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The Constitutional Right of Association

By Charles E. Rice

Introduction

It has been accurately observed that we are a nation of joiners. Alexis de Tocqueville, as early as 1835, concluded that "in no country in the world has the principle of association been more successfully used, or more unsparingly applied to a multitude of different objects, than in America." Tocqueville noted the ubiquitous character of American voluntary associations in the following comments:

Societies are formed to resist enemies which are exclusively of a moral nature, and to diminish the vice of intemperance: in the United States associations are established to promote public order, commerce, industry, morality, and religion; for there is no end which the human will, seconded by the collective exertions of individuals, desairs of attaining. Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds—religious, moral, serious, futile, extensive or restricted, enormous or diminutive. . . . Wherever, at the head of some new undertaking, you see the Government in France, or a man of rank in England, in the United States you will be sure to find an association.

In these general remarks on the underlying right of association, it is important to note the extent to which the ingrained American associative habit has been acknowledged in the fundamental law of the Constitution. In 1958, the Supreme Court of the United States affirmed, for the first time in unmistakable terms, the status of freedom of association as a fundamental right:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the

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3 Id. at 204-05.
4 2 id. at 114.
"liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.\footnote{NAACP v. Alabama, 357 U.S. 449, 460 (1958).}

The occasion for this affirmation was an attempt by the State of Alabama to oust the National Association for the Advancement of Colored People from that State, ostensibly for that organization's failure to comply with a statute\footnote{:\textit{ Ala. Code} tit. 10, §§ 192-98 (1940).} requiring foreign corporations to qualify before doing intrastate business. The State obtained a court order requiring that the NAACP produce certain records, including a list of all its Alabama members, on the grounds that such information was required in order to answer the association's denial that it was conducting intrastate business. On certiorari from a judgment of contempt for failure to reveal the names, the Supreme Court reversed, holding that the secrecy of the membership list was essential to the freedom of association of the members and that the order constituted an unwarranted invasion of that freedom.\footnote{:\textit{NAACP v. Alabama}, 357 U.S. 449 (1958).} For obvious reasons, the individual members of the NAACP were not parties to the action. The association, therefore, asserted both its own alleged constitutional rights and the constitutional rights of its members. The Court seemed to regard the association and its members as "in every practical sense identical"\footnote{:\textit{Id.} at 459.} for the purpose of the association's assertion of the members' right to silence, a right which would be nullified in the very act of its assertion by the members themselves. The Supreme Court recognized that "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."\footnote{:\textit{Id.} at 462.} Most importantly for our purpose, the Court affirmed, for the first time in unmistakable terms, the fundamental character of freedom of association as a basic constitutional liberty. In view of the essential character of this freedom, and the catastrophic effect of disclosure upon the NAACP, the Court found that the rather tenuous connection between the disclosure of members' names and the state's capacity to determine whether the association was doing intrastate business was insufficient justification for the resultant restriction upon freedom of association.\footnote{:\textit{Three times since 1958, the Supreme Court has considered aspects of this running battle between Alabama and the NAACP. Each time the Court, predictably, sustained the NAACP's contention. \textit{NAACP v. Alabama ex rel. Patterson}, 390 U.S. 240 (1959) (reversing the Alabama Supreme Court's reaffirmation of the contempt}}
In analyzing this newly-asserted freedom of association, notice should be taken of the tacit recognition which was given to it before its explicit proclamation in 1958. Although the varieties of voluntary associations are virtually endless, the development of the basic right of association may be seen from its evolution with relation to a few such groups. Today the freedom of association is principally discussed and applied with reference to labor unions, pressure groups and what, for want of a better term, we can call subversive associations. But, with the possible exception of the last named, the legitimacy of each of these groups has long had the sanction of law to a greater or lesser degree.

**Labor Unions**

The labor union, for example, has had a checkered career under the law. It was not until the era of the Industrial Revolution that the development of the employment relation brought into existence combinations of workmen for the purpose of securing better conditions of work or payment.\(^1\) English common law in the eighteenth century developed the theory that combined action by workers to raise their wages was criminal conspiracy.\(^2\) The gist of the offense was the combination, since concededly the workers could individually refuse to work for less than a certain wage.\(^3\) It could be noted that combinations of workers were not declared per se unlawful, but only those combinations aimed at improving wages and conditions; since there are few other meaningful purposes of workers' combinations, the distinction is of little significance.\(^4\)

