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FREEDOM OF ASSOCIATION AND FREEDOM OF EXPRESSION*

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Freedom of association has always been a vital feature of American society. In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life. At the same time the exercise of this freedom has given rise to novel and troublesome problems. Organizations have grown in size and power, and organizational techniques have achieved a new order of effectiveness. These associations have been strenuously resisted at times by other private groups, or sought to be regulated or curbed by government authority. At another level the rights of individual members and minority groups within these centers of private power have come to be a matter of growing concern. And likewise the position of the individual who does not belong, and who does not wish to be forced into association, has raised the problems of defining an area of personal freedom into which neither government nor private organizational power may intrude.

No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection, and that limitations on such a fundamental freedom must be brought within the scope of constitutional safeguards. The courts have in the past recognized this need and have dealt with many aspects of associational activity in terms of constitutional right and power. But recently the issues have taken new and complex forms. And constitutional doctrine in the area of freedom of association has assumed an unprecedented importance.

The most striking development of the past few years has been the enunciation by the Supreme Court of a new constitutional doctrine known as "the right of association." This came about in the 1958 decision of *NAACP v. Alabama ex rel. Patterson*. In that case the State of Alabama sought to compel

*This article is based upon a lecture delivered at the University of Puerto Rico School of Law, and it is being published simultaneously, in Spanish translation, in REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO. It is a development and application of the general theory of the first amendment set forth in the author's earlier article, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963), and rests, to a considerable extent, upon the analysis presented therein.

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production of NAACP membership lists in order to determine whether the organization was operating in Alabama in violation of the law requiring registration of foreign corporations doing business within the State. Mr. Justice Harlan, speaking for the Court, established "the right of association" in the following manner:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.[1]

Mr. Justice Harlan thus initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them. In the remainder of his opinion, however, he elevated freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment. He repeatedly used the phrase "freedom of association" by itself, and at one point carefully distinguished it by referring to "these indispensable liberties, whether of speech, press, *or* association."[2] In the end, as already noted, he had established it as the "constitutionally protected right of association."[3]

Following the *Alabama* case the Supreme Court has applied the doctrine of "the right of association" in a number of cases, involving a variety of factual situations. Yet the constitutional source of "the right of association," the principles which underlie it, the extent of its reach, and the standards by which it is to be applied have never been clearly set forth. Moreover, the various justices have differed among themselves on all these matters.

Commentators on the Supreme Court decisions have, in general, hailed the emergence of an independent constitutional "right of association" as an event of the first importance.[4] One author has undertaken to demonstrate

1. 357 U.S. 449, 460 (1958).

2. *Id.* at 461.

3. *Id.* at 463.

4. Comment on the doctrine includes: ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION (1961); RICE, FREEDOM OF ASSOCIATION (1962); FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION (1963); Note, *Freedom of Association*, 4 RACE REL. L. REP. 207 (1959); Solter, *Freedom of Association — A New and Fundamental Civil Right*, 27 GEO. WASH. L. REV. 653 (1959); Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730 (1960); Hotes & Hotes, *Freedom of Association*, 10 CLEV.-MAR. L. REV. 104 (1961); *Developments in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963); Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963). Earlier material is cited in EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 137-38 (2d ed. 1958). See also Note, *State Control Over Political Organizations: First Amendment Checks on Powers of Regulation*, 66 YALE L.J. 545 (1957); McKay, *The Repression of Civil Rights as an Aftermath of the School Segregation Cases*, 4 HOW. L. REV. 9 (1958); Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958); *A Symposium on Group Interests and the Law*, 13

that numerous difficult constitutional problems, including those involved in freedom of religion and the establishment of religion, right-to-work laws, disclosure requirements, and restrictions on "subversive associations," are best resolved in terms of "the right of association."[5] In view of this widespread acceptance of the doctrine, and in view of its varying and uncertain application by different members of the Supreme Court, it seems worthwhile to attempt a closer analysis of the doctrine and its usefulness in protecting individual rights against encroaching governmental or private power.

