

FREEDOM OF ASSOCIATION: INDIAN TRIBES, WORKERS, AND COMMUNAL GHOSTS

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I. INTRODUCTION

You truly do me a great honor by inviting me to give the Sobeloff Lecture. I am particularly pleased to give this lecture because of who my predecessors have been and, even more, because of what kind of lawyer, judge, and *mensch* Judge Sobeloff was. It is no exaggeration to say that to speak of Judge Simon E. Sobeloff today, nearly fifteen years after his death, is to speak of a legendary figure. Lawyers I admire tell and retell the tale of Solicitor General Sobeloff's refusal to sign the government's brief in *Peters v. Hobby*,¹ a case challenging the harassing application of a "Red scare" government loyalty program. Professor Peters of the Yale Medical School already had passed several loyalty tests without incident, and Judge Sobeloff believed that the government should confess error and be done with a bad business.

Judge Sobeloff's courageous decision not to go along despite considerable pressure simply to sign off is the stuff of legends, in part because Judge Bazelon retold the story at the memorial service for Judge Sobeloff.² Judge Bazelon noted that Sobeloff's refusal to be a good soldier, to hold his nose but to sign the brief, very possi-

* Professor of Law, Boston University. B.A., Yale University, 1969; M.U.S., 1972; J.D., Yale Law School, 1972. After many years of teaching law, I find myself blessed with friends who are ready to aid my scholarly efforts and even to try to save me from myself. Before presenting this lecture, I was lucky to have the chance to try it out "out of town" at law faculty workshops at Louisiana State University and the University of Texas, as well as at Boston University. All three sessions helped me a great deal; I hope those who talked with me about groups are able to detect at least a few shards of evidence of their contributions.

Friends who deserve particular thanks for their conversation and their careful, critical, and constructive reading of early drafts include: Kathy Abrams, Ed Baker, Victor Brudney, Steve Diamond, Mary Ann Glendon, John Leubsdorf, Hugh Macgill, Maeva Marcus, Bruce Mann, Martha Minow, Jim Pope, Larry Sager, David Seipp, Carol Weisbrod, and Larry Yackle. I also had outstanding research assistance from Linda Love Mesler and, particularly, from Leiv Blad. Finally, as always, Peggy Thomas did an incomparable job of taking care of our entire crew. I am most grateful to Mike Kelly and the faculty and students at the University of Maryland School of Law for the opportunity to speak in memory of Judge Sobeloff.

1. 349 U.S. 331 (1955).

2. Judge Simon E. Sobeloff Memorial, 523 F.2d 6, 6 (1975) (remarks of Judge David L. Bazelon).

bly cost Judge Sobeloff an appointment to the United States Supreme Court.³ And Judge Bazelon stared directly at Chief Justice Burger, the man who did sign the brief, as he recalled Judge Sobeloff's rare act of lawyerly courage.

According to Judge Bazelon, Judge Sobeloff told friends who expressed concern about his decision and its possible effects on his career: "I'm not doing this so I can live with my friends. I do it only because I must live with myself."⁴ Noble as it was, Judge Sobeloff's reply suggests a typical, important, but ultimately false, dichotomy. I do not mean that Judge Sobeloff intended to insist on an "either/or" choice between one's circle of friends and oneself. Indeed, he understood better than most that we are made who we are by the communities we come from and by the communities we choose to enter. Or, in more academically fashionable terms, the webs of significance spun even by singular individuals mean something because of the groups in which these individuals achieve meaning.

In less high-falutin words, Judge Sobeloff's action and his explanation for it exemplify a vital, communal story. His legal legend grows not only because of his principled refusal to go along with injustice, but also because as a judge he demonstrated "learning in wisdom, tempered by a tremendous feeling for people."⁵

Even as individuals trained in the atomizing, skeptical cauldron of the law, we cannot escape the power of group symbols. We recognize and help make communal legends and tales that suggest how the excessively individualistic focus of our law is misleading and often mischief-making. As Karl Llewellyn argued, in legal thought we maintain a "vicious heritage of regularly viewing parties . . . as single individuals."⁶ I am going to invoke legal realists, of all people, as I scrutinize legends and ghosts.

II. THE COMMUNAL GOLDEN AGE AS A POSSIBLE GOLDEN CALF

I do not join uncritically in the mystical leap backwards to a golden age of community, even though such a move is much in vogue today. The legal historian in me doubts that there ever was a time when contented folks knew their places in some great chain of being. Probably, people never generously tolerated each other's

3. *Id.* at 7-8.

4. *Id.* at 8.

5. *Id.*

6. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 734 n.63 (1931).

foibles while appreciating the craftsmanship of virtuous lutemakers. Our ancestors, no matter where they lived, never had the time, inclination, or mutual respect needed to undergo the many evenings required for real participatory democracy.

Nor am I urging a golden mean between atomistic individualism and organic republicanism.⁷ Instead, I suggest that we have lost familiarity with a crucial phenomenon concerning community, and that it is important to develop an independent constitutional right to freedom of association.

The right I advocate is not limited to a choice between intimate associations and associations instrumental in the cause of expression. It is neither merely a protected expressive right nor an unprotected commercial claim. Like all other rights I know, this right will not always be trump. In a sense, of course, all legal rights are instrumental. To put this skeptical point another way, in law there are no ends, just means. But not every conglomeration of individuals should be equally able to invoke the right I proclaim here.

To join groups is as American as for all of us to proclaim our individualism together all the time. As Madison, Tocqueville, and myriad other, less venerated elitists made abundantly clear, voluntary associations in America have been both distinct, and very probably more vital to political and social stability than are analogous groups in other countries.⁸ The role of groups both in bringing about, and sometimes in resisting, the unspeakable horror of recent German and Soviet history, for example, makes American ambivalence about groups seem something of a curiosity, a singular tension almost peripheral to the main action of modern history. Yet that might be said of our constitutional law as well. Because I follow my late friend Bob Cover in the belief that law is a bridge, perhaps *the* bridge, between what we are and what we might become, I am not reluctant to use judicial opinions as my texts, as useful springboards for trying to depart from current, dominant ways of thinking.⁹

7. I am sobered by the old southern political saying that "the only thing you'll find in the middle of the road is a yellow stripe and dead animals."

8. For a brief review of the statements of Madison, Tocqueville, and other observers concerning the incomparable importance of groups in the United States, see Soifer, *infra* note 12.

9. Bob Cover often advanced what at first appears to be a bleak vision, particularly dark concerning the role of judges. See R. COVER, *JUSTICE ACCUSED* (1975); Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986) [hereinafter *Violence*]. But he also expressed great hope in law as "a challenging enrichment of social life," Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4, 68 (1983) [hereinafter *Nomos*], that might provide "the bridge—the committed social behavior which constitutes the way a group of people will attempt

It seems appropriate to begin with one of Tocqueville's prescient statements, words that unfortunately seem more accurate every year. Tocqueville said there is a great danger of "administrative despotism" in America.¹⁰ He warned of an "orderly, gentle, peaceful slavery which . . . could be combined, more easily than is generally supposed, with some of the external forms of freedom and . . . [has] a possibility of getting itself established even under the shadow of the sovereignty of the people."¹¹ To counter this danger, to amplify the free voices of individuals, Tocqueville emphasized the importance he perceived in the extraordinary propensity, even the basic natural right, of Americans to become a nation of joiners.¹² It is the constitutive memory of that function, that elemental aspect of American law both on the books and in action, that I seek to resuscitate so we may commence reconstruction.

III. WHY DISCUSS AN INDEPENDENT RIGHT OF FREEDOM OF ASSOCIATION?

These days we are inundated with talk about groups, communities, and associations. Why is this particular fixation such a major part of our intellectual milieu? Why hang rights on groups? Tales (and the shaggy dog stories they tend to wag) of the hopes and dangers of faith in community have waxed and waned throughout American history. The effort to grope for groups continues to produce strange, perhaps even dangerous, bedfellows. Many of us maintain healthy fears of decisions made by unaccountable power elites who gather at exclusive watering-holes, of the grip of cults over the will of individuals, of the spectre of mob violence, and of

to get from here to there." *Id.* at 9. See also Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 179, 181 (1985) [hereinafter *Folktales of Justice*].

If we embrace communal ghosts even while we recognize their dangerous tendencies, we may create more and better room for ourselves and our posterity. A room entirely of one's own, Virginia Woolf notwithstanding, is a tough place to work or live. We need privacy, but we also need others to make sense of our efforts at communication. As Milner Ball recently asked, "Isn't the primary reality and real mystery the community? Is it I or is it the neighbor and our binding that is wonderful?" Ball, *Humanizing Law* (Book Review), 35 *UCLA L. REV.* 547, 554 (1988) (reviewing J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 1986).

10. A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 666-68 (J.P. Mayer ed. 1966).

11. *Id.* at 667.

12. *Id.* Tocqueville's views on groups provide one of the themes discussed in Soifer, "Toward a Generalized Notion of the Right to Form or Join": *An Essay for Tom Emerson*, 38 *CASE W. RES. L. REV.* 641 (1988). See also Schlesinger, *Biography of a Nation of Joiners*, 50 *A. HIST. REV.* 1 (1944).

the baleful influence of economic power consolidated in lobbying and election spending.

I cannot put all such fears to rest. Nor will my argument for a limited independent right of freedom of association blaze a clear path to an other-directed, altruistic utopia. But we may find a glimmer of hope in dusty but intriguing constitutional decisions and in a debate about communal ghosts that is nearly a century old.

By thinking seriously about our myriad communities in the context of several recent constitutional cases, we may at least avoid the kind of howler exemplified in President Reagan's Executive Order 12,333.¹³ This executive order reconstituted National Security Council procedures in December 1981 to enhance government secrecy¹⁴ (and thereby set in motion the coups-de-loop and loopy countercoups that helped bring us the Iran-Contra rats' nest). Our President—or people speaking for or through our President—stressed, repeatedly, and with capital letters no less, the common concern of something called “the Intelligence Community.”¹⁵ This doubly oxymoronic statement reveals the propensity of sponge-like words such as “community” and “intelligence” to be easily devalued, or worse. Being more careful, less mystical, and yet neither hypocritical nor hypercritical about the symbolic power of the idea of community may help us struggle forward a few steps through the mythic haze of individualism which does much to keep the American legal system afloat.¹⁶ When we deny the vital functioning of groups in our world, we even impoverish the pursuit of individual fulfillment.