This treatment of most concerted labor action as criminal con-

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4. In *Rex v. Journeymen Taylors*, 8 Mod. 10, 88 Eng. Rep. 9 (1721) the unlawful object of the combination was the raising of wages above the rate fixed by a statute; it was thus a conspiracy to violate a general statutory law, and therefore unlawful; see *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 122 (1842); in *Rex v. Eccles*, 1 Leach 274, 168 Eng. Rep. 240 (1783) the object does not appear to have been violative of such an express statute, and Lord Mansfield remarked that "every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence." 1 Leach at 276, 168 Eng. Rep. at 241.
spionage was carried over to the American colonies. Nevertheless, even in pre-Revolutionary America, there were primitive forms of combination among wage earners and other workers, and these were sometimes recognized by the law. After the end of the Revolution, the economic and regional groupings of the people became more sharp. With the decline of the apprenticeship system, the rise of the factory system, and the narrowing of the door through which workers had entered easily into the ranks of employers, the trade union began to develop as an independent, viable institution. These beginnings fore-shadowed the serious commencement of the labor movement in the nineteenth century. It is significant that, although the law continued to regard most concerted labor action as unlawful, there appears to have been virtually no infliction of criminal penalties upon such action in the post-Revolutionary period, whether masters or journeymen were involved.

It has been said that the American courts in the post-Revolutionary period regarded all combinations of workers to improve wages and conditions as criminal conspiracies. On the other hand, it has been urged more precisely that what was forbidden by the American courts was not the mere combination to improve wages and conditions, and not even the use of the strike for that limited purpose, but rather the employment of unlawful means, e.g., picketing, violence, or closed-shop practices, to attain that end.

Any remaining doubts as to the attitude of the American courts toward the right to join labor associations were dissipated by Commonwealth v. Hunt. The defendants had agreed not to work for any person who should employ anyone not a member of defendants’ assoc-

17 See Faulkner, American Economic History 311-15 (1949); Morris, op. cit. supra note 15, at 200; Rayback, op. cit. supra note 16, at 54; Wright, The Battles of Labor 77-78 (1906).
18 See 1 Chitwood & Owsley, A Short History of the American People 538 (1945).
19 Faulkner, op. cit. supra note 17, at 312-13; Morris, op. cit. supra note 15, at 205-06.
22 45 Mass. (4 Met.) 111 (1842).
ciation. This was held not to be an unlawful purpose or means, and therefore it was not a criminal conspiracy. Chief Justice Shaw defined the distinction between the lawfulness of the combination as such and the lawfulness of its object:

The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful . . . . But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed, object of the association, was criminal. 23

After Commonwealth v. Hunt, the criminal conspiracy theory was infrequently used in labor cases, 24 but this result may well be ascribed to the inappropriateness of the theory and the fact that the Hunt decision was really a restatement of the general common law, affirming the right to join labor unions for a lawful purpose, rather than to any revolutionary influence of the decision. 25

While the common law recognized the right of an employee to join a labor association, it also recognized his right under freedom of contract to execute a so-called yellow-dog contract with his employer whereby he pledged not to join a union, and the corresponding right of the employer to insist upon such a contract as a condition of employment. 26 The yellow-dog contract was relegated to the discard by the Norris-LaGuardia Act of 1932, 27 which declared it to be the public policy of the United States that the employee, as well as the employer, should "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment . . . ." 28 The act went on to render unenforceable, rather than void, any contract whereby either an employer or employee agreed not to join an employers' or employees' association. 29 Earlier, the Railway Labor Act had flatly prohibited

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23 Id. at 129.
24 Between 1842 and the Civil War, it was used three times, and was used on eighteen recorded occasions, between 1863 and 1880. In the 1880's it was used more often, though most of the cases are unreported. Witte, supra note 21, at 829.
yellow-dog contracts in the railroad industry.\textsuperscript{30} The invalidation of yellow-dog contracts involved an attribution to labor unions of a preferred status among voluntary associations; the invalidation also, of course, involved an acknowledgment of the general disparity in bargaining power between the would-be employee and the prospective employer.