It is first necessary to consider the general theory of freedom of association in a democratic society, and the implications of that theory for constitutional doctrine (I). An attempt is then made to analyze the Supreme Court decisions in which the doctrine of "the right of association" has been employed and to appraise its value in solving constitutional problems of associational activity (II). The conclusion reached is that, while associational rights are fundamental in the legal structure of a democratic society, their protection through creation in doctrinal form of a general "right of association" does not carry us very far in the solution of concrete issues. Rather, current problems involving associational rights must be framed and answered in terms of more traditional constitutional doctrines. Finally, by way of illustration of this thesis, an effort is made to formulate a doctrinal framework for dealing with associational rights in one part of the field of freedom of expression (III).

I. Theory of Freedom of Association and its Implications for Constitutional Doctrine

At the outset it should be noted that issues of freedom of association arise in at least four different contexts. The first is where a question is presented of the general power of the government to restrict or otherwise regulate the affairs of an organization or its membership. This was the problem involved in *NAACP v. Alabama ex rel. Patterson*. It comes up in many other situations, such as the Smith Act cases, the registration provisions of the Internal Security Act, and anti-trust cases, although the Supreme Court has not always attempted to deal with these matters in terms of a "right of association." A second type of problem arises when governmental power is used to compel an individual to belong to an organization, pay dues, or otherwise participate in its activities. Questions of this nature are posed in regulations establishing or supporting the closed shop or the integrated bar. In a third context, problems of freedom of association arise in connection with the rights of individual members or minority groups vis-à-vis the organization to which they belong. An example is the Labor-Management Reporting and Disclosure Act, which

Rutgers L. Rev. 429 (1959); McAulay & Brewster, *In re Application of the Association for the Preservation of Freedom of Choice*, 6 How. L.J. 169 (1960); Vance, *Freedom of Association and Freedom of Choice in New York State*, 46 Cornell L.Q. 290 (1961).

5. Rice, *op. cit. supra* note 4. *But cf.* Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, *supra* note 4.

guarantees certain rights of franchise, free expression and due process to members of a labor organization.[6] The fourth area is where the associational rights at stake are not organizational but personal in nature. Professor Herbert Wechsler believes that this was a primary, though overlooked, issue in the *School Segregation Cases*.[7] A more clear-cut illustration is furnished by a state law which punishes association with criminals, or prohibits persons of different races from eating together in restaurants.

The rights involved in these four contexts — and there are perhaps others — may all be loosely described as "associational rights," and that terminology is adopted here. Yet they pose quite different constitutional problems. In order to deal with these, and to determine the role that a doctrine of "the right of association" should play in a system of legal protection for these various rights, it is necessary to examine further the general principles of association which prevail in a democratic society.

Such a theory of association must begin with the individual. In a society governed by democratic principles it is the individual who is the ultimate concern of the social order. His interests and his rights are paramount. Association is an extension of individual freedom. It is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties. Hence, as a general principle, the right of individuals to associate or to refrain from association ought to be protected to the same extent, and for the same reasons, as individual liberty is protected. Thus, as a starting point, an association should be entitled to do whatever an individual can do; conversely, conduct prohibited to an individual by a state can also be prohibited to an association. And the extent of the power of government to compel association should be limited to accomplishing such control of the individual as the government could impose directly. The rights and limitations of individual conduct are, of course, embodied in traditional constitutional doctrines such as due process, freedom of religion, freedom of expression, equal protection, prohibition of bills of attainder, and the like, and in the powers of government such as the commerce clause and the police power.

The impact of association, however, particularly in a modern complex society, very often carries beyond this initial point. The conduct of an association is likely to acquire unique qualities, to have effects which can originate only with an association rather than an individual. In practice, through the accumulation of resources, through the focussing of effort, and through the other results of organization, an association may be able to achieve objectives so far beyond individual effort as to be qualitatively different. Moreover, an association sometimes engages in conduct which is not even theoretically open to an individual, such as collusive price-fixing. When an association takes on these unique qualities, which are beyond the scope of individual action, an

6. 73 Stat. 22 (1959), 29 U.S.C. §§ 411-15 (Supp. III, 1962).

7. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959), reprinted in WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961).

additional factor is present and the association becomes subject to government regulation on a different basis than does the conduct of an individual. Under these circumstances, what are the limits of state control? They can no longer be derived from any general principle of association which affords the protection available to an individual; there can be no generalized "right of association" in this sense. In other words, the mere fact of association does not under these conditions afford a ready solution of the constitutional problem. The basic limitations which are applicable must again be found in traditional constitutional protections. But at this point the results of applying such constitutional doctrine may be different because the unique associational factor will now be taken into account.

One further general principle of association can be stated. Since the fundamental value involved is the liberty of the individual, any general right of association must be subordinate to the individual right. In the hierarchy of rights the individual rights prevail. Hence, where the problem is one concerning state control over the relation of the individual member to the association, the powers of the association cannot be allowed to impair individual rights of a constitutionally protected character. The controlling doctrines must be those which apply to the rights of the individual against the government. In other words, the legislative power to regulate the relation of the individual member to the association, or the judicial power under the constitution if state action is present, is governed by the usual rules of constitutional protection.

Translating these general premises more specifically into constitutional terms, it would follow:

(1) Associational rights, to the extent they exist, are not derived solely from the first amendment. Rather they are implied in the whole constitutional framework for the protection of individual liberty in a democratic society.

(2) The one general principle of association which can be expressed in terms of constitutional doctrine is that an association or its members acting in concert are entitled to do what an individual can do to the extent the associational conduct is merely an extension of individual liberty, and the government can compel through the medium of compulsory association only what it can compel directly.

(3) When associational conduct takes on an additional quality as uniquely associational, then it becomes subject to additional government regulation, though still limited by established constitutional protections. And state control over the relation of the individual to the association is also subject to traditional constitutional limitations.

(4) In summary, the principle of association, while fundamental to the maintenance of democratic rights, does not provide a single key to the decision of the varying constitutional issues involving associational rights. Such issues must be considered in light of the specific circumstances and the specific constitutional doctrines applicable to the specific problems which arise.

II. Analysis of "The Right of Association" as Constitutional Doctrine

As pointed out above, problems of freedom of association arise in at least four different contexts. In appraising the value of "the right of association" as a constitutional tool for deciding these issues it is necessary to consider that doctrine as it applies in each of the contexts. We are particularly concerned with the manner in which the doctrine has been utilized by the Supreme Court in various lines of decision beginning with *NAACP v. Alabama ex rel. Patterson.*

A. Governmental Regulation of the Affairs of an Organization or Its Members

Issues involving associational rights have arisen most frequently in the situation where the government undertakes to control the formation or activity of an association or the conduct of its members. Cases emerging in this context relate to many different kinds of organizations and many different types of government regulation. Associations may be designed to serve a myriad of purposes, and the governmental regulation may be imposed at any number of points and in any number of forms. Associational rights are affected not only by requirements for disclosure of membership, but by regulations dealing with campaign contributions, going on strike, combining to fix prices, and a host of other matters. It is quite clear that no general concept of "the right of association" can govern all these situations or solve all these problems. Once the conduct involved reaches the point where it takes on the unique quality of association, no general rule of a right to association can apply. Constitutional protection must be found in other, more specific, constitutional doctrines. The courts in the past have dealt with these issues on this basis, and they must continue to do so.

One might argue that "the right of association" should at least be construed, in a much narrower sense, to mean that the mere right to form or join an association is protected, subsequent conduct in pursuance of the objectives of the association being controlled by other principles. This is a doctrine of doubtful validity. Even such a bare right to form or join would seem to depend upon the character of the organization. Thus, if the objective of the organization is entirely illegal — for example, to rob a bank — the government could probably prohibit the mere forming or belonging to the association, at least where the individual knows the purpose of the organization and intends to further that illegal purpose. It is true that the mere right to form or join an organization should be guaranteed as to many types of association. This right should be protected at times even in the case of an organization that has several objectives, some of which are legal and some illegal. The significant point is that it is impossible to construct a meaningful constitutional limitation on government power based upon a generalized notion of the right to form or join an association. Some types of association need, and are entitled to, greater protection than others. The legal doctrine that protects associational

rights must be able to distinguish between them and to afford the required measure of protection in each case.