One might say, however, that the individual in tension with community is a trite tale. In fact, it is so trite that it falls into the trap once called the fallacy of “the conservation of historical energy.”¹⁷ It is a common yet nevertheless big mistake to assume that if a sense of community decreases, a sense of individual worth automatically increases. It is also an error simply to assume that the reverse is necessarily or even generally true. But even the

13. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981). In describing the “Goals [of] the National Intelligence Effort,” the first specific goal mentioned was: “Maximum emphasis should be given to fostering analytical competition among appropriate elements of the Intelligence Community.” *Id.* at 59,942.

14. *Id.*

15. *Id.*

16. See generally A. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY 11-21 (1985).

17. J. HEXTER, REAPPRAISALS IN HISTORY 42 (1962).

sophisticated irony that individuals need others and that hell is other people seems unexceptional.

What is striking about legal thinking is that we insist on individual rights without inquiring seriously about the internal or external dimensions of the paradigmatic individuals we construct. We simply ignore major themes of twentieth century science, psychology, sociology, and anthropology, to say nothing of what may be even trickier genres of literary criticism, religion, and history. In part this is because to do otherwise seems to require belief in, or at least obeisance to, what Morris Raphael Cohen derided as "communal ghosts."¹⁸ It is also because we have generally assumed progress from status to contract, and we have allowed legal fictions about class representation, corporate entities, and formal citizenship to go virtually unchallenged.¹⁹ Legally, the individual still thrives in splendid, hypothetical isolation.

Our first-year law school paradigms help blind us to a point Arthur Bentley made eighty years ago: "The most insignificant suit between two parties over a contract is dealt with socially on the basis of great group interests which have established the conditions and the bounds for it."²⁰ In chasing *A* and *B* around Blackacre, we celebrate detachment, but we may confuse a lawyer's professional detachment with the detachment of the undertaker. We overemphasize symmetry and the need to reason things out. When logic

18. M. COHEN, *Communal Ghosts in Political Theory*, in *REASON AND NATURE* 386 (1931). This essay was originally published as Cohen, *Communal Ghosts and Other Perils in Social Philosophy*, 16 *J. PHIL.* 673 (1919). For a fine discussion of Cohen, and particularly of his tendency to seek balance by defining entire fields of discourse in terms of monolithic, abstract extremes, see D. HOLLINGER, *MORRIS R. COHEN AND THE SCIENTIFIC IDEAL* 51-58 (1973).

19. For recent works criticizing such assumptions, see, e.g., M. DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986); R. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978); S. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987). See also Abrams, "Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act," 63 *N.Y.U. L. REV.* 449 (1988).

20. A. BENTLEY, *THE PROCESS OF GOVERNMENT* 277 (1908). In C. Weisbrod, *Article Two as a Framework for Groups* (1987) (manuscript on file with author), Weisbrod elaborates reasons why Karl Llewellyn was so enamored of Bentley that he described some of his own work in the early 1930s as simply "a rediscovery of Bentley" in Llewellyn, *The Constitution as Institution*, 34 *COLUM. L. REV.* 1, 1 n.1 (1934). For a fine discussion of Llewellyn's attention to differences among groups of merchants in the context of drafting the Uniform Commercial Code, see Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 *HARV. L. REV.* 465 (1987). An earlier European version of Bentley's pluralist point may be found in Georg Simmel's essay. See G. SIMMEL, *Conflict*, in *CONFLICT AND THE WEB OF GROUP AFFILIATIONS* 37 (K. Wolff trans. 1964), quoted in C. WEISBROD, *THE BOUNDARIES OF UTOPIA* 113 (1980).

and reason defy common sense, we tend to throw up our hands and pretend that the solution has been reasoned out by someone else. Alternatively, we resort to claims that, in the long run, benevolent results will follow if we deny benevolent principles in the short run.²¹

Today, academics dress up the rediscovery of groups in the garb of new-fangled notions about interpretive communities, neo-republican virtues, or "a living tradition [that] is an historically extended, socially embodied argument."²² Even some law professors now recognize a paradoxical universal need "to be loved alone."²³ Because "there is nothing like a paradox to take the scum off your mind,"²⁴ I rush forth in pursuit of some of our communal ghosts.

Let there be no excruciating, perhaps medically contraindicated suspense. I will try to show how an independent constitutional right to freedom of association would make a difference in actual cases and in general clarity of thought. I am not talking merely, or even much, about family units, political organizations, religious groups,

21. These thoughts are hardly new, of course. For a specific source for most of them, see T. ARNOLD, *The Mystery of Jurisprudence*, in *THE SYMBOLS OF GOVERNMENT* 59-71 (1935).

22. A. MACINTYRE, *AFTER VIRTUE* 206-07 (1981). See also *Symposium on Republicanism*, 97 *YALE L.J.* 493 (1988). The recent use and abuse of the concept of "interpretive community" in legal interpretation can be traced largely to the exchange between Owen Fiss and Stanley Fish in *Symposium: Law and Literature*, 60 *TEX. L. REV.* 373 (1982).

23. W. H. Auden put it as follows:

The windiest militant trash
 Important Persons shout
 Is not so crude as our wish:
 What mad Nijinsky wrote
 About Diaghilev
 Is true of the normal heart;
 For the error bred in the bone
 Of each woman and each man
 Craves what it cannot have,
 Not universal love
 But to be loved alone.

W.H. AUDEN, *September 1, 1939*, in *THE COLLECTED POETRY OF W.H. AUDEN* 57, 58-59 (1945). In the original published version, Auden also included the following wonderful lines, which he later omitted as "a damned lie." H. CARPENTER, *W.H. AUDEN* 330 (1981).

There is no such thing as the State
 And no one exists alone;
 Hunger allows no choice
 To the citizen or the police;
 We must love one another or die.

W.H. AUDEN: *SELECTED POEMS* 86-89 (E. Mendelson ed. 1979).

24. I HOLMES-LASKI LETTERS: *THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1925*, at 389 (M. Howe ed. 1953).

or the National Association for the Advancement of Colored People (NAACP), all of which already receive considerable constitutional protection.²⁵ I am more interested in doing some detective work about other organizations, because they exemplify group entities entitled to legal protection sometimes different from the protection afforded either to those individuals who constitute the sum of their parts or to groups protected because of their intimacy or their expressive conduct.²⁶

There already are important practical examples in which group identity is protected even when individuals would not be, *e.g.*, groups who parade, report the news, engage in certain labor activities and boycotts, face persecution in their home countries. Ed Baker has provided a detailed explication of the history and limitations of current parade permit doctrine, for example, as well as compelling arguments for why analysis of the right of assembly should not be subordinated, as it traditionally has been, to judicial analysis of speech rights, thereby allowing assembly rights to be easily balanced away through invocation of a "reasonableness" test.²⁷ And we should not despair when we can find no overarching principle that permits us even hard-won generalizations combining families, people stuck in elevators together, collaborative reproduction units, Native American tribes, religious cults, unions, multinational corporations, and even gaggles of legal academics. No matter what the legal form, we have important associations to consider.²⁸

25. This surely is not the place to attempt the daunting task of offering a general taxonomy of groups. By the mid-1950s, "an enterprising American sociologist had uncovered more than 90 discrete definitions" of the term "community" in use within the social sciences. Hamilton, *Editor's Forward* to A. COHEN, *THE SYMBOLIC CONSTRUCTION OF COMMUNITY* 7 (1985). See also C. SMITH & A. FREDMAN, *VOLUNTARY ASSOCIATIONS: PERSPECTIVES ON THE LITERATURE* (1972). We have made considerable "progress" in complicating the definitional and conceptual questions since.

26. See, *e.g.*, *Federal Election Comm'n v. Massachusetts Citizens For Life*, 107 S. Ct. 616, 628 (1986) (election spending by business corporation or union "raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair trade advantage in the political marketplace," in contrast to spending by non-profit organization protected by first amendment); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-22 (1984) (Jaycees organization is neither an intimate association nor sufficiently related to protected expression to receive freedom of association protection); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-20 (1982) (local NAACP chapter protected from huge state court fine imposed on organizing and enforcing lengthy economic boycott of white merchants). For detailed discussions of these decisions, see Soifer, *supra* note 12.

27. See Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U.L. REV. 937 (1984).

28. It seems entirely appropriate to tell a truncated ghost story or two here, right next to the graveyard that holds, though it may not contain, one of Boston's great gifts

IV. A BRIEF HISTORICAL INTRODUCTION

A. *A Few Beginnings in the Cases*

*United States v. Cruikshank*²⁹ is a notorious 1875 case that deserves even greater notoriety. It was one of the long, tragic series of decisions, beginning in the 1870s, in which the United States Supreme Court reneged on the promise of the immediate post-Civil War era and used astonishingly formalistic, overly technical construction either to bury or to kill (Mr. Poe, are you there?) the amendments and civil rights statutes that together constituted the second constitution.³⁰ *Cruikshank* is particularly appalling. Chief Justice Waite dramatically illustrated how to operate mechanical jurisprudence in holding an indictment insufficient to sustain the convictions of whites who murdered more than one hundred blacks who had gathered at a political meeting in 1873.³¹

"The very idea of a government, republican in form," said Waite, "implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances."³² Moreover, Waite asserted that "the right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States."³³ It was, in fact, precisely because this right to assemble was so basic, so fundamental as to be preconstitutional and within what Waite ex-

to Baltimore—and I don't mean American League pennants, snappy waterfront shopping areas, or University of Maryland Law School Dean Mike Kelly—Edgar Allan Poe. Poe is generally credited as the originator of the modern detective story. In *The Murders in the Rue Morgue*, Poe has the narrator observe that "[t]he necessary knowledge is of what to observe." E.A. POE, 4 COLLECTED WORKS 177 (1902). Or, as Albert Einstein put it, "It is the theory which decides what we can observe." See D. BELL, COMING OF POST-INDUSTRIAL SOCIETY 9 (1973). (Poe also began his haunting story, *The Man of the Crowd*, with the quotation, "Ce grand malheur, de ne pouvoir etre seul," roughly translated as "The great unhappiness is never to be able to be alone." E.A. POE, *supra*, at 159.)

