the power to accomplish results constitutionally forbidden to Congress itself.[81]

III. THE EXCLUSIVE REPRESENTATION RULE DOES NOT SERVE ANY COMPELLING STATE INTEREST AND UNDULY INFRINGES UPON THE ASSOCIATIONAL RIGHTS OF EMPLOYERS AND EMPLOYEES

Section 9 (a) of the NLRA establishes an appropriately certified union as the exclusive bargaining agent for all employees within a defined unit. Interpretative Board and court decisions have established the following propositions, many of which have already been noted. In any unit where an exclusive bargaining representative has been designated, an employee cannot go to his employer, ask him for a raise, more responsibility, a day off, or discuss grievances with him. Instead, he must act through his union representative.[82] Even though the employee may not have

80. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . . One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *accord*, Murray v. Curlett, 374 U.S. 203 (1963).

81. International Ass'n of Machinists v. Street, 367 U.S. at 777 (Douglas, J., concurring).

82. Technically, the NLRA does permit bilateral negotiation of grievances:

> [A]ny individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, *as long as the*

voted for the union and even though he may not belong to the union, he must depend upon the union to press his claims.[83] In exchange for this unwanted and unsolicited representation, the employee may be compelled to pay dues or fees.[84] Similarly, the employer may not deal with his employees individually, and if he does so he commits an unfair labor practice.[85] The preceding is but black letter law, and it is delineated only to emphasize that section 9(a) on its face and as applied, does infringe upon both the employer's and employees' freedom of association.

This infringement is rationalized on the ground that exclusive representation will promote industrial peace and stability and thereby facilitate the flow of goods in interstate commerce.[86] Congress undoubtedly has the power under the commerce clause, such power being evolved from *Gibbons v. Ogden*[87] to the present, to require observance of the exclusive representation rule *unless* some other provision of the Constitution prohibits that particular legislative command.[88] But in *Carter v. Carter Coal Co.*,[89] the Court stated:

> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment, and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. . . . [T]he conclusive answer is

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adjustment is not inconsistent with the term of the collective bargaining contract. . . .

Labor Management Relations (Wagner) Act § 9(a), 29 U.S.C. § 159(a) (1970) (emphasis added). Although a few early cases construed this provision to permit an employee to take his grievance directly to his employer, it has become a largely meaningless caveat. Most collective bargaining agreements now specify grievance procedures, and courts consistently hold that employees must pursue their remedies under the grievance procedures.

83. Vaca v. Sipes, 386 U.S. 171 (1967).

84. Railway Employee's Dep't v. Hanson, 351 U.S. 225 (1956).

85. The Court established this rule very early; J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

86. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court through Chief Justice Hughes said: "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." *Id.* at 42. Industrial peace and stability are repeatedly said to be the objectives of the § 9 (a) exclusive representation rule. *See, e.g.*, Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973).

87. 22 U.S. (9 Wheat.) 1 (1824).

88. Maryland v. Wirtz, 392 U.S. 183 (1968).

89. 298 U.S. 238 (1936).

> that the evils are all local evils over which the federal government has no legislative control.[90]

For as broad as the commerce clause power is, it is not a grant to which all other constitutional provisions are subordinated. Indeed, it may in some circumstances be subordinate to other prevailing constitutional principles.[91]

Even if Congress rationally concluded that union organizers fomented industrial unrest by encouraging strikes for better wages and thereby impeded the movement of goods in interstate commerce, it presumably could not under the guise of exercising its commerce clause power prohibit union organizers from moving across state lines to urge workers to join unions.[92] Likewise Congress presumably could not deny union organizers the use of the mails for organizational purposes.[93] In fact, the freedom of association principle clearly protects the workers' right to organize.[94]

The simple point is that any exercise of commerce clause power which infringes upon first amendment freedoms is constitutionally suspect because those freedoms are "fundamental" and "preferred." Such exercises of authority survive only if they serve some compelling state interest in the least intrusive fashion. As Justice Douglas once observed:

> The right of association is an important incident of First Amendment rights. The right to belong—or not to belong—is

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90. *Id.* at 308 (emphasis added).

91. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) a concurring opinion set forth that

> every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws.

Id. at 275.