Furthermore, constitutional protection of the bare right to form or join an association is, as a practical matter, usually more symbolic than real. None of the cases from this area in which the Supreme Court has hitherto relied upon "the right of association" has raised the legal issues in this naked form. Realistically, it may be urged, the simple right of forming an organization was the only issue at stake in the *Alabama* case, since government power was being exerted for the purpose of destroying the NAACP. But as the government regulation was constructed, and the constitutional issues framed, the question posed was not that simple. On the face of it, the exercise of governmental power was designed to achieve another purpose — enforcing registration of foreign corporations. Hence the case could not be treated as involving only the elementary issue of forming or joining an organization to advance certain views. And this will seldom, if ever, be the case. Rather the problem before the court is whether the state possesses the power to impose certain types of regulation upon the organization involved or its members.

The Supreme Court has employed the doctrine of "the right of association" only in cases raising issues in the first amendment area. It has thus not faced the problem of utilizing the concept on a broader scale. Analysis of the decisions within this one sphere in which the doctrine has been applied, however, clearly reveals its serious shortcomings as an effective instrument for constitutional adjudication.

In *NAACP v. Alabama ex rel. Patterson* Mr. Justice Harlan, having created "the right of association," went on to frame the test for determining whether the right has been constitutionally infringed. He pointed out that compulsory disclosure of membership in an association as unpopular as the NAACP in Alabama entails "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."[8] The question for him then became, "whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association."[9] He concluded that Alabama's interest in obtaining the membership lists is not sufficiently substantial to justify the infringement of "the right of association."[10] The test was, in other words, a broad balancing of associational right against state interest. The decision was unanimous, Mr. Justice Harlan's opinion being the only one rendered in the case.

The next case in which the Supreme Court discussed "the right of association" was *Bates v. City of Little Rock* (1960).[11] The problem here was very

8. 357 U.S. 449, 462 (1958).
9. *Id.* at 463.
10. *Id.* at 464-65.
11. 361 U.S. 516.

similar to that in the *Alabama* case. Local ordinances in two Arkansas cities, enacted under authority to impose a licensing tax on organizations operating within the city, required production of membership lists. Officials of the local branch of the NAACP were convicted for refusing to produce the lists. Mr. Justice Stewart, writing for the majority, began by deriving "the right of association" from the right of peaceable assembly, and went on to treat it as an independent constitutional right. As in the *Alabama* case, he balanced the interference with freedom of association against the interest of the city. Finding "no relevant correlation" between the power of the city to impose a licensing tax and the compulsory disclosure of membership, he concluded that "the municipalities have failed to demonstrate a controlling justification for the deterrence of free association."[12]

This time Justices Black and Douglas concurred in a separate opinion. They viewed the ordinances as violating freedom of speech and assembly. With respect to association they observed: "One of those rights, freedom of assembly, includes of course freedom of association." In addition, they declined to apply the balancing test, saying only that "First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government."[13]

The following case — *Shelton v. Tucker* (1960)[14] — raised similar issues, but in a somewhat different form. An Arkansas statute required every teacher to file an affidavit listing all organizations to which he had belonged or contributed in the preceding five years. Failure to do so resulted in loss of employment. Mr. Justice Stewart, again writing for the majority, found that compelling a teacher to disclose every associational tie "is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."[15] He concluded that "the right of association" was violated in this case because the statute was too broadly drawn: "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[16]

Four justices — Frankfurter, Harlan, Clark and Whittaker — dissented. The opinion of Mr. Justice Harlan, in which the others concurred, again dealt with "the right of association" as an independent right, "embodied in the 'liberty' assured against state action by the Fourteenth Amendment." But it held that the disclosure required was justified "on the basis of a superior

12. *Id.* at 527.
13. *Id.* at 528.
14. 364 U.S. 479.
15. *Id.* at 485-86.
16. *Id.* at 490.

governmental interest to which such individual rights must yield."[17] A separate opinion by Mr. Justice Frankfurter took substantially the same position.[18]

The next case in the line is *Louisiana ex rel. Gremillion v. NAACP* (1961).[19] This decision involved two Louisiana statutes. One prohibited any organization from doing business in the state if it was affiliated with any out-of-state association of which the officers or directors were members of Communist, Communist-front, or subversive organizations. Mr. Justice Douglas, writing for the majority, struck the statute down on grounds of vagueness, making no reference to "the right of association." The second statute required the principal officer of various types of "benevolent" associations operating in Louisiana to file a list of the names and addresses of all officers and members. Here Mr. Justice Douglas referred to association, stating that "freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment."[20] He then held the statute unconstitutional, apparently on two separate grounds. First, citing the *Alabama* case, he stated flatly that "where it is shown . . . that disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required."[21] Second, citing *Shelton v. Tucker,* he found the statute too broadly drawn. The four justices who had dissented in *Shelton* concurred in the result but not in the opinion.