The right to join labor associations was reaffirmed beyond question in the National Industrial Recovery Act,\textsuperscript{31} the Wagner Act,\textsuperscript{32} and the amendatory Taft-Hartley Act.\textsuperscript{33} Moreover, the preferred status of labor unions among associations was demonstrated by the legal recognition of a duty on the part of employees to join a union under certain circumstances. The Wagner Act of 1935\textsuperscript{34} permitted closed-shop agreements, whereunder an employee must be a member of the certified union at the time he begins employment and must remain so thereafter. The Taft-Hartley Act of 1947\textsuperscript{35} reaffirmed the Wagner Act policy in favor of collective bargaining, but it limited compulsory unionism by prohibiting closed-shop and preferential-hiring agreements.\textsuperscript{36} Under Taft-Hartley, the union shop, wherein an employee need not belong to a union at the time he is hired, but must join within a specified period thereafter, is valid when the agreement is made pursuant to the statutory procedures and when not contrary to state law.\textsuperscript{37} Similarly to the Wagner Act, which did not legitimize compulsory unionism agreements in states in which they were illegal by state law,\textsuperscript{38} the Taft-Hartley Act provided:

Nothing in this Act shall be construed as authorizing the execution


\textsuperscript{36} NLRB v. Shuck Constr. Co., 243 F.2d 519 (9th Cir. 1957); Local 466, Elec. Workers, 120 N.L.R.B. 110 (1960); Carpenter & Skaer, 93 N.L.R.B. 188 (1951).


\textsuperscript{38} Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 313-14 (1949).
or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.\textsuperscript{39}

At this writing, nineteen states have right-to-work laws with their sanction of voluntary unionism and their recognition of the right not to join a labor union.\textsuperscript{40} Right-to-work laws have been sustained by the Supreme Court against constitutional attack on grounds of free speech, peaceable assembly and petition, equal protection, due process, and impairment of contract.\textsuperscript{41} The freedom of choice of the individual employee was further recognized in subsequent cases in which the Supreme Court curtailed the power of unions, operating under union-shop agreements, to use compulsorily-paid dues money for political purposes disapproved by the dues-paying member.\textsuperscript{42}

In short, it can be readily seen that the recognition in fundamental, statutory and case law of the right of labor association is no creature of the last decade. Nor is the basic right to join such groups even a creature of this century, although it has been only in the last fifty years that the effectiveness of its exercise has been ensured. In the process, labor unions have been accorded considerable powers, e.g., to compel membership, not granted to other voluntary groups. Analytically, the granting to unions, which are certified as bargaining agents, of power to represent and bind nonmembers and the power to compel membership or the payment of dues through union security devices, involves an attribution or delegation of governmental power to the union.\textsuperscript{43}

The foregoing cursory summary of the legal development of the right of labor association illustrates the long-standing nature of the right and the continuing tensions in the law between the unions and management on the one hand and between the unions and their mem-

\textsuperscript{43} Compare Railway Employes' Dep't, AFL v. Hanson, 351 U.S. 225, 231-32 (1956), in which the Supreme Court recognized that the private collective bargaining agreement, implemented by federal enforcement machinery, is subject to the first and fifth amendments which bind the federal government. See also Lathrop v. Donohue, 367 U.S. 820 (1961) (similar questions are raised by the integrated bar).
bers on the other. There are some observers who still discuss the labor problem in language more suited to the intellectual barricades of the 1930's than to the realities of the present day. On the contrary, it is increasingly obvious that the major current problems in this area are those created by the continuing excessive hypostatization of the labor union itself. Harold Laski warned of the dangers attendant upon an undue submergence of the individual in the group:

I do not think the importance of this approach can be exaggerated. It makes us see . . . that behind all collective entities, however vast, however ancient, however precious they may be regarded by their members, are always individual men and women, and that it is the will of each of these that lends to the collective "person" whatever strength "it" has. . . . I agree with the view Professor Cohen so strongly held that only by a continuous emphasis that men and women alone are persons can we make responsibility real in the relations of community life. As soon as we personify the idea, whether it is a country or a church, a trade union or an employers' association, we obscure individual responsibility by transferring emotional loyalties to a fictitious creation which then acts upon us psychologically as an obstruction, especially in times of crisis, to the critical exercise of a reasoned judgment.  

To state that labor unions, the most prominent of all "voluntary" associations, are enormously powerful today, is to belabor the obvious. Nevertheless, the reality is a source of legitimate concern, for the conclusion is fair that from the aggrandizement of those groups the public interest and the individual members' freedom of action can suffer much. Labor unions have been the steady beneficiaries of favorable court decisions.  

And, perhaps most importantly, they are practically exempt from the strictures of the antitrust laws which are enforced against business enterprises. Labor unions are deeply involved in politics, almost entirely in behalf of the Democratic Party.  