29. 92 U.S. 542 (1875).

30. *Id.* See, e.g., H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 (1982); R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985); S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968); Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515 (1987); Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1935-53 (1987).

31. 92 U.S. at 559.

32. *Id.* at 552.

33. *Id.* at 551. Curiously, two years earlier, even in the Slaughter-House Cases, Justice Miller's crabbed majority opinion described "[t]he right to peaceably assemble and petition for redress of grievances," along with the privilege of habeas corpus, as "rights of the citizen guaranteed by the Federal Constitution." The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

plicity called the "natural rights of man" that the right somehow could not be protected by the federal government.³⁴ Instead, it fell within "the very highest duty of the States."³⁵ What is most striking for our purposes is how readily and emphatically a unanimous Court, in the supposed heyday of Langdellian formalism, moved to a natural law, preconstitutional theory of a fundamental right to assemble enjoyed by all citizens as "members of the political community to which they belong."³⁶

That judges generally honored this nascent right of freedom of association only in the breach is all too apparent in judicial opinions over the next half-century explaining why injunctions might be issued against union activity.³⁷ As Haggai Hurvitz points out, "only shortly before the boycotts of 1885-1886, American courts established a doctrine permitting the peaceful boycott as a legitimate weapon in economic conflicts under which resulting losses were defined as damages without legal remedy."³⁸

Once it became obvious that labor unions could and would impose boycotts, and then successfully invoke this doctrine, however, judges resorted to a series of legal innovations to justify enjoining, criminalizing, and otherwise prohibiting and punishing this and

34. 92 U.S. at 551-52.

35. *Id.* at 553. Waite relied on the preamble to the federal constitution and the Declaration of Independence, as well as his own sense of what rights are so basic as to constitute preconstitutional or natural rights. Tragically, Waite similarly relied on his own sense about the entirely separate spheres of state and federal government; he used this stark, formalistic dichotomy in conjunction with his creation of a requirement that racial hostility be specifically averred to strike down the convictions of the only 2 rioters convicted after more than 100 were indicted for their murderous acts. It is intriguing to consider, by way of contrast, Justice Bradley's circuit court opinion in *Cruikshank*, which provided a powerful summary of the strand of republican ideology prevalent just after the Civil War that insisted upon a basic governmental duty to protect as a fundamental right. *United States v. Cruikshank*, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (no. 14, 897). Unfortunately, Bradley seems to have changed his mind, and he silently joined Waite's unanimous opinion for the Supreme Court. 92 U.S. at 559.

36. 92 U.S. at 549. Indeed, Waite found it worth emphasizing that "the people who compose the community . . . in their associated capacity, have established or submitted themselves to the dominion of the government for the promotion of their general welfare and the protection of their individual as well as their collective rights." *Id.* The surprising idea, apparently, was the individual rights protection, not the unquestioned protection of collective rights.

37. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930).

38. Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895*, 8 *IND. REL. L.J.* 307, 315 (1986). For another excellent study of forgotten legal protections for union activity, demonstrating early awareness that union organizing promoted claims going beyond a view of each individual's labor as a commodity, see Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 *TEX. L. REV.* 1071 (1987).

much more group activity. As Hurvitz and other legal historians have recently demonstrated, judges were anything but formalistic as they began to ad-lib the concept of entrepreneurial property rights meriting judicial protection.³⁹

Even when the Supreme Court began to apply first amendment protections to the states in the 1920s, it still seemed easy for Justice Van Devanter and a nearly unanimous Court to uphold New York's conviction in *New York ex rel. Bryant v. Zimmerman* of a Ku Klux Klan officer for his group's failure to disclose its membership list.⁴⁰ This all-but-forgotten decision has never been expressly repudiated. Curiously, in the course of his celebration of the renewed recognition of freedom of association and freedom from disclosure in the

39. See, e.g., Hurvitz, *supra* note 38, at 324-28, discussing *State v. Stewart*, 59 Vt. 273, 9 A. 559 (1887), in which the Supreme Court of Vermont upheld the indictment of members of the National Stonecutters' Union for criminal conspiracy. The union members were found to have belittled, threatened to disgrace (by identifying scabs), and to drive away nonunion workers. Justice Powers found the union action inconsistent with a common-law conception of the law of the land, "with every principle of justice that permeates the law under which we live." *Id.* at 286, 9 A. at 567. A more specific legislative provision therefore was not found necessary. See also, e.g., *State v. Glidden*, 55 Conn. 71, 74, 8 A. 890, 894-95 (1887) (properly left to court to determine if conspiracy was "morally wrong" or "detrimental to the public weal."); *Brace Brothers v. Evans*, 5 Pa. C. 163, 171 (1888), reported in 3 RAILWAY & CORP. L.J. 561, 564 (1888) (the very use of the word "boycott" a threat that could properly be enjoined). As Rutgers Law Professor Jim Pope pointed out, in 1916 the United States Commission on Industrial Relations endorsed a constitutional amendment to protect "the unlimited right of individuals to form associations, not for the sake of profit but for the advancement of their individual and collective interest." FINAL REPORT OF THE UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS, S. DOC. NO. 415, 64th Cong., 1st Sess. (1916). See generally J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); V. CONNER, THE NATIONAL WAR LABOR BOARD (1983); C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985); Avery, Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts under the Antitrust Laws, 1890-1921 (1988) (manuscript on file with author); Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; Soifer, *The Paradox of Paternalism and Laissez-faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 268-279 (1986).

40. 278 U.S. 63 (1928). New York's "Walker Law" of 1923 required every "membership corporation" or "unincorporated association having a membership of twenty or more persons" that required an oath for membership to file a sworn copy of its oath, constitution, by-laws, rules, regulations and "a roster of its membership and a list of its officers" *Id.* at 66. The law specifically exempted labor unions and benevolent orders mentioned in the benevolent orders law. Justice Van Devanter's majority opinion sustained the law against attack based on privileges and immunities, *id.* at 71, due process, *id.* at 72, and equal protection, *id.* at 73, by a member of the Ku Klux Klan who had been convicted and jailed for his knowing membership in a group that did not comply with the law. Justice McReynolds alone dissented, and he said he did so on jurisdictional grounds. *Id.* at 77 (McReynolds, J., dissenting).

NAACP decisions of the late 1950s,⁴¹ even such a giant as Harry Kalven basically punted when he discussed the *Bryant* decision.⁴² He appeared to claim tautologically that it was acceptable to force the Nazis to disclose their membership because they might thereby be deterred from illegal activity.⁴³ This was an unsatisfactory way to distinguish the 1928 Ku Klux Klan case from the NAACP cases and, for that matter, from the troublesome decisions in the wake of McCarthyism that upheld, as late as 1961, the requirement that the Communist Party reveal its membership.⁴⁴

The first clear Supreme Court victory for a freedom of association claim did not come until 1937. In *DeJonge v. Oregon*,⁴⁵ Chief Justice Hughes's opinion for the Court reversed a conviction for assisting in a meeting sponsored by an organization that advocated illegal means to bring about political change. Hughes wrote, "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."⁴⁶ That these strong words were not the product of a slip of the judicial pen was made clear when Hughes added that these rights cannot be denied "without violating those fundamental principles of liberty and justice

41. See, e.g., *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Bates v. Little Rock*, 361 U.S. 515 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

42. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 91-94 (1965).

43. *Id.* at 94-95. Kalven wrote: "Alabama presumably could not directly seek to inhibit membership in the NAACP; New York presumably could inhibit membership in the Klan." *Id.*

44. *Id.* In *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961), Justice Frankfurter's majority opinion upheld forced disclosure because the Subversive Activities Control Board had a reasonable basis to inquire about the danger of "a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself . . ." *Id.* at 96.

Justice Black's dissent in that case, along with his similarly vigorous dissent in related decisions, see, e.g., *Barenblatt v. United States*, 360 U.S. 109, 134 (1959), mark some of the very best innings for this obvious Hall of Famer. Black asserted that banning an association, whether political or not, is "a fateful moment in the history of a free country," 367 U.S. at 137; he castigated the idea he perceived in the Subversive Activities Control Act of "Government . . . as a paternal guardian." *Id.* at 139. Black called the Sedition Act of 1798 "one of the greatest blots" in American history, *id.* at 155, and he warned against beliefs such as that held by arch-Federalist Harrison Gray Otis that "[t]he spirit of association . . . is a dangerous thing in a free government, and ought carefully to be watched." *Id.* at 161. Instead, Black asserted, "The creation of public opinion by groups, organizations, societies, clubs, and parties has been and is a necessary part of our democratic society." *Id.* at 167.

45. 299 U.S. 353 (1937).

46. *Id.* at 364.

which lie at the base of all civil and political institutions."⁴⁷ Still, at least in retrospect, *DeJonge* looks like an easy case; Hughes's language seems tied to the political nature of the association, which might well be protected independent of any freedom of assembly claim.

B. Thomas v. Collins

The crunch came in 1945 in *Thomas v. Collins*,⁴⁸ a decision that merits close attention, though it generally receives little notice today. In contrast to the formal binary categories in contemporary decisions dealing with freedom of association, Justice Rutledge's majority opinion in *Thomas* is rich in dynamic, relational language. In *Roberts v. United States Jaycees*,⁴⁹ for example, Justice Brennan found that the Jaycees' exclusion of women fell right between the "I's": the protected categories of intimate or instrumentally expressive association.⁵⁰

By contrast, listen to Rutledge's tone as he protects a union leader from the contempt sentence imposed for ignoring an *ex parte* judicial order to follow Texas's licensing procedure for paid union solicitors.⁵¹ The Court discerned both an unconstitutional prior re-

47. *Id.*

48. 323 U.S. 516 (1945). A notable precursor was *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 512 (1939) (city officials forbidden to interfere with speeches and assemblies publicizing the National Labor Relations Act). Justices Black, Hughes, and Roberts viewed the rights involved as privileges of national citizenship, *id.* at 514, 532; Justices Stone and Reed anchored the rights in the first amendment, applied to the states through the fourteenth amendment. *Id.* at 519.