The next two cases, involving the Communist Party rather than the NAACP, were decided adversely to claims based upon "the right of association." *Scales v. United States* (1961)[22] was a prosecution under the membership provisions of the Smith Act, making it a crime to be a member of an organization which advocates overthrow of the government by force and violence, knowing the purposes of such organization. Mr. Justice Harlan for the majority held first that the Communist Party's advocacy of action to overthrow the government by force and violence "is not constitutionally protected speech." He then ruled that attaching a criminal penalty to active membership in such an organization, with "knowledge of the proscribed advocacy" and the "specific intent" to bring about the overthrow of government as speedily as circumstances would permit, "does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent.'" Hence he concluded there was no violation of the first amendment and no imposition of guilt by association contrary to the due process clause of the fifth amendment.[23] Justices Black and Douglas dissented. Making no reference to "the right of association," they contended that the conduct of Scales,

17. *Id.* at 497.
18. *Id.* at 490-96.
19. 366 U.S. 293.
20. *Id.* at 296.
21. *Ibid.*
22. 367 U.S. 203.
23. *Id.* at 228-30.

amounting only to the expression of beliefs and not involving overt acts, was protected by the first amendment.[24]

In *Communist Party v. Subversive Activities Control Board* (1961),[25] the Court dealt with the registration provisions of the Internal Security Act. These required an organization found by the Board to be a Communist-action organization to register with the Attorney General and disclose the details of its operations, including its officers, members, finances, printing equipment and the names of persons actively participating in its affairs. A Communist-action organization was defined in the Act as one which is substantially directed, dominated or controlled by the foreign government which controls the world Communist movement, and operates primarily to advance the objectives of that movement. The Board made the requisite findings, though it did not find that the Communist Party incited "the present use of force"[26] or engaged in advocacy of the kind prohibited by the Smith Act. Mr. Justice Frankfurter wrote the majority opinion. He stated that disclosure "may in certain instances infringe constitutionally protected rights of association,"[27] citing the *Alabama, Bates* and *Shelton* cases. Against this infringement, he declared, "there must be weighed the value to the public of the ends which the regulation may achieve."[28] Considering "the magnitude of the public interests which the registration and disclosure provisions are designed to protect and . . . the pertinence which registration and disclosure bear to the protection of those interests,"[29] he concluded there was no violation of the first amendment.

Mr. Justice Douglas, in an opinion in which Mr. Justice Brennan concurred, agreed with the ruling on the first amendment; he was of the opinion that "more than debate, discourse, argumentation, propaganda, and other aspects of free speech and association are involved."[30] Only Mr. Justice Black dissented on the first amendment issue. Not referring to "the right of association," but discussing various efforts throughout English and American history to suppress associations, he concluded that Congress had no power "to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country."[31]

The next decision — *NAACP v. Button* (1963)[32] — reverted to the problems of the NAACP. This case involved a Virginia statute which, as interpreted

24. *Id.* at 259-78. Mr. Justice Brennan, joined by the Chief Justice and Justices Black and Douglas, dissented on other grounds. *Id.* at 278-89.

25. 367 U.S. 1.

26. *Id.* at 56.

27. *Id.* at 90.

28. *Id.* at 91.

29. *Id.* at 93.

30. *Id.* at 172. Mr. Justice Douglas dissented on other grounds, as did Mr. Chief Justice Warren and Mr. Justice Brennan.

31. *Id.* at 147.