92. *Cf.* Pittman v. Nix, 152 Fla. 378, 11 So. 2d 791 (1943). The *Pittman* court found that an ordinance which made it unlawful to organize a labor union in the town and prohibited solicitation of union memberships on the streets or in any other public place impaired "the well settled legal right of employed workers to organize labor unions and to use their powers of persuasion to induce others to join them, so long as no fraud or coercion is resorted to." *Id.* at 384, 11 So. 2d 794-95. *See also* Staub v. City of Baxley, 355 U.S. 313 (1958) (a city ordinance which required that all persons intending to solicit union memberships must first obtain a permit, which cost $2,000 plus $500 for every member obtained, constituted an unconstitutional prior restraint on freedom of speech).

93. *See, e.g.*, Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

94. *See* note 48 and accompanying text *supra.*

> deep in the American tradition. Joining is one method of expression. This freedom of association is not an absolute . . . . Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown.[95]

None of the interests allegedly served by the exclusive representation rule is compelling. However desirable industrial peace and stability may be, its absence from time to time in any given industry seldom poses any great threat to the nation's welfare. While a strike at any given plant or in any given industry may well affect the profits of the particular employers and the welfare of the particular employees for a specified period, it will generally have a minimal impact on consumer prices for the goods produced and a negligible effect on gross national product. The total number of man-hours lost because of strikes is less than one percent of all man-hours.[96] Even in those rare instances where strike activity does appreciably affect the gross national product, the negative effect stems from the existence of powerful industry-wide unions that can shut down an entire industry and thereby preclude the more flexible responses that occur in decentralized industries hit with strikes. In short, both the incidence and impact of industrial strife have been exaggerated.

Similarly, there is little evidence that union authority will dwindle to the point of ineffectiveness unless the union is given the exclusive right to represent all employees. Comparative studies of union activity in right-to-work and non-right-to-work states show that right-to-work laws do not adversely affect the growth of unions, either numerically or percentage wise.[97] The Court itself noted in *International Association of Machinists v. Street* that railway unions had traditionally refrained from advocating the union shop because they believed " 'that the strongest and most militant type of labor organization was the one whose members were carefully selected and who joined conviction and a desire to assist their fellows in promoting objects of labor unionism . . . .' "[98] The European trade union movement, which is even stronger than its American counterpart, has not only survived but

95. Lathrop v. Donohue, 367 U.S. 820, 881-82 (1961) (Douglas, J., dissenting).

96. *See generally* H. MILLIS & R. MONTGOMERY, ORGANIZED LABOR (1945).

97. Niebank, *In Defense of Right-to-Work Laws*, 8 LAB. L.J. 459, 460-62 (1957).

98. 367 U.S. at 750 n.6 (quoting C. MacGowan, Transcript of Proceedings, Presidential Board, appointed Feb. 20, 1943, p. 5358).

thrived without the legislative grant of exclusive authority to represent all workers. Moreover, "union effectiveness," however desirable it might be thought to be, is not constitutionally guaranteed. If the courts must thus reconcile conflicts between competing values, one of which enjoys constitutional status while the other does not, they must prefer the constitutionally protected value even though Congress has expressed a contrary preference.[99]

Finally, the employer will not likely be harrassed with irreconcilable demands from various employees if the union is deprived of its privileged status as exclusive bargaining agent. Employers in nonunionized industries, for example, are not beset with such harassment. Employers and employees in nonunionized industries have developed various methods for handling disagreements and demands, and these methods would presumably work equally well in industries with unions lacking exclusive authority to represent all workers.

Even if the exclusive representation rule could be shown to serve a compelling state interest, it cannot be proven to be rationally related to the end sought, let alone the least intrusive means of accomplishing that end. Little or no empirical evidence sustains the proposition that the exclusive representation rule promotes industrial peace and stability. In order to carry their burden of proof, proponents would have to show, first, that strikes which impede the flow of goods in interstate commerce occur more frequently in nonunionized industries and, second, that the lack of any exclusive representation rule causes those strikes. This they can scarcely do in a country where less than 25 percent of the work force is unionized and where few work stoppages occur in the nonunionized industries.[100] Indeed, the exclusive representation rule may actually foster industrial unrest. By precluding individuals from settling grievances outside the union-approved channels, it may lead to "wildcat" strikes or employee dissatisfaction which will manifest itself in ways that adversely affect production.[101]

99. The Court's role as the final arbiter of what the Constitution commands is a mandate as old as Chief Justice Marshall's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Moreover, it is a function that the Court jealously guards. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 17-18 (1958).

100. DEPT. OF LABOR, HANDBOOK OF LABOR STATISTICS 366 (1974).

101. *See* Emporium Capwell Co. v. Western Addition Co., 420 U.S 50 (1975).