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45 See, e.g., NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964), in which the Court, employing a strained distinction between product picketing and enterprise picketing, expanded the power of unions to employ secondary consumer picketing as a means of secondary boycott.
46 See F. Peterson, American Labor Unions 105 (1963). The recent proposal by Walter Reuther that his United Auto Workers Union, with nearly 1,200,000 members, merge with the 300,000 member International Union of Electrical Workers would have raised, if giant corporations rather than giant unions had been involved, considerably more private, and even governmental, protest than actually occurred. See N.Y. Times, Feb. 13, 1965, p. 35, col. 1; id., Feb. 11, 1965, p. 25, col. 1. See also discussion in column by David Lawrence, N.Y. Herald-Tribune, Feb. 12, 1965, p. 19.
This raises questions transcending even the elemental issues of fairness posed by their use of compulsorily-extracted dues for political purposes of which their members disapprove. For if the labor leaders have contributed indispensably to the successful waging of a Presidential campaign, who can blame them for expecting official benevolence in return for services rendered?

The repeal of Section 14(b) of the Taft-Hartley Act is one item on labor's legislative program. This repeal would cause the invalidation of the nineteen state right-to-work laws, with a consequent limitation of the employee's freedom not to associate and his basic civil right of choice.

The exaltation of the group, at the expense of the member, as exemplified by the labor union experience, is a fit subject for analysis. For it highlights the truth that in an ordered and free society, intermediate groups, functioning on a level between the individual and his government, are merely means to an end, the common good of their members and society. The welfare of those groups ought not to be an end in itself. For another instance, it ill behooves us, in the face of the inherent wrong and the dire results of racial discrimination, to be complacent about the apparent role of some labor unions in perpetuating that discrimination. While intermediate groups, including labor unions, exist for the benefit of their members, they owe duties as well to society at large. It is fair to say that the cause of equal government under law could well be served by an emphatic reaffirmation that, while labor unions are desirable, they are above neither the law nor the rights of their members and other persons.

48 See cases cited note 42 supra.

49 "The Department of Labor has become an adjunct of the AFL-CIO and the Secretary of Labor is told what to do by the union chieftains. John A. Crimes, Labor-Relations Specialist for the Wall Street Journal, writes as follows: 'W. Willard Wirtz is discovering that being Secretary of Labor often also requires being labor's Secretary. Put another way, Mr. Wirtz is getting some practical lessons in how his freedom of action can be sharply curbed by the wants of the AFL-CIO. The federation feels such a strong proprietary interest in the Johnson administration's activities that it claims a veto power over Mr. Wirtz. Three times in recent weeks the Secretary has started out to do something and has found the considerable bulk of federation president George Meany blocking the way.'" Column by David Lawrence, N.Y. Herald-Tribune, Feb. 12, 1965, p. 19.


52 "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association." Universal Declaration of Human Rights art. 20.
Pressure Groups

The right to form and join a political party has long been recognized as a fundamental one, whether as a corollary of the constitutional right of suffrage,\textsuperscript{53} or the rights of assembly and petition,\textsuperscript{54} or simply as a right inherent in a free people.\textsuperscript{55} A related but more important type of association, in terms of contemporary constitutional controversy, is the pressure group. Broadly speaking, it is fair to say that an affirmation of a fundamental right to join and support pressure groups carries with it a recognition of similar rights relating to less contentious voluntary groups such as fraternal and social organizations. Therefore, an evaluation of the extent to which the pressure group and its members are protected by the Constitution will be helpful in assessing the constitutional status of voluntary associations in general.

The private pressure group is familiar, not only as a lever for influencing legislators and officials, but also as a source of information for their guidance in formulating public policy.\textsuperscript{56} Because the functions of the pressure groups have become so essential in the political process, the right to form and join such organizations, although not absolute, is fundamental and constitutionally protected.\textsuperscript{57} The right to associate in pressure groups may be traced to the right of petition.\textsuperscript{58} The right to petition the Crown for a redress of grievances was enunciated in Magna Carta in 1215.\textsuperscript{59} The right exerted influence on the legislative, judicial, and executive processes of the government, and came to be recognized as a fundamental right of the subject.\textsuperscript{60} The Bill of Rights of 1689, therefore, did not create the right of petition, but merely ratified it\textsuperscript{61} by providing: “That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.”\textsuperscript{62}

This right to petition for a redress of grievances was employed by

\textsuperscript{53} Sarls v. State ex rel. Trimble, 210 Ind. 88, 166 N.E. 270 (1929); Ex parte Wilson, 7 Okla. Crim. 610, 125 Pac. 739 (1912).

\textsuperscript{54} Britton v. Board of Election Comm'rs, 129 Cal. 337, 342, 61 Pac. 1115, 1117 (1900).