32. 371 U.S. 415.

by a majority of the Court, would have prohibited the NAACP from urging Negroes to seek legal redress for violations of their civil rights by instituting litigation through members of the Association's legal staff. On this occasion Mr. Justice Brennan wrote the opinion for the majority. He first addressed himself to the question whether the activities prohibited by the statute fell within the area of freedoms protected by the first amendment, and found that they did. Mr. Justice Brennan at times referred to these activities as "expression" or "political expression," at other times as "expression and association."[33] In any event he went on to hold that the Virginia statute violated petitioners' constitutional rights on two grounds: the statute was too vague and too broad; and the interest of the state in regulating the kind of activity involved was not sufficiently compelling to justify invasion of first amendment rights.[34] Mr. Justice Harlan, dissenting with Justices Clark and Stewart, argued that, while "the basic rights in issue are those of the petitioner's members to associate, to discuss, and to advocate," nevertheless "litigation . . . is *conduct;* it is speech *plus.*"[35] In such a situation, he contended, the standard for determining whether there has been an infringement of the individual's right is whether "the regulation has a reasonable relationship to a proper governmental objective and does not unduly interfere with such individual rights."[36] He continued: "Although the State surely may not broadly prohibit individuals with a common interest from joining together to petition a court for redress of their grievances, it is equally certain that the State may impose reasonable regulations limiting the permissible form of litigation and the manner of legal representation within its borders. . . . [Such] regulations are undeniably matters of legitimate concern to the State and their possible impact on the rights of expression and association is too remote to cause any doubt as to their validity."[37]

A similar issue arose later in *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar* (1964).[38] Here the Virginia statute outlawed a practice whereby the Brotherhood, in order to assist the prosecution of claims by injured railroad workers or their families, maintained a Department of Legal Counsel which recommended to members and their families the names of lawyers whom the Brotherhood believed honest and competent. The Court, speaking through Mr. Justice Black, upheld the practice. Relying principally on the *Button* case, but without mentioning "the right of association," Mr. Justice Black held that "the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them . . . ."[39]

33. *E.g., id.* at 430, 437.
34. *Id.* at 444.
35. *Id.* at 454-55.
36. *Id.* at 454.
37. *Id.* at 455.
38. 377 U.S. 1.
39. *Id.* at 5. The *Button* ruling was reiterated in NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964), discussed *infra.*

Mr. Justice Clark, in a dissent in which Mr. Justice Harlan concurred, thought that the activities involved were "not a form of political expression, but rather a procedure for settlement of damage claims," and that the question involved "solely the regulation of the [legal] profession, a power long recognized as belonging peculiarly to the State."[40]

A somewhat different type of problem was presented in *Gibson v. Florida Legislative Investigation Comm.* (1963).[41] The Committee was empowered to investigate all organizations within the state "whose principles or activities include a course of conduct . . . which would constitute violence, or a violation of the laws of the state, or would be inimical to the well-being and orderly pursuit of their personal and business activities by the majority of the citizens of this state." The Committee undertook an investigation of the Miami Branch of the NAACP with a view to determining whether that organization had been infiltrated by Communists. It ordered the president of the Miami Branch to bring before the Committee all records of membership and contributions so that it could determine whether certain persons, whom the Committee's information showed to be members of the Communist Party or Communist-front organizations, were members or active in the NAACP. On refusal, the president was convicted of contempt of the Committee.[42]

The Supreme Court reversed. Mr. Justice Goldberg, writing the prevailing opinion, phrased the issue as one involving "the rights of free speech and association," and pointed out that the Court "has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments."[43] In determining whether these rights had been unconstitutionally violated, Mr. Justice Goldberg said, quoting *Schneider v. State*,[44] "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[45] Application of this test in the situation before him, he continued, required that "the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[46] Mr. Justice Goldberg concluded that "the record in this case is insufficient to show a substantial connection between the Miami branch of the NAACP and Communist *activities* . . ."; hence the inquiry violated constitutional rights.[47] Mr. Justice Douglas, concurring in the result, approached the problem differently. Viewing freedom of association as "part of the periphery of the First Amendment," he

40. 377 U.S. at 10.
41. 372 U.S. 539.
42. The Florida Supreme Court affirmed the contempt conviction. Gibson v. Florida Legislative Investigation Comm'n, 126 So. 2d 129 (1960).
43. 372 U.S. 539, 543 (1963).
44. 308 U.S. 147, 161 (1939).
45. 372 U.S. at 545.
46. *Id.* at 546.
47. *Id.* at 551.