49. 468 U.S. 609, 617-29 (1984) (Minnesota Human Rights Act, MINN. STAT. § 363.03(3) (1982), compelling United States Jaycees to accept women as regular members held not to abridge either the male members' freedom of intimate association or freedom of expressive association).

50. 468 U.S. at 617-29. I applaud the result, incidentally, but find Brennan's reasoning strained at best, though not nearly as unconvincing as the reasoning rejecting freedom of association claims in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Runyon v. McCary*, 427 U.S. 160 (1976). See also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), to say nothing of such disparate decisions as *Lyng v. International Union, UAW*, 108 S. Ct. 1184 (1988); *Hodel v. Irving*, 107 S. Ct. 2076 (1987); and *Connick v. Myers*, 461 U.S. 138 (1983). For further discussion of *Hodel*, *Lyng*, and *Connick*, see *infra* notes 87-90, 97-131, & 140-150 and accompanying text.

51. *Thomas*, 323 U.S. at 518. R.J. Thomas was president of the International Union, United Automobile, Aircraft and Agricultural Implements Workers (UAW), a vice president of the Congress of Industrial Organizations (CIO), *id.* at 520, and one of the country's most influential labor leaders. In 1943, the year Thomas came to Texas to solicit for union members, for example, President Roosevelt put him on a special five-person labor commission created to deal with labor disruptions (and perhaps to co-opt the political thrust of the left) during World War II. See generally A. PREIS, *LABOR'S GIANT*

straint on Thomas's speech and an unconstitutional limitation on the right of Thomas and his audience to hold a public meeting.⁵²

Rutledge wrote:

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievance. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance.⁵³

The *Thomas* decision, which recognized "a national right, federally guaranteed . . . [to] some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth,"⁵⁴ is important for several reasons.

First, Rutledge swept beyond previous opinions protecting political and religious groups when he noted that the first amendment "gives freedom of mind the same security as freedom of conscience."⁵⁵ The Court in *Thomas* also insisted that the rights of petition and assembly are not limited to religious or political matters, just as the rights of free speech and a free press "are not confined to any field of human interest."⁵⁶ Moreover, in according "the great, the indispensable democratic freedoms secured by the First Amendment" a "preferred place" in the constitutional scheme,⁵⁷ Rutledge directly attacked the old states' rights limitations on the scope of those freedoms. Finally, Rutledge emphasized that the rights of speaker and audience, association and members, are "[n]ecessarily correlative"⁵⁸ and broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements.⁵⁹

STEPS (1964). Thomas traveled to Bay Town, Texas, to address the oil workers there and specifically to challenge a 1943 Texas statute that required licensing of paid union solicitors. *Id.* at 520-21. (The statute is set out, and accepted as intended to protect the laboring class, in *Ex parte Thomas*, 141 Tex. 591, 174 S.W.2d 958 (1943)). Thomas made it a point to address "one Pat O'Sullivan, a nonunion man in the audience," and to urge him by name to join the Oil Workers Union. 323 U.S. at 522-23.

52. 323 U.S. at 532. The Court held that the statute curtailed their rights of free speech and free assembly in violation of the first and fourteenth amendments. *Id.*

53. *Id.* at 530.

54. *Id.* at 543.

55. *Id.* at 531.

56. 323 U.S. at 531.

57. *Id.* at 530.

58. *Id.* at 534.

59. *Id.*

The vital importance of the *Thomas* decision, however, is in its unified approach to first amendment rights. Because rights of speech and assembly are “cognate,” and rights of speaker and audience are “correlative,” *Thomas* adopted a structural approach to first amendment rights nearly forgotten today. The *Thomas* three “C’s”—cognate first amendment rights, contextual sensitivity, and most strikingly today, correlative rights of the union, its members and its officials—starkly contrast with the instrumental focus of more recent freedom of association decisions. What happened to this recognition that unions, for example, have important freedom of association rights themselves? I can offer a few speculations.

C. *Ghostly Footnotes in the Sands of Time*

In 1900 Frederic W. Maitland published his own translation of the German scholar Otto Gierke’s *Political Theories of the Middle Ages*.⁶⁰ In his wonderful introduction, Maitland traced the notion of corporate personality in England, Germany, and Italy back to Roman law roots.⁶¹ Maitland was particularly concerned with “a middle region where a sociology emulous of the physical sciences discourses of organs and organicism and social tissue, and cannot sever by sharp lines the natural history of the state-group from the natural history of other groups.”⁶² He noted with characteristic dry wit that the combination of English insularity with the advantages of Empire “facilitated . . . a certain thoughtlessness or poverty of ideas.”⁶³ The English were quick to accept a

unicellular State, and at a critical time they were not too well equipped with tried and traditional thoughts which would meet the case of Ireland or of some communities, commonwealths, corporations in America which seemed to have wills—and hardly fictitious wills—of their own, and which became State and United States.⁶⁴

Picking up on Maitland’s challenge, Harold Laski first achieved fame in the United States when he asserted, in the *Harvard Law Review* in 1916, that corporate forms have their own personalities.⁶⁵

60. O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (F.W. Maitland trans. 1900).

61. *Id.* at vii-xiv.

62. *Id.* at xi.

63. *Id.* at x.

64. O. GIERKE, *supra* note 60, at x (footnote omitted).

65. Laski, *The Personality of Associations*, 29 *HARV. L. REV.* 404 (1916). For an intriguing reinterpretation of changes in the imagery of corporations in the late nineteenth

Eulogizing the legal philosopher Morris Raphael Cohen in 1948, however, Laski credited Cohen for ultimately convincing Laski of the error of his youthful ways in "taking a side which was bound to have reactionary results."⁶⁶ Cohen, according to Laski, helped extricate him from a stream muddied by the "torrent of mysticism" of German neo-Hegelians.⁶⁷ Without getting our feet wet in such dangerous toney waters, or speculating about why Laski was so insistent on distancing himself from German thinkers in 1948, we might find it worthwhile to consider briefly what the curmudgeonly Cohen had to say in his once-famous *Communal Ghosts* essay.⁶⁸

Cohen began his argument by noting, "A certain awe for the word social is one of the outstanding phenomena of current intellectual life."⁶⁹ Even without a detailed historical sense of the repeated ebb and flow in popular enthusiasm for community, it is striking to find evidence, in the very way Cohen described his target in 1919, of the cyclical quality of our intellectual fads.⁷⁰ Cohen defined the issue in controversy as "the extent to which the principle of unity should be hypostatized or reified"; he expressed a wish to say "thingified."⁷¹

What followed was a trenchant discussion of different kinds of unity—synthetic, chemical, and biologic—all of which Cohen conceded actually characterize diverse human associations in diverse ways.⁷² Indeed, what today is most striking about Cohen's essay is that he explicitly acknowledged that "every group has distinctive group marks" and that "there is something uniting the different individuals so that they act differently from what they would if they were not so interdependent . . ."⁷³ But this concession gives away the whole game. Through it, despite himself, Cohen acknowledges the power of ghosts. Ancient battles over corporate personality turn out to produce near consensus about the reality of groupness.

If a hard-boiled rationalist such as Morris Raphael Cohen—a

century, see Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, in *CORPORATIONS AND SOCIETY* 12 (W. Samuels & A.S. Miller eds. 1987).

66. Laski, *Morris Cohen's Approach to Legal Philosophy*, 15 *U. CHI. L. REV.* 575, 578 (1948).

67. *Id.*

68. M. COHEN, *supra* note 18.

69. *Id.* at 386.

70. See R. NISBET, *COMMUNITY AND POWER* (1962) (originally published as R. NISBET, *THE QUEST FOR COMMUNITY* (1953)); R.J. WILSON, *IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860-1920* (1970).

71. M. COHEN, *supra* note 18, at 390.

72. *Id.*

73. *Id.* at 388.

man whose greatest contribution, according to Laski, was to "push out of the road a good deal of useless and, not seldom, pretentious lumber that stood in the way of clear understanding"⁷⁴—recognized the relational kinetic quality of "group marks" and distinctive group power to influence individual conduct, the issue of whether "personality" is the appropriate terminology for the ghost seems almost irrelevant, not even basic to the important issue of collective responsibility that, with tragic prescience, concerned Cohen and Laski. But their debate does starkly illuminate the extent to which lawyers and judges still insist on the gnostic power of naming static individuals. As a matter of constitutional law today—with a few narrow exceptions such as heterosexual couples, explicitly political associations, and the NAACP most of the time—conglomerations of individuals are treated as if they simply and accurately reflect the mere sums of their individual parts. We do not even admit that there are "distinctive group marks." What happened?

D. *A Brief Interlude for Historical Speculation*

The virtual disappearance until recently of the idea that groups sometimes have their own claim to rights, as illustrated by Rutledge's opinion in *Thomas v. Collins*,⁷⁵ is striking. Having finally acknowledged that unions have their own first amendment rights, for example, the Supreme Court later, in the post-World War II period, began to regard unions as only synecdoches for individuals. This is neither the time nor the place to elaborate or footnote my speculation about why. I will offer a few guesses, only in part because lawyers like to divide everything into multiple units in order to appear to conquer.

First, there was important disaffection, even within the New Deal, with the corporatist first phase of the alphabet agency approach. Odious comparisons to Mussolini's fascist brand of syndicalism helped to underscore a pervasive American distaste for government recognition of groups. Judicial opinions and lawyers' arguments are full of references to the contrast between good old American individualism and the treatment of people in old world group terms.⁷⁶

Moreover, the internecine warfare within unions over the role

74. Laski, *supra* note 66, at 576.

75. 323 U.S. 516 (1945).