\textsuperscript{55} Davidson v. Hanson, 87 Minn. 211, 92 N.W. 93 (1902).

\textsuperscript{56} Abernathy, The Right of Association, 6 S.C.L.Q. 32, 42 (1953).


\textsuperscript{58} D. Blaisdell, American Democracy Under Pressure 93 (1957).

\textsuperscript{59} R. Perry, Sources of Our Liberties 21 (1959).


\textsuperscript{61} R. Perry, Sources of Our Liberties 228 (1959).

\textsuperscript{62} Id. at 246.
the American colonists in complaining to King George III. The First Continental Congress, in its Declaration and Resolves, showed the connection between the right of assembly and the right of petition. The first amendment to the Constitution reaffirmed the right of petition, but in language which left some doubt about its purpose and relation to the right of assembly. That this language constituted the right of petition as the primary right, and the right of assembly as the ancillary right, thereby guaranteeing a right to assemble in order to petition the national government, was indicated by the Supreme Court in 1875. This restricted right of assembly, though seemingly accurate in a historical sense, has yielded today to a recognition that the right of assembly, for any lawful purpose, “is a right cognate to those of free speech and free press and is equally fundamental.” The right of petition, too, underwent an expansion, so that it is no longer confined to rather negative demands “for a redress of grievances,” but includes as well the right to ask for active and positive government intervention in aid of the interest or objective promoted by the petitioners. Today there are many thousands of voluntary, non-profit associations, of all sorts and purposes. In one way or another, each of these is actually or potentially a pressure group.

This basic right to form and join voluntary associations, as established by the legal history of the pressure group, is not immune from reasonable restrictions, such as those found in regulations of lobbying

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63 See id. at 271 for resolutions of the Stamp Act Congress of 1765.
64 “That they have a right peaceably to assemble, consider of their grievances, and petition the King . . . .” R. Perry, Sources of Our Liberties 288 (1959).
65 “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.
67 See BLAISDELL, AMERICAN DEMOCRACY UNDER PRESSURE 94 (1957).
69 U.S. Const. amend I.
70 See U.S. Senate, The Constitution of the United States of America—Analysis and Interpretation (2d ed. Small & Jayson 1964) which draws this conclusion at 915. The cases leading to this conclusion are discussed at 915-50.
71 See Bone, American Politics and the Party System 71-72 (2d ed. 1955); McKean, Party and Pressure Politics 430 (1949); Abernathy, The Right of Association, 6 S.C.L.Q. 32, 41-42 (1953).
in Congress\textsuperscript{78} and state legislatures.\textsuperscript{74} It is clear, none the less, that the fundamental right has long existed and enjoyed the sanction of the law.

What is no less clear is the utility of voluntary groups as intermediate agents in the body politic. As the nation sets its course toward the Great Society, it becomes apparent that the specifics of that goal are to be attained through the agency of a substantial, and unprecedented, peacetime accretion of power to the federal government. The wide assumption by Washington of social functions heretofore primarily performed by private groups, in education, medicine, social welfare and other fields, poses the possibility that voluntary intermediate groups may atrophy and lose their effectiveness as pluralistic repositories of meaningful responsibilities. It ought to be the concern of lawmakers and students of the law to ensure that, through a proper respect for the principle of subsidiarity, voluntary groups retain their vitality.\textsuperscript{76} For that vitality is, in a sense, an index of the state of individual liberty in any commonwealth. Significantly, when the radical intellectuals of the French Revolution found the National Assembly at their disposal, one of their early actions, in 1789, was to dissolve at a stroke all trade guilds, corporations and unions.\textsuperscript{76} The Loi Chapelier\textsuperscript{77} further prohibited the formation of corporate bodies, professional associations, trade unions, and similar bodies.\textsuperscript{78}

While voluntary groups merit our concern for their preservation, they bear a concomitant responsibility. It is not within the compass of these general remarks to comment in detail upon this aspect of the problem. However, candor compels the parenthetical assertion that it is in the field of racial relations, more than in any other today, that private groups have defaulted in discharging their responsibilities to the public. This stricture has particular reference to some of the pres-