asserted that the "right of association has become a part of the bundle of rights protected by the First Amendment. . . ."[48] He therefore concluded, "Government can intervene only when belief, thought, or expression moves into the realm of action that is inimical to society."[49] Mr. Justice Black agreed with the views stated by Mr. Justice Douglas.[50] Mr. Justice Harlan, joined by Justices Clark, Stewart and White, dissented. He took the position that information in possession of the Committee showed a connection between the NAACP and Communist activities "sufficient to overcome the countervailing right to freedom of association."[51]

Finally, the *Alabama* case came back to the Court in *NAACP v. Alabama ex rel. Flowers* (1964).[52] After various intermediate proceedings,[53] the Alabama courts enjoined the NAACP from doing business in Alabama and from attempting to qualify to do business there. The grounds for exclusion consisted of eleven charges made against the organization. The Court, in a unanimous opinion delivered by Mr. Justice Harlan, dealt with the issues in terms of the "right of association." Some of the grounds for exclusion, such as the efforts of the NAACP to enroll Negro students in the University of Alabama, involved conduct protected by the first amendment. With respect to these grounds the Court, without elaboration, ruled that "such a challenge cannot stand."[54] The remaining grounds, such as "organizing, supporting and financing an illegal boycott" agianst a Montgomery bus line, involved conduct which the Alabama court had found to be in violation of state law. Assuming the invalidity of this conduct, the Supreme Court nevertheless held that such activities did not justify the exclusion: "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[55] The Court declared that the penalty of exclusion "unduly" infringed the constitutional right and that the objective sought by Alabama could be "more narrowly achieved." In short, the charges "suggest no legitimate governmental objective which requires such restraint."[56]

The course of decision makes it clear that the Supreme Court, in recognizing an independent "right of association," has undertaken to give that right constitutional protection primarily through application of a balancing test. The

48. *Id.* at 568-69.
49. *Id.* at 573.
50. *Id.* at 558-59.
51. *Id.* at 579.
52. 377 U.S. 288.
53. The intermediate litigation is reported at 360 U.S. 240 (1959) and 368 U.S. 16 (1961).
54. 377 U.S. at 309.
55. *Id.* at 307.
56. *Id.* at 308. In Aptheker v. Secretary of State, 378 U.S. 500 (1964), discussed *infra*, the majority opinion relied collaterally upon the right of association. *Id.* at 507, 517. See also references to the right of association in the concurring opinions of Justices Black and Douglas. *Id.* at 518, 520.

values attributed to freedom of association in the first amendment area are balanced against the values sought by the legislature in the regulation restricting association. This test is open to all the objections which have been made to the use of *ad hoc* balancing in first amendment cases generally. The factors which enter into the balance on each side are hopelessly vague and not really comparable. It is difficult to understand by what legal criteria "the right of association" precludes the government from obtaining the organizational affiliations of its teachers, but does not protect from destruction a political party which has foreign ideological ties but engages in no overt illegal acts or even in the illegal advocacy proscribed by the Smith Act. The elusive nature of the balancing test is dramatized by the fact that, even in the NAACP cases, a dissenting group of four justices, applying the same standard, reached the opposite result in three of the seven decisions. In its ultimate result, the use of the *ad hoc* balancing formula leaves "the right of association" with little concrete protection, in effect subject to restriction by any "reasonable" regulation. It is true, of course, that a majority of the present Court does employ the *ad hoc* balancing test in most first amendment cases, whether or not "the right of association" is involved. But the point is that "the right of association" concept is so broad, and so undifferentiated, that its use effectively precludes any other approach. And the balancing process here is even less confined, and less subject to objective application, than where specific rights of freedom of speech, press, assembly or petition are subjected to that treatment.[57]

The other constitutional test heretofore used by the Court for safeguarding "the right of association" is that government regulation must not be "too broadly drawn." This measure of protection is equally unsatisfactory. The doctrine that a statute can be unconstitutionally broad in its impact is of value in certain circumstances, which will be discussed later, but does nothing to solve the problem of what infringement upon freedom of association, if any, should be permitted.

In short, the concept