76. This story is still to be fully told, but parts of it may be found in P. IRONS, *THE NEW DEAL LAWYERS* (1982); E. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

of communists during the height of the Cold War was messy enough, and sufficiently bitter, to alert courts to the problematic nature of trying to hang rights on groups themselves. It was almost a reprise of the battle, more than a century earlier, between congregationalists and unitarians over which group could rightfully claim church property.⁷⁷ Judges generally believed it the better part of valor to hide behind pious judicial incantations about neutrality.⁷⁸

Popular perception of the danger posed by communist cells and cadres helps explain why lawyers and judges sought refuge in legal process values and found solace in cleansing the autonomous individual of any traces of the individual's group marks. Lawyers and even bureaucrats who were not lawyers found it delightfully easy to squeeze the discontented in the passive vises of the requirements of individual standing, formal representation rules, the need to prove bad motive in one's own discrimination claim, and so forth.

Focusing on the individual also neatly taps into popular nostalgia. It evokes myths about ruggedly independent cowboys and self-helping entrepreneurs. If groups are associated with radical threats, individuals can be constituted as a "good guy" counterpoint. This technique allows the lawyer to exercise and find support for the role of professional conservative, without actually becoming concerned with history.

Finally, much of the legal opposition to *Brown v. Board of Education*⁷⁹ sought respectability by claiming that the right of freedom of association necessarily entailed the freedom not to associate with blacks.⁸⁰ It followed, according to Herbert Wechsler as well as numerous lesser legal lights,⁸¹ that although the effect might be undesirable, it was constitutionally inappropriate to invade a decision by

77. For a vivid description of these church schisms in antebellum Massachusetts, see L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 29-42 (1957). For a historical overview of various attempts to settle disputes outside of law in America, see J. AUERBACH, *JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS* (1983).

78. Judge Sobeloff's famous profile in lawyerly courage stands in sharp and noble contrast to our usual professional timidity, which often is couched in terms of benevolent neutrality or benign neglect. As Bob Cover put it, "Prudential deference . . . is the great temptation, and the final sin of judging." *Folktales of Justice*, *supra* note 9, at 190.

79. 347 U.S. 483 (1954). See generally Arendt, *Reflections on Little Rock*, 6 *DISSENT* 45 (1955); Arendt, *The Crisis in Education*, 25 *PARTISAN REV.* 493 (1958).

80. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 34 (1959).

81. See, e.g., R. KLUGER, *SIMPLE JUSTICE* 544-46 (1975) (John W. Davis's argument for South Carolina). But see Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 *U. PA. L. REV.* 473 (1972).

a group that defined itself by excluding others on the basis of race.⁸² Though many believe that argument retains some force to this day,⁸³ guilt by association with segregationists helps explain the diminished capacity of the independent right of freedom of association as it was developed in *Thomas v. Collins*.⁸⁴

V. SO WHAT?

So what? What difference would an independent right of freedom of association make in what we ironically call the "real world" of litigation? I will suggest only a few of the many categories of cases in which, if my proposed independent right were taken seriously, the outcomes should be different. (I am not such a believer in the autonomy of the law, nor such a disbeliever in the wily word-smithery of good lawyers and judges, as to claim boldly that it actually will make a difference.) But, as Morris Raphael Cohen put it in his own mystical moment, "words are most potent influences in determining thought as well as action."⁸⁵

A. A Sampler of Recent Decisions about Native American Tribal Rights

Claims by Native Americans provide the easy examples—entirely too easy for anyone with a sense of tragic history.⁸⁶ Still, I find it astonishing that there were no dissents in *Hodel v. Irving*, a virtually unnoticed property case, when the Supreme Court found unconstitutional a 1983 federal statute that attempted to deal with the serious public problem of the "extreme fractionation of Indian lands."⁸⁷

Representatives of decedents, who could have but did not

82. Wechsler, *supra* note 80, at 34.

83. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-83 (1972) (Douglas, J., dissenting).

84. 323 U.S. 516 (1945).

85. M. COHEN, *supra* note 18, at 389.

86. See, e.g., Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3; Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1035-43 (1983); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

87. 107 S. Ct. 2076, 2084 (1987). Justice Brennan, joined by Justices Marshall and Blackmun, concurred separately, *id.* at 2084, in order to do battle with Justice Scalia, joined by Chief Justice Rehnquist and Justice Powell, who also concurred, *id.* at 2084-85, but claimed that the Court's willingness to uphold the minimal property claims involved undercut the entertaining decision in *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (upholding the Eagle Protection Act's ban on any sale of artifacts containing eagle feathers, on the theory that the value of such artifacts was not entirely destroyed, since they might be displayed at roadside stands for which admission might be charged). *Id.* at 2085. Justice Stevens, joined by Justice White, also concurred separately in *Hodel*. *Id.* at 2085-93.

otherwise devise their land, challenged the congressional plan that provided that their tiny "fractionated" land holdings would escheat to the tribe. Justice O'Connor's opinion for the Court emphasized the importance of an individual's vital "right to pass on property," and found the de minimis examples of that right involved in the case to be obviously superior to the congressional solution, though she conceded that "consolidation of Indian lands in the Tribe benefits the members of the Tribe."⁸⁸ In holding that such consolidation constituted a taking of an individual's property right, the Court provided a tragic centennial observance of the Dawes Severalty Act of 1887,⁸⁹ through which it became federal policy to break up the tribes on the premise that tribal units deprived Native Americans of that "selfishness which is at the bottom of civilization."⁹⁰ The so-called conservative Justices never hinted that they had qualms as they intervened rather actively to protect the admittedly attenuated property claims of individuals from clear and very recent action by the Congress recognizing the relational quality of tribal property.

As if to demonstrate that the Court's insensitivity to tribal interests in *Hodel v. Irving* was no fluke, the Court has since determined that there was no constitutional barrier to building six miles of paved highway across a national forest and through the ground most sacred to several Northwest Indian tribes, despite the fact that the road-building and logging operations undertaken by the Department of Agriculture, against the recommendation of a study it had commissioned, "could have devastating effects on traditional Indian religious practices."⁹¹ Justice O'Connor explained for the majority

88. 107 S. Ct. at 2083-84.

89. Dawes Severalty Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 381 (1982)).

90. A. DEBO, AND STILL THE WATERS RUN 21-22 (1940) (quoting 1885 BOARD OF INDIAN COMM'RS ANN. REP. 90-91 (statement of Sen. Henry L. Dawes)). As Milner Ball pointed out, late in Thomas Jefferson's life his goal was the division of the country into wards "until it ends in the administration of every man's farm by himself." See M. Ball, *The Promise and Deficiency of the Story of Origins in American Constitutional Jurisprudence* (1988) (manuscript on file with author); Jefferson, *Letter to Joseph C. Cabell*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 660 (A. Koch & W. Peden eds. 1944).

91. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319, 1326 (1988). The Ninth Circuit Court of Appeals had predicted that the road would "virtually destroy the Indians' ability to practice their religion," see *Northwest Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986), but Justice O'Connor's majority opinion argued that, even if this prediction proved accurate, "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." 108 S. Ct. at 1327. Justice Brennan, joined by Justices Marshall and Blackmun, dissented, and Justice Kennedy did not take part. *Id.* at 1330.

that "[t]he crucial word in the constitutional text is 'prohibit.'"⁹² Because nothing was "prohibited" in building a road, no constitutional right was impinged. Moreover, she insisted, "[h]owever much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."⁹³ This lowest common denominator approach—all citizens have only the rights of every citizen—ignores history and destroys special, communal claims that are particularly compelling in the case of Native Americans, without even reaching any religious claims Indian tribes may make. Justice O'Connor even added what she apparently took to be the private property law clincher: "Whatever rights the Indians may have to the use of the area . . . do not divest the Government of its right to use what is, after all, *its* land."⁹⁴

*B. The Rational Relationship Test for Freedom of Association Claims:
Lyng v. International Union, UAW*

Less dramatic, perhaps more mainstream examples of how sensitivity to an independent right of freedom of association would yield different and quite clearly better results include a recent holding that allows the exclusion of the NAACP Legal Defense and Education Fund, Inc., from the general federal charity drive among federal employees on a "mere rationality" basis of review,⁹⁵ and several decisions allowing the Internal Revenue Service (IRS) virtually unchecked discretion in its decisions concerning tax-exempt status.⁹⁶

Yet the most significant of all the recent decisions that depreciate the importance of freedom of association is *Lyng v. International Union, UAW*.⁹⁷ The Omnibus Budget Reconciliation Act of 1981 (OBRA)⁹⁸—an Act Justice Stevens appropriately called a "vast piece

92. 108 S. Ct. at 1326.

93. *Id.* at 1327.

94. *Id.* (emphasis in original). This is reminiscent of President Reagan's famous argument during the 1980 New Hampshire primary that "I paid for this microphone." It merely amounts, however, to a restatement of the idea that the greater power necessarily includes the lesser power. For further discussion see *infra* note 113.

95. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985).

96. For a discussion of these decisions, see Soifer, *supra* note 12, at 662-64. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).

97. 108 S. Ct. 1184 (1988).

98. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 109, 95 Stat. 357, 361 (1981).

of hurriedly enacted legislation"⁹⁹—provided that no household could become eligible for food stamps or receive an increase in its food stamp allotment while any member of the household was on strike.¹⁰⁰ District Court Judge Louis Oberdorfer declared this amendment to the Food Stamp Act¹⁰¹ unconstitutional on the ground that it interfered with the strikers' freedom of association with their families, unions, and fellow union members.¹⁰² He also held that Congress had unconstitutionally restricted the first amendment right of strikers to express themselves free from government coercion and had denied them equal protection by classifying solely on the basis of animus, by treating strikers significantly worse than employees who voluntarily quit their jobs, and by placing the onus of the decision to strike directly on the families of the strikers.¹⁰³

Through poignant and detailed affidavits, the unions and individuals who challenged the food stamp restriction presented uncontested evidence of the hardship wrought by the congressional action.¹⁰⁴ Nevertheless, Justice White's majority opinion asserted that, in the overwhelming majority of cases, the statute probably had no effect.¹⁰⁵ In any event, the Court noted, the statute does not "order" individuals to refrain from dining together nor does it in any way "directly and substantially interfere with a family's living arrangements."¹⁰⁶ The Court thereby ignored the ignominious

99. *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 867 (1986) (Stevens, J., dissenting).

100. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 109, 95 Stat. 357, 361 (1981).

101. 7 U.S.C. §§ 2011-2027 (1982).

102. *International Union, UAW v. Lyng*, 648 F. Supp. 1234 (D.D.C. 1986); *International Union, UAW v. Block*, 648 F. Supp. 1241 (D.D.C. 1985).

103. *Lyng*, 648 F. Supp. at 1239-40; *Block*, 648 F. Supp. at 1251, 1254-55.

104. Some of the affidavits were summarized in Judge Oberdorfer's opinion granting summary judgment for the plaintiffs. The government agreed that the strikers had to choose among "leaving their households, abandoning a strike by returning to work, quitting their jobs, or attempting to persuade their unions to call off the strike." *Lyng*, 648 F. Supp. at 1236. Some strikers remained disqualified even though their employers had replaced them and therefore foreclosed any chance to return. Judge Oberdorfer indicated that the 1981 House Agriculture Committee report mentioned that the reason the amendment was rejected previously was because it was "the non-neutral act of pressuring the worker to abandon the strike . . ." *Id.* (quoting H.R. REP. No. 106, 97th Cong., 1st Sess. 142).

105. *Lyng v. International Union, UAW*, 108 S. Ct. 1184, 1189 (1988) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

106. *Id.* (holding that statutory definition of "household" for food stamp purposes satisfied rational relationship test)). Justice White asserted that *Castillo* "foreclosed" the claims of associational rights asserted in the striker-food stamp case. 108 S. Ct. at 1189.

choice between family and union loyalty the statute forced upon people.

The Court's distinction between direct and indirect burdens is reminiscent of the dichotomous judicial approach to interstate commerce and to federalism in the years before the constitutional revolution of 1937.¹⁰⁷ But the core concern within the majority's effort to distinguish direct and indirect harms quickly became clear. Amid rhetoric declaring that "[t]he Constitution does not permit" any other result and that "discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts," White announced that "[w]e have little trouble in concluding that Sec. 109 is rationally related to the legitimate government objective of avoiding undue favoritism to one side or the other in private labor disputes."¹⁰⁸

White used a footnote to concede, as the precedents suggest he had to do, that associational rights may be "abridged even by government actions that do not directly restrict individuals' ability to associate freely," as well as by frontal assaults.¹⁰⁹ But White also asserted that "[e]xposing the members of an association to physical and economic reprisals or to civil liability merely because of their membership in that group poses a much greater danger to the exercise of associational freedoms than does withdrawal of a government benefit based not on membership in an organization but merely for the duration of one activity that may be undertaken by that organization."¹¹⁰ This is blatant double-talk. In translation, this circular line of reasoning seems to mean that the Court simply will take judicial notice of the level of harm to associational rights

107. See generally *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (Congress lacked power over coal-mining); *United States v. Butler*, 297 U.S. 1, 68 (1936) (Congress lacked power over agriculture); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (Congress lacked power to regulate indirect effect on interstate commerce of child labor); P. IRONS, *supra* note 76. The direct/indirect approach was vigorously attacked and rejected by Justice Cardozo and by a majority of the Court and it has nearly disappeared—at least for the moment—from explicit Supreme Court decisions about federalism and the constitutional reach of the commerce clause. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Nevertheless, the approach is dear to lawyers and still echoes mightily within the doctrinal morass in current labor law concerning such matters as boycotts and handbilling. See generally Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984).

108. *International Union*, 108 S. Ct. at 1193, 1192.

109. *Id.* at 1190 n.5 (citing *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *Healy v. James*, 408 U.S. 169, 183 (1972)).

110. *Id.*

threatened by particular governmental action. On one hand, there are serious, judicially-cognizable threats to freedom of association in the forced disclosure of membership lists and in a large damage award imposed because of an association's lengthy boycott of all the white merchants in town.¹¹¹ These intrusions may be distinguished by judicial fiat, however, from pressure that is even more basic—hunger—imposed on a striker and a striker's family because of participation in, or even failure to renounce, a strike.¹¹² This restriction is somehow considered neither punishment nor a significant burden on freedom of association. Apparently, the Court conceived of food stamps as mere government largess. As long as the government decision is couched in terms of "neutrality," food stamps can be doled out or cut off for any reason, for no reason, or even, apparently, for the purposes of penalizing an unpopular group.

The Court unquestioningly accepted Congress's claim that it sought to be neutral. "Strikers and their union would be much better off if food stamps were available," the majority acknowledged, "but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right."¹¹³

111. The Court referred here to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919-920 (1982), and to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). *International Union*, 108 S. Ct. at 1190 n.5. Both decisions involved the NAACP, of course, and neither was a model of clarity about the extent of the freedom of association right embraced by the Court or about why traditional limitations such as standing and state action requirements were relaxed in these cases. In this respect, these decisions seem to be akin to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), though—unfortunately in my view—they so far have not shared the capacity of that decision to grow far beyond its initial very sympathetic fact pattern.

112. See generally Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1 (1964); Harper, *supra* note 107. But see *International Longshoremen's Ass'n, AFL-CIO v. Allied Int'l*, 456 U.S. 212, 226-27 (1982) (prohibition of secondary political picketing) and compare with *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1404 (1988) (29 U.S.C. § 158(b)(4) (1982), construed to avoid first amendment problems which would result were the statute read to prohibit secondary handbilling).

113. *International Union*, 108 S. Ct. at 1190. The majority also conceded that "[i]t would be difficult to deny that this statute works at least some discrimination against strikers and their households," *id.* at 1192, but did not consider that discrimination to be of constitutional significance. Instead the Court adopted the idea that the greater power automatically includes the exercise of any degree of lesser power. This idea seems to be increasingly popular with the current Court, see, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968, 2979 (1986) (government power to ban gambling necessarily includes government power to exercise lesser power of banning advertising of gambling in newspapers targeted at local population); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (government may influence an indigent pregnant woman's constitutionally protected fundamental right to choose about abortion by subsidizing childbirth, but not abortion, since government need not provide any comprehensive medical care). Cf. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517,

The legislature is entitled "not to subsidize" even the exercise of a fundamental right.¹¹⁴ This subsidization view is a dangerous extension of the purported neutrality the Court accepted in the abortion-funding decisions.¹¹⁵ Moreover, the Court sought to distinguish precedents invalidating unconstitutional conditions.¹¹⁶ Apparently the "governmental obligation of neutrality"¹¹⁷ may sometimes require relatively close scrutiny when fundamental rights, such as those originating in the establishment and free exercise clauses of the first amendment, are at stake. Freedom of association claims, however, despite their similar first amendment origin, are afforded much lower, indeed negligible, status.

In other words, there is neutrality and then there is *neutrality*. Sometimes the Constitution is said to oblige the Court to defer to strained, even false, claims of neutrality, as in the striker amendment to the Food Stamp Act.¹¹⁸ But sometimes neutrality is said to oblige the Court to consider carefully whether the government is

517 (1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

An older, even less appealing source for the greater power-lesser power argument may be found in what was probably the leading rationale for slavery in the 1600-1700s, traceable to Roman roots, that slaves were captives in war and therefore could be killed. Merely enslaving people was actually favorable treatment, it was said, clearly included within the greater power to kill them. *See generally* D.B. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 83-121 (1966); W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); E.S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* (1975). For a demurrer concerning the reality of the justification in Graeco-Roman culture, see M.I. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 82-92 (1980).

114. *International Union*, 108 S. Ct. at 1190 (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983)).

115. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

116. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (denial of unemployment benefits to one refusing on religious grounds to work on Saturday held to violate free exercise clause).

117. *International Union*, 108 S. Ct. at 1191 n.7 (quoting *Maher*, 432 U.S. at 475 n.8).

118. Justice Marshall's dissent, joined by Justices Brennan and Blackmun, convincingly demonstrated nonneutrality in several different ways. Marshall used legislative history, excerpts from the affidavits of strikers, and responses by the government in the course of the litigation to show that the statutory intent, and its sometimes devastating actual effect, was intended to punish strikers and to force them into hard choices such as between living with their families and being loyal to their unions. Moreover, Marshall made the important point that "[o]n a deeper level," the neutrality argument "reflects a profoundly inaccurate view of the relationship of the modern federal government to the various parties to a labor dispute." 108 S. Ct. at 1198. He pointed to tax subsidies, Small Business Administration loans, bankruptcy law protections, and similar advantages afforded management in strike situations. *Id.*

really being neutral.¹¹⁹ The Court brusquely rejected the relevance of a decision that invalidated a limitation on food stamps aimed at punishing hippies on the ground that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."¹²⁰ White claimed that *Moreno* merely required the usual, extremely deferential rational relationship test.¹²¹ In the context of the striker-food stamp amendment, this version of neutrality is bizarre; it permits legislative action specifically designed to punish members of an unpopular group for their constitutionally protected group action.

Nevertheless, the Court would have us sympathize with the plight of Congress. White asserted that "Congress was in a difficult position when it sought to address the problems it identified."¹²² It is acceptable for Congress to be "[h]arder on strikers than on 'voluntary quitters,'" according to White, because "the concern about neutrality in labor disputes does not arise with respect to those who, for one reason or another, simply quit their jobs."¹²³ If you whine, you cannot dine. But winos and others who, like Bartleby the Scrivener, simply prefer not to work, those who just up and quit one fine day, are treated much more kindly by a statute "rationally related to the stated objective of neutrality."¹²⁴

Even putting to one side the dissenters' devastating critique of such presumed neutrality, the majority's approach merits attention for what it says and does not say about freedom of association. Two points in *Lyng* help illustrate why an independent right is important and how it would make a difference.

119. See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274-79 (1979) (absolute preference for veterans for civil service jobs valid because it was not "inherently non-neutral"); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (three-pronged test developed to measure crucial government neutrality regarding religion); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1967) ("absolute neutrality" the essence of the first amendment rule prohibiting content regulation).