\textsuperscript{74} See Bons, \textit{op. cit. supra} note 71, at 207.
\textsuperscript{76} In sharp point of fact, of course, the federal government today possesses the power to curtail, and even terminate, the effective existence of many private nonprofit organizations through the selective granting or withholding of income tax exemptions. Regardless of the political views involved, we ought to scrutinize carefully the recent action of the Administration in terminating the tax exemptions of some conservative organizations for alleged political activity. A number of other tax-exempt organizations openly supported President Johnson in the 1964 campaign, but the Internal Revenue Service apparently has not challenged their tax privileges. See \textit{N.Y. Times}, Nov. 17, 1964, p. 22, col. 3.
\textsuperscript{76} See \textit{Dicy}, \textit{Law and Public Opinion in England} 469 (1926).
\textsuperscript{77} June 14-17, 1791.
\textsuperscript{78} See \textit{Cahn}, \textit{The Predicament of Democratic Man} 100 (1961); \textit{Dicy}, \textit{op. cit. supra} note 76, at 469; \textit{Duguit, Law in the Modern State} 111 (1919).
MIGHT OF ASSOCIATION

sure groups on both sides of the civil rights controversy. We have seen on the one hand covert appeals to racial prejudice under the cloak of advancing the cause of individual freedom of choice. On the other hand we find an exaggerated emphasis upon racial sins and alleged "rights" to an extent where the civil rights movement has assumed in some quarters eccentric and revolutionary proportions. The net effect of the widespread abuse of the right of association in this area predictably will be the generation in the American people of a color-consciousness so deep that the elimination of it will be the work of generations yet unborn.⁷⁰

"Subversive" Associations

But if the pre-1958 history of labor unions and pressure groups evidences the existence of a basic freedom of association for many years before the Supreme Court declared it, the chronicle of subversive associations is markedly different in effect. For, in that category, American law has never formally recognized a fundamental right of subversive association.⁸⁰ From the Alien and Sedition Laws⁸¹ to the Civil War experience,⁸² through World War I,⁸³ the rise of criminal anarchism and criminal syndicalism,⁸⁴ the Ku Klux Klan agitation in the 1920's⁸⁵ and the Nazi activity prior to and during World War II,⁸⁶ there was a clear recognition in the law that some associational activities were so inimical to the prevailing requirements of public order and safety, that one undertook them only at his peril. Through

⁷⁰ So far there has not emerged any effective champion of the ideal of color blindness advanced by Mr. Justice Harlan in his dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).
⁷¹ Mr. Justice Brandeis hinted at a possibly different approach in 1927 when he stated that he was "unable to assent to the suggestion ... that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment." Whitney v. California, 274 U.S. 357, 379 (1927) (concurring opinion). Compare Yates v. United States, 354 U.S. 298 (1957).
⁸¹ 1 Stat. 566, 570, 577 (1798).
⁸² See generally RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951).
⁸³ See Goldman v. United States, 245 U.S. 474 (1918); Oarar v. United States, 261 Fed. 257 (5th Cir. 1919); Wells v. United States, 257 Fed. 605 (9th Cir. 1919); Bryant v. United States, 257 Fed. 378 (5th Cir. 1919).
⁸⁶ See Note, Recent Legislative Attempts to Curb Subversive Activities in the United States, 10 GEO. WASH. L. REV. 104 (1941).
World War I, the primary restrictive weapon was legislation punishing active subversive conspiracy on the part of the individual defendant.\(^7\) The restrictive legislation aimed at the criminal syndicalist and criminal anarchist movements provides the first significant example of punishment imposed for membership, as such, in a subversive group.\(^8\) Similar strictures were imposed upon members of the Ku Klux Klan\(^9\) and, by the Smith Act, upon members of Communist, Nazi, and Fascist groups.\(^9\) Similarly, the Voorhis Act, effective January 15, 1941, required registration with the Attorney General, and the filing of detailed information including membership lists, by certain types of political organizations subject to foreign control, certain types of political or foreign-controlled organizations engaged also in military activity, and organizations which aim to forcibly overthrow the government.\(^1\) Alien members of Communist, Nazi, or Fascist associations were subject to exclusion from the country\(^2\) and, if they were

\(^7\) For example, the Conspiracies Act of July 31, 1861, provided in part, “if two or more persons . . . shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States . . . each and every person so offending . . . shall be punished by a fine . . . or by imprisonment . . . .” 12 Stat. 284, upheld in In re Impaneling and Instructing the Grand Jury, 26 Fed. 749 (D. Ore. 1886). The Espionage Act of 1917 read in part, “if two or more persons conspire to violate the provisions . . . of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished . . . .” 40 Stat. 219.

\(^8\) “Any person who . . . (4) Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . is guilty of a felony . . . .” CAL. PEN. CODE § 11401, upheld in Whitney v. California, 274 U.S. 357 (1927). Scienter was found to be a requirement of the statute. Compare the result in De Jonge v. Oregon, 299 U.S. 353 (1937).