IV. THE EXCLUSIVE REPRESENTATION RULE IS AN UNCONSTITUTIONAL ABRIDGEMENT OF THE FIRST AMENDMENT RIGHT TO ASSOCIATE FREELY

Unfortunately, the perception that the NLRA generally, and the exclusive representation rule specifically, infringe upon first amendment rights has dawned rather late on the Court, and this may cause the Court to feel trapped within its own unhappy precedents. However, those precedents scarcely foreclose a reexamination of the compatibility of the exclusive representation rule with the first amendment. Justice Douglas once remarked that "all constitutional questions are always open."[102] But beyond the fact that constitutional questions are always open, the precedent may be reassessed and distinguished in light of evolving constitutional doctrine.

First, the original decisions sustaining the constitutionality of the NLRA intimated that the individual employee remained free to bargain with his employer and only later did the Court depart from the clear implication of those earlier holdings. Second, the Court in those later cases did not examine seriously the evidentiary underpinnings of the argument for the exclusive representation rule. Instead, they were accepted at face value. Third, the Court has recently indicated an unwillingness to accept at face value legislative assertions. Fourth, the Court committed itself to the constitutionality of the exclusive representation rule before it had "discovered" that the first amendment guaranteed freedom of association, and the Court has never tried to reconcile these later association cases with the earlier union cases.

Originally, the Court permitted individual negotiation under the NLRA and that permission was essential to a finding that the NLRA was constitutional.[103] The lower federal courts consistently

102. Gideon v. Wainright, 372 U.S. 336, 346 (1963) (Douglas, J., concurring). The classic statement of the reasons why the doctrine of *stare decisis* has only limited application in the field of constitutional law is Mr. Justice Brandeis' dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932).

103. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); Precision Castings Co. v. Boland, 13 F. Supp. 877 (W.D.N.Y. 1936) (exclusive representation provision permissible because it does not prevent employer from dealing with other employees); *cf.* Virginian Ry. Co. v. Federation, 300 U.S. 515, 548-49 (1937) (government conceded that "[the statute] must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees").

adhered to the *Jones & Laughlin*[104] holding that the employer remained free under the NLRA to negotiate directly with individual employees.[105] In *J.I. Case Co. v. NLRB,*[106] however, the Court refused to give any substantial content to the reservations announced in *Jones & Laughlin* and theretofore respected in the lower courts. The Court declined to review "those cases in detail" but confidently asserted "that their decision called for nothing and their opinions contain nothing which may properly be read to rule the case before us."[107] Instead the Court, while purportedly preserving some scope for individual contracts, ruled that such contracts must yield to any collective agreement or "the Act would be reduced to a futility."[108] Justice Jackson failed, however, to explain how or why individual contracts would destroy the NLRA. Over a decade later in the *Hanson* case, the Court was still accepting without any serious inquiry the assertion that "the long-range interest of workers would be better served" by compulsory unionism.[109] Decisions such as these, which rest on *ipse dixit* rather than empirical proof, may be overturned if the Court can be induced to review present evidence which suggest that the assumptions upon which the conclusions in these cases were based are factually erroneous.

Although the Court's refusal to scrutinize the rationality of the exclusive representation rule is arguably consistent with its "hands-off" attitude toward "economic" legislation, it has never flatly said it would not judge the substantive validity of such legislation. In fact, it has almost always coupled its refusals to scrutinize economic legislation with a rhetorical reservation of authority to do so in another "appropriate" case.[110] Moreover, the Court has recently given some content to those rhetorical reservations, as many commentators had urged it to do.[111]

104. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

105. *E.g.*, Illinois Central R.R. v. Moore, 112 F.2d 959 (5th Cir. 1940); NLRB v. Sands Mfg. Co., 96 F.2d 721, 724 (6th Cir. 1938); NLRB v. Union Pac. Stages, 99 F.2d 153, 159 (9th Cir. 1938). *But cf.* NLRB v. Superior Tanning Co., 117 F.2d 881 (7th Cir. 1941).

106. 321 U.S. 332 (1944).

107. *Id.* at 336.

108. *Id.* at 337.

109. 351 U.S. at 234-35 (1956).

110. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34.