120. *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original) (invalidating restrictive definition of household for food stamp purposes clearly aimed at "hippies").

121. *International Union*, 108 S. Ct. at 1192.

122. *Id.*

123. *Id.* at 1193. Nevertheless, White was certain that "[i]t was no part of the purposes of the Food Stamp Act to establish a program that would serve as a weapon in labor disputes." *Id.* at 1192.

124. *Id.* at 1193. Having decided this, the majority mentioned but did not rely on either the money-saving or aid-to-the-neediest rationales suggested by the government. *Id.* at 1195-97. The first would virtually end review of restrictions in government programs, and the second cannot be supported given the eligibility criteria for the food stamp program.

First, the way the majority glibly brushed aside the freedom of association right is revealing. White began by conceding that "[w]e have recognized that 'one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.'" ¹²⁵ Within three paragraphs, however, he completed his discussion of freedom of association by relying upon an equal protection decision which had held that denial of unemployment benefits to workers thrown out of work in a labor dispute "does not involve any discernible fundamental interest."¹²⁶ Etymology to the contrary, freedom of association is a foundational right, but not a fundamental right.¹²⁷

In fact, freedom of association so lacked the qualities of a fundamental right that White simply segued into a discussion of traditional, toothless rational relationship review. Once the statute was said to have "no substantial impact on any fundamental interest,"¹²⁸ the majority needed only to determine that strikers did not constitute a suspect class. The very strong doctrinal presumption in favor of legislative line-drawing sufficed. White's discussion of neutrality illustrates how "one could get out of a premise all that one had put into it."¹²⁹ But I want to underscore not that particular silliness, nor even its inconsistency within the genre of recent equal protection

125. *International Law*, 108 S. Ct. at 1189 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982)).

126. *Id.* at 1191 (quoting *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 489 (1977)).

127. How to resolve issues of what is, at bottom, fundamental in constitutional law, or a suitable foundation for what we construct, remains in considerable doubt. The words "foundation" and "fundamental" share the same derivation and once shared exactly the same meaning. *OXFORD ENGLISH DICTIONARY* 493, 604 (1978). Moreover, as Connecticut Law Professor Hugh Macgill pointed out, Boswell related that Dr. Johnson was once met with great laughter when he stated that "the woman had a bottom of good sense," which Dr. Johnson then amended to proclaim, "'I say the woman was *fundamentally* sensible.'" 4 *BOSWELL'S LIFE OF JOHNSON* 114-15 (G. Hill ed. 1891) (emphasis in original). In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974), Justice Douglas's majority opinion insisted that the village ban on groups of three or more unrelated by blood or marriage sharing a household was constitutional because "[i]t involves no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association . . ." The other fundamental rights Douglas sought to distinguish were voting, the right of access to the courts, and rights of privacy. *Id.* at 7-8. Justice Marshall's dissent argued that "deference does not mean abdication" when, as in the case of the Belle Terre zoning ordinance, government action "infringe[s] upon fundamental constitutional rights." *Id.* at 14. Justice Brennan also dissented, primarily on jurisdictional grounds. *Id.* at 12.

128. *International Union*, 108 S. Ct. at 1191-92.

129. Thomas Reed Powell is quoted to this effect, in turn quoting William Graham Sumner. See Braeman, *Thomas Reed Powell on the Roosevelt Court*, 5 *CONST. COMMENTARY* 143, 145 (1988).

analysis.¹³⁰ Rather, I am concerned about how glibly, and with what destructive consequences, the court transplanted freedom of association from the company it should keep with its first amendment counterparts into a makeweight instrumental interest, an interest that actually carries no weight at all.

If freedom of association properly were considered "one of the foundations of our society," the union and family claims in *Lyng v. International Union, UAW* surely require more careful scrutiny than that afforded by the majority's extreme deference to government.¹³¹ As comparison to the native American decisions makes clear, the current Court is hardly consistent in deciding when to defer to Congress and when to intervene aggressively. If the Court were to heed important, albeit not absolute claims made on behalf of freedom of association, as Justice Rutledge did in *Thomas v. Collins*,¹³² it would sometimes reach different results. Perhaps more important, it would surely begin to tell different tales and might help groups of citizens seeking to grope together toward creating better traditions.

C. *Nascent Groups: A Matter of Public Concern?*

A significant element of the current legal confusion about groups stems from habits of thought developed through the bureaucratized approach used to categorize and regulate associations. We often sacrifice function to form. It now seems apparent, for example, that workers made something of a Faustian bargain to obtain the protections of concerted activity provided by the Wagner Act.¹³³ The federal labor policy which we now take for granted came at great cost to spontaneity and to older union customs, to local control of organizing and of the use of political clout, and to an array of organizing techniques outside the formal legal process.¹³⁴

130. White did not mention his own majority opinion in *Cleburne Living Center, Inc. v. City of Cleburne*, 473 U.S. 432, 439, 450 (1985), which indicated that there should be some bite in judicial consideration of whether similarly situated persons are treated alike and whether differential treatment indicates that the true goal of government action is illegitimate. See also *Plyler v. Doe*, 457 U.S. 202 (1982).

131. 108 S. Ct. at 1189-94. The majority relied on the extremely minimal scrutiny proclaimed in, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Dandridge v. Williams*, 397 U.S. 471 (1970).

132. 323 U.S. 516 (1945).

133. See, e.g., J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); C. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 IND. REL. L.J. 450, 458-68 (1981); Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

134. See, e.g., P. IRONS, *supra* note 76, at 203-71; D. MONTGOMERY, *WORKERS' CONTROL*

It is hardly surprising that the Supreme Court has struggled mightily in its recent flirtation with the relatively newfangled notion that there is some federal constitutional protection for an individual's property right in continued public employment.¹³⁵

What seems most directly to confound the Court in the realm of public employment is the notion that custom, as well as formal state or federal law, may determine when one has a "more than unilateral expectation" of job security.¹³⁶ The difficulty arises for three interlocking reasons. First, recent social and economic changes—ranging from the diminished power of political parties and patronage to altered public perceptions about how much harshness of life is to be endured before seeking redress—have helped to change the legal status of public employment.¹³⁷ Second, the Court itself has begun to extend limited first amendment protections into public sector employment.¹³⁸ Finally, and most relevant to our concern about groups, giving weight to custom necessarily concedes that groups,

IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY AND LABOR STRUGGLES (1979); C. TOMLINS, *supra* note 133, at 99-243; WORKING CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY AND AMERICAN SOCIETY (M. Frisch & D. Walkowitz eds. 1983); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

135. Compare, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986) (Justice Powell wrote the plurality opinion, but he was joined only by then-Justice Rehnquist and Chief Justice Burger in Section IV, in which he stressed the impact of even a temporary layoff of an employee and quoted an article that asserted that "the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." (quoting Fallon & Weiler, *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 58)); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (holding that "the 'bitter with the sweet' approach misconceives the constitutional guarantee"); *with, e.g., Arnett v. Kennedy*, 416 U.S. 134, 163 (1974) (holding that due process clause does not require any higher expectancy of job retention than the right conferred not to be discharged except for "cause" and conditioning the grant of that right by procedural limitations); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that lack of contractual or tenure right to re-employment, taken alone, does not defeat claim that nonrenewal of employment contract violates free speech right under the first and fourteenth amendments); *Board of Regents v. Roth*, 408 U.S. 564, 579 (1972) (holding that assistant professor at state university who had no tenure rights to continued employment, and who was informed that he would not be rehired after one academic year, did not have property interest protected by fourteenth amendment).

136. *Roth*, 408 U.S. at 577.

137. See, e.g., B. BARBER, *STRONG DEMOCRACY* (1984); L. FRIEDMAN, *TOTAL JUSTICE* (1985); M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

138. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) (assistant public defender could not be discharged solely because of political beliefs); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (public employment could not be conditioned on membership in or loyalty to political party in power). *But see Brown v. Glines*, 444 U.S. 348, 361 (1980) (upholding Air Force regulations requiring prior approval of commanding officers before circulating petitions to Congress on military base); *United States Civil Serv. Comm'n v.*

but not isolated individuals, may and do establish understandings, expectations, and reliances that have legal significance beyond the individualistic paradigm of the employment-at-will labor contract.

Yet the Court fails to recognize the crucial role of organizing within the workforce that is outside the formal realm of the National Labor Relations Act¹³⁹ or of existing political parties. The Court's failure to perceive the importance of constitutional protection for nascent groups in particular helps to explain the disaster of *Connick v. Myers*.¹⁴⁰ In that decision, the majority determined that the effort by Assistant District Attorney Sheila Myers's effort to solicit the views of her fellow employees about how the office was being run was an employee grievance presented outside normal channels.¹⁴¹ The decision to dismiss Myers for circulating a questionnaire "may not be fair," the Court declared, but it was nonetheless not subject to judicial review.¹⁴² Justice White's majority opinion acknowledged that the questionnaire Myers sent her co-workers surely was not "totally beyond the protection of the First Amendment," yet held that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in response to the employee's behavior."¹⁴³

If not to a federal court, where are people to go for legal vindication of such first amendment rights? A perspective that gives freedom of association its due and uses a structural rather than a compartmentalizing approach to first amendment freedoms would find constitutional protection for Myers in her questioning and or-

National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973) (reaffirming limitation on active participation by civil servants in political parties).

139. 29 U.S.C. § 151 (1982).

140. 461 U.S. 138 (1983).

141. *Id.* at 154.

142. *Id.* at 146-47. Myers chose to circulate the questionnaire after she objected to a transfer, was transferred anyway, and was told that her concerns about how the office was being run "were not shared by others in the office." *Id.* at 141.

143. *Id.* at 147. The concession of a first amendment element in the case combined with the majority's denial that federal courts ought to be open to such concerns boggles the mind. The majority's position grows curiouser and curiouser, however, when one learns that one of Myers's questions—the one her employer was particularly upset about because it "would be damaging if discovered by the press," *id.* at 147—concerned pressure to work in political campaigns, an issue which if substantiated would clearly violate the Constitution. See cases discussed *supra* note 138. Cf. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977) (school teacher could be fired without reason, but not for exercise of first amendment right). The Court segregated this question from all the other issues it considered to be not of public concern. After doing so, the majority used an explicit balancing test without any specific criteria and thereby determined that Myers had raised only an unprotected employee grievance. *Connick*, 461 U.S. at 150-54.

ganizing. Freedom of association should be valued as a goal, not merely as a troublesome means. White's unworkable and analytically indefensible test of whether Myers's speech was of "public concern" thereby could have been avoided.¹⁴⁴ A more realistic and more appropriate first amendment test would not have required the sharp line White attempted to draw between communications about public concerns, which apparently even federal courts will protect, and other matters, such as Myers's questionnaire, which was the type of employee expression that "cannot be fairly considered as relating to any matter of political, social, or other concern to the community."¹⁴⁵

What makes the majority's crabbed view doubly appalling is the way it denigrates the public as it spins out the unworkable consequences of its wrong-headed premise that communication and organizing can take place in splendid, individualistic isolation. It neither reflects the robust expressive activities of the era of the framing of the Constitution,¹⁴⁶ nor makes logical sense. It is circular to argue on the one hand that Myers is not protected because "the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo,"¹⁴⁷ and then to claim that Myers was fired because "[q]uestions, no less than forcefully stated opinion and facts, carry messages."¹⁴⁸

By attempting to reduce Myers's questionnaire to "an employee grievance concerning internal office policy,"¹⁴⁹ the *Connick* majority protested too much. White asserted that "[a]lthough today the balance is struck for the government, this is no defeat for the first amendment."¹⁵⁰ It is more akin to a debacle. The explicit protection of labor law statutes ought not to be necessary to place Myers's

144. *Connick*, 461 U.S. at 147-49.

145. *Id.* at 146. Not only did this statement of what "fairly" can be said gratuitously insult the four dissenters—Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, *id.* at 156—but it required the majority to reverse the fact-finding of the district court, upheld by the Fifth Circuit Court of Appeals, on the grounds that "[t]he inquiry into the protected status of speech is one of law, not fact. Thus, we are not bound to the views of the District Court unless clearly erroneous." *Id.* at 146 n.7.

146. See generally L. LEVY, *EMERGENCE OF A FREE PRESS* (1985); P. MAIER, *FROM RESISTANCE TO REVOLUTION* (1972); Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 *STAN. L. REV.* 795 (1985). But see J. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (1986).

147. *Connick*, 461 U.S. at 148.

148. *Id.* at 152.

149. *Id.* at 154.

150. *Id.*

organizing and communicating efforts within the "preferred position" tradition articulated in *Thomas v. Collins*.¹⁵¹ A first amendment approach sensitive to efforts to form groups, as well as striving to allow groups to function as freely as possible most of the time, would better reflect how we work, live, and learn.

The test I propose is similar to the one we use when freedom of the press is at stake. The press certainly does not always win, but the precedents suggest—quite appropriately in my view—that restrictions on or discriminatory treatment of journalists must be handled in a gingerly fashion.¹⁵² Like the press, associations serve a vital "checking value" in our society.¹⁵³ The form and function of voluntary associations, for example, should not be left to the unbridled discretion of government officials. My approach would affect lower courts' treatment of such diverse recent issues as the licensing of escort services in Las Vegas¹⁵⁴ and the constitutionality of the integrated bar in Wisconsin.¹⁵⁵ It would help provide a rationale for

151. 323 U.S. 516 (1945).

152. See, e.g., Soifer, *Freedom of the Press in the United States*, in *PRESS LAW IN MODERN DEMOCRACIES* 79 (P. Lahav ed. 1985); Melville B. Nimmer Symposium, 34 U.C.L.A. L. REV. 1331 (1987); Anderson, *Media Success in the Supreme Court*, (1987 Gannett Center for Media Studies Working Paper).

153. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523. Eric Fromm probably overstated this important point a bit when he said that "[g]roups which represent an idea in its purity and without compromise are the seedbeds of history; they keep the idea alive, regardless of the rate of progress it makes among the majority." E. FROMM, *THE REVOLUTION OF HOPE* 160 (1968). See also *Coates v. Cincinnati*, 402 U.S. 611, 615, n.5 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of [free assembly and association]" (noting *City of Toledo v. Sims*, 14 Ohio Op. 2d 66, 69, 169 N.E.2d 516, 520 (1960), which pointed out that arrests and prosecutions under the loitering and congregating statute at issue would have been effective against the patriots in front of the Raleigh Tavern in Williamsburg, Virginia, in 1774)). But see *Boos v. Barry*, 108 S. Ct. 1157, 1168-69 (1988) (invalidating District of Columbia ban on displaying signs, but upholding ban on congregating within 500 feet of a foreign embassy and refusing to disperse when ordered to do so by police).

154. See, e.g., *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1197 (9th Cir. 1988) (split decision rejecting facial overbreadth, freedom of association challenge to licensing scheme for commercial dating service in Las Vegas).

155. See, e.g., *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478, 1502 (W.D. Wis. 1988) (Judge Crabb decision striking down Wisconsin integrated bar scheme on freedom of association grounds).

I am certainly not suggesting that freedom of association claims should always prevail. In the *IDK* case, for example, the fact that the dating service was obviously quite commercial, along with the fact that the challenge to the statute presented no factual context of abuse of the licensing scheme since the suit was brought on facial overbreadth grounds, suggest that the majority probably was justified in rejecting the claim. But my approach would help to avoid the sharp, dichotomous choice, about which the Ninth Circuit judges split, as to whether a "date" involved either the intimate association or expressive association held to warrant constitutional protection in *Roberts v.*

the Court's conclusion that non-profit organizations are somehow different for first amendment purposes¹⁵⁶ and might aid in considering the explosion of controversies in which freedom of association claims are being raised today.¹⁵⁷

VI. CONCLUSION

It certainly makes sense to think of judges as "jurispathic," as Bob Cover suggested.¹⁵⁸ They wield violence on behalf of the state, and they are inclined to control or even to kill off alternative narratives and competing norms. It is important to realize, however, that violence on behalf of the community is not always to be condemned or avoided. Deference to the lowest common denominator—whether it be Coach Lombardi's notion of treating everyone the same, like dogs, or Justice Holmes's nasty version of Social Darwinism, in which he claimed to detach himself and defer to whatever the crowd would fight for¹⁵⁹—hardly seems sufficiently protective of key constitutional rights threatened by statism and pure majoritarianism. It is even possible for some few great judges, and Judge Sobeloff surely was one of that rare breed, to be so compassionate, so wise, and so creative as to help build rather than block the bridge between law and justice. Such judges contribute to our legends;

United States Jaycees, 468 U.S. 609 (1984), discussed *supra* note 26. The integrated bar decision, on the other hand, seems correct largely because Wisconsin had already severed most important group functions and made them voluntary. Mandatory membership in the bar association, therefore, was rightfully condemned by Judge Crabb as not serving a compelling state interest; moreover, the defendants had failed to show "that in the absence of mandatory membership, the Bar's goals could not be achieved." 679 F. Supp. at 1501 (footnote omitted).

156. *Federal Election Comm'n v. Massachusetts Citizens for Life*, 107 S. Ct. 616 (1986), discussed *supra* note 26. Though I obviously reject Brennan's lumping of all union activities with all corporate activities, some union activities are properly classified as economic and therefore not protected. But other union activities are not purely economic and should be protected. This resonates with the long tradition of attempts by workers to reject the notion that a person's labor is simply a commodity to be sold for the best price. It also helps explain the difficult but important line-drawing task in the *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)—*Ellis v. Railway Clerks*, 466 U.S. 435 (1984) line of cases distinguishing economic from political, ideological, and other activities. See Brudney, *Association, Liberty, and the First Amendment* (1988) (manuscript on file with author).

157. See, e.g., *New York Club v. City of New York*, No. 86-1836 (U.S. arguments heard Feb. 23, 1988). For a discussion of cases involving distinctions within groups, see Brudney, *supra* note 156.

158. *Violence*, *supra* note 9, at 1610; *Nomas*, *supra* note 9, at 1140.

159. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897). See generally, Hamilton, *On Dating Mr. Justice Holmes*, 9 U. CHI. L. REV. 1 (1941).

they help us struggle to fit old ghost stories to our present needs and, more important, to our future aspirations:

The stories of what judges do—and what they do not do also is vitally important—cannot be neatly plotted on a smooth curve between discrete points. Like Bible stories and other great tales, judicial legends are full of tension and complexity. They contain multidimensional responses to multilayered problems. According to the Biblical rule, for example, the eldest son clearly should inherit; but in all the famous Bible stories, the eldest son loses out to a younger brother. What are we to make of that contrariness? It is hardly surprising to detect tension and difficulty in the great moral and legal issues of our day. Yet the key decisions are made by groups of us, not by isolated individuals.

We retain and create from our own traditions. Stories of heroic acts and legends about seekers of justice are much more than mere ghost stories. They may not comport with “the logical method and form [that] flatter that longing for certainty and for repose which is in every human mind,”¹⁶⁰ yet they must not be ignored. In trying to shed a little light on what we might do about groups, I hope I have at least made at bit more complexity somewhat appealing.

Our legends remind us that it is a mistake to take refuge in complacent oversimplification or to trust the nice clear binary choices we like to consider to be appropriate rational limits. Gershom Scholem once said, “Reason is a great instrument of destruction. For construction, something beyond is required.”¹⁶¹ If we are to find the fragile material we need to pursue glimmerings of a better world, we must heed multilayered stories that help us form and pass on our identities together.

160. *Id.* at 466. Holmes added, “But certainty generally is illusion, and repose is not the destiny of man.” *Id.* In the course of his peculiar discussion of the statute of limitations and the law of prescription, however, Holmes noted, “The law can ask no better justification than the deepest instincts of man.” *Id.* at 477.

161. See Rothstein, *A Fateful Intellectual Friendship*, in 84 COMMENTARY 41, 44 (1987) (quoting Scholem).