\(^9\) See N.Y. CIV. RIGHTS LAW §§ 53-57.


\(^2\) 54 Stat. 1201 (1940), 18 U.S.C. § 2386. The statute defines the scope of political activity to which it applies. At its convention in November, 1940 the Communist Party, U.S.A., resolved: “That the Communist Party of the U.S.A., in convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International . . . for the specific purpose of removing itself from the terms of the so-called Voorhis Act.” The Subversive Activities Control Board found, however, that this tactic did not alter the domination of the Communist Party, U.S.A., by the Communist International. INTERNAL SECURITY SUBCOMM., SENATE COMM. ON THE JUDICIARY, 84TH CONG., 1ST SESS., REPORT ON THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA 2 (Comm. Print 1955).

naturalized, they were liable, in some instances, to denaturalization.\textsuperscript{93}

In 1951, in \textit{Dennis v. United States},\textsuperscript{94} the Supreme Court upheld the convictions of eleven leading members of the Communist Party on a charge of conspiring to violate the substantive provisions of the Smith Act. Even more stringent anti-Communist legislation was enacted in the early fifties.\textsuperscript{95} In 1957 the conspiracy provisions of the Smith Act were restrictively construed by the Court in \textit{Yates v. United States},\textsuperscript{96} holding that Congress intended to punish the advocacy only of concrete action for the forcible overthrow of the government and not mere advocacy of forcible overthrow as an abstract doctrine.\textsuperscript{97}

Nevertheless, the conclusion is justified from the principal cases decided prior to 1958, that the law theretofore definitely did not recognize in principle a basic right of subversive association. Indeed, with few exceptions, the courts legitimized and implemented severely hostile legislation directed against such groups and their members.

Nor does the case law subsequent to the Supreme Court’s first explicit recognition in 1958 of “freedom to engage in association for the advancement of beliefs and ideas,”\textsuperscript{98} support the notion that subversive groups will be accorded the same fundamental freedom of association long extended implicitly, and explicitly after 1958, to other organizations.\textsuperscript{99} And it could not logically be otherwise. There cannot be a constitutionally protected right to join or support a subversive association which levels a fundamental attack at the state itself and its government. The Constitution cannot consistently contain within itself detailed provisions for its permanent endurance unto generations yet unborn and at the same time legitimize the efforts of those who would disregard those provisions and overturn its very foundations. Mr. Justice Frankfurter approached the issue in the \textit{Dennis} case, where he observed that “no government can recognize a ‘right’ of revolution, or a ‘right’ to incite revolution if the incitement has no

\begin{itemize}
\item \textsuperscript{93} See Baumgartner v. United States, 322 U.S. 665 (1944).
\item \textsuperscript{94} 341 U.S. 494 (1951).
\item \textsuperscript{96} 354 U.S. 298 (1957).
\item \textsuperscript{97} Id. at 320.
\item \textsuperscript{98} NAACP v. Alabama, 357 U.S. 449, 460 (1958).
\end{itemize}
other purpose or effect.” The Constitution provides measures, such as frequent elections and judicial review, to forestall usurpation and abuse. It sanctifies neither a despotism imposed in its name nor the efforts of those who would pervert constitutional guarantees to cloak their conspiracy to destroy the Constitution itself. This is especially true of a foreign-directed conspiracy such as the Communist enterprise. At the same time, however, it must be recognized that measures taken against even subversive associations must conform to the basic standards governing governmental action in general, such as due process and the first amendment freedoms of speech and press. The problem here as in similar areas is one of balancing between the state’s right and duty to preserve itself and the asserted individual or associative freedom of expression and action.

The suspicion is merited that in recent years the Supreme Court has shrunk from a frank intellectual confrontation with the realities of the Communist problem. A case in point is Aptheker v. Secretary of State where the Court reversed the denial of passports, pursuant to section 6 of the Subversive Activities Control Act of 1950, to Herbert Aptheker, editor of the Communist Party’s theoretical journal, Political Affairs, and Elizabeth Gurley Flynn, the Party chairman. In Aptheker, the Court, with Justices Clark, Harlan, and White dissenting, refused to construe the statute as applied to the petitioners and instead, construing it on its face in a manner normally reserved for the preferred freedoms of the first amendment, ruled the section unconstitutional on its face since it “too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment.”

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100 341 U.S. at 549 (concurring opinion).
101 See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 174-75 (1961) for an acknowledgment by Justice Douglas, who dissented on fifth amendment grounds from the majority’s upholding of the Control Board’s registration order, that foreign control makes the Communist Party particularly vulnerable to regulation.
105 Miss Flynn is since deceased and, incidentally, she was cremated in Moscow, where her ashes were honored in a ceremony at the Kremlin. N.Y. Times, Sept. 9, 1964, p. 3, col. 1.
107 378 U.S. at 505. See also Baggett v. Bullitt, 377 U.S. 360 (1964), in which the Court invalidated, as unconstitutionally vague, a Washington State loyalty oath, required of state employees and teachers, which was identical to a Maryland oath which, in the view of dissenting Justices Clark and Harlan, had been sustained against a vagueness attack in Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (per curiam).
A basic note of unreality is struck by the Court’s refusal to notice judicially the nature and effect of the Communist Party and its general operations. In cases involving the membership clause of the Smith Act, for example, the Court, applying the evidentiary requirements enunciated in the conspiracy case of Yates v. United States, requires that, in each case, it must be shown that the Communist Party advocates the unlawful, forcible overthrow of the government and, secondly, that the particular defendant has the necessary knowledge and intent. The finding of unlawful advocacy by the Party, however, must be made only on the basis of the evidence in the record of the instant case “and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party.” This rule overlooks the technique of judicial notice, which was employed in 1928 in People ex rel. Bryant v. Zimmerman to support the determination of the New York State Legislature that the Ku Klux Klan is engaged in such invidious advocacy and activity that it ought to be required to disclose its membership. The result now is that if two members of the Communist Party are prosecuted under the membership provisions of the Smith Act in separate trials, and the evidence in each case sufficiently shows that each defendant has the necessary knowledge and intent, one may be convicted and one may be acquitted because of variances in the proofs of the common issue of whether the same Party is engaged in unlawful advocacy.

111 278 U.S. 63, 76-77 (1928).
112 The statute in Zimmerman made continued membership in an organization ordered to register, with knowledge that the organization has failed to register, a misdemeanor, N.Y. Civ. Rights Law § 56. The Zimmerman case, therefore, does not limit the technique of judicial notice to a non-criminal proceeding.
113 In the Noto case, the conviction of Noto was reversed because the Party was not shown, on the record, to be engaged in illegal advocacy. 367 U.S. at 299. In fact, the proof of his own knowledge and intent was also lacking, so that there could have been no conviction even if the Party’s advocacy had been proven. But if Noto’s knowledge and intent had been proven, the defendant in the companion Scales case, whose conviction was upheld, would have been punished, while Noto would have been freed because of a failure in the proof of a common issue. This analysis assumes, of course, that the local units of the Party in which defendants were members were both engaged in unlawful advocacy. It may be unfeasible to notice judicially the nature of the advocacy and activity of a local or state branch of the Party, even if the Court were to notice the nature and purpose of the Party as a whole. Even if the Court should notice judicially the national character of the Party, it would be preferable to require some actual proof on the record as to the “conspiratorial-nexus,” 367 U.S. at 231, between the local branch and the national Party.
over, the requirement of separate proof in each case on this issue imposes an unnecessary burden upon the government, without justifiable benefit to the accused, requiring a parade of witnesses in each case to testify on the specific applications of the Marxist-Leninist dogma and the activities of the Party which are, or at least ought to be, common knowledge for every schoolboy. The various congressional declarations as to the nature of Communism and the purposes and activities of the Communist Party of the United States are at least as supportable from common knowledge as were the conclusions of the New York State legislature concerning the Ku Klux Klan. This matter of judicial notice then, is one in which a more realistic approach to the problem of law enforcement may be possible without an infringement of properly-conceived rights of defendants or of voluntary associations in general.

Conclusion

The subject of unincorporated non-profit associations is a large one, and involves many more types of organizations than have been specifically discussed here. Rather than attempt an inclusive survey of the area, it is the burden of this article to show the existence of a basic freedom of association, applicable to all such groups, and to suggest areas in which the vitality of intermediate groups is encouraged or endangered by current legal developments. Because the freedom of association has been most sharply defined in relation to labor unions, pressure groups and “subversive” associations, the status of those groups has been specifically examined here. This is not to imply that they are the only significant unincorporated, non-profit associations, nor that they are typical. Their development, and problems, are discussed merely to sketch the character of the underlying freedom of association and, in the case of the subversive groups, to show that the freedom is not indiscriminately recognized and is not without limitation. Hopefully, a greater awareness of the freedom of association and its corollaries will contribute to a clarification of the position of voluntary associations in general and to the responsible fulfillment of the functions which are properly theirs.