111. *E.g.*, Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

In *James v. Stranger*[112] a unanimous court struck down a Kansas statute for recoupment of fees expended for indigent defendants because the statute lacked any rational relation to its avowed purpose. Several times in the same term, the Court used the rational relationship standard to invalidate state legislation.[113] In all these cases, the Court resorted to the "rational relation" standard characteristic of its pre-1935 decision-making. Its new-found willingness to examine the substantive validity of "economic" legislation is especially important because its principal labor decisions were decided during an era when it was unwilling to undertake such an examination. Consequently, the questions of substantive validity raised in those cases may fairly be said to remain open.

Additionally, the Court may rely upon the freedom of association cases as authority for its reassessment of the constitutionality of the exclusive representation rule. The freedom of association cases, which were decided some time after the initial labor law cases, stand as an alternative line of authority which the Court may now apply to the labor relations field.[114] The Court's treatment of the association right itself has evolved from its early decisions, which allowed states to interfere with freedom of association on a mere showing of a rationally related interest, to its later decisions which permit states to interfere only if they can demonstrate a compelling state interest.[115] While the association cases admittedly arose initially in a political context, their ration-

112. 407 U.S. 128 (1972).

113. *E.g.*, Jackson v. Indiana, 406 U.S. 715 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Humphrey v. Eady, 405 U.S. 504 (1972); Reed v. Reed, 404 U.S. 71 (1971).

114. For example, Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), was decided two years before the Court "discovered" the right of association in NAACP v. Alabama, 357 U.S. 449 (1958). The Court did not discuss the freedom of association doctrine in that case, and Justice Black, dissenting in *International Ass'n of Machinists v. Street,* easily distinguished *Hanson:*

> That case *[Hanson]* cannot, therefore, properly be read to rest on a principle which would permit government—in furtherance of some public interest, be that interest actual or imaginary—to compel membership in Rotary Clubs, fraternal organizations, religious groups, chambers of commerce, bar associations, labor unions, or any other private organizations . . . . [T]he *Hanson* case did not hold that the existence of union-shop contracts could be used as an excuse to force workers to associate with people they do not want to associate with . . . .

367 U.S. at 787.

115. *Compare* Uphaus v. Wyman, 360 U.S 72 (1959) *with* Robel v. United States, 389 U.S. 258 (1967). *See generally* ANNOT., THE SUPREME COURT AND THE FIRST AMENDMENT RIGHT OF ASSOCIATION, 33 L. Ed. 2d 865, 880 (1972).

ale is not limited to that context for the first amendment guarantees freedom of association in *all* contexts.[116]

The Court may be induced to look more carefully at the substantive rationality of the exclusive representation rule for three reasons. In the first place the precedents themselves constitute no insuperable bar. As outlined above, they are sufficiently malleable to permit a principled reassessment of the currently prevailing doctrine. Second, the social context in which the NLRA was passed has changed radically. Unions are no longer perceived as weak, yet desirable, institutions whose strength must be succored by benevolent government support.[117] They are now seen as enormously strong institutions whose unchecked excesses threaten the nation's well-being. Third, there is today a growing body of scholarship that calls into question many of the assumptions upon which the NLRA was based.[118] Thus at the very time when the Court may be more inclined than at any other time in the recent past to question facile assertions that unions need legislative preferments, data suggests that the unions do not need and have flagrantly abused the special preferences conferred upon them by Congress. Thus the Court may finally remember that the first amendment protects individual workingmen and businessmen too. To paraphrase Justice Fortas' oft-quoted statement in *Tinker v. Des Moines Independent School District,*[119] "It can hardly be argued that either [employees] or [employers]

116. *But see* C. RICE, FREEDOM OF ASSOCIATION (1962).

> Whether there shall be compulsory or voluntary unionism is a matter for the appropriate legislature to decide. It would be desirable for the legislature to consider the right of association as an *advisory, nonconstitutional* standard on this point, and to refrain from infringing upon it without a genuinely compelling reason.

Id. at 92 (emphasis added).

117. Chief Justice Hughes thus described the plight of the working man in *NLRB v. Jones & Laughlin Steel Corp.*:

> We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

301 U.S at 33.

118. *See* W.H. HUTT, THE STRIKE THREAT SYSTEM (1973); H. LEWIS, UNIONISM AND RELATIVE WAGES IN THE UNITED STATES: AN EMPIRICAL INQUIRY (1963); E. SCHMIDT, UNION POWER AND THE PUBLIC INTEREST (1973).

119. 393 U.S. 503 (1969).

shed their constitutional rights to freedom of speech or [association] at the [factory] gate."[120]

120. *Id.* at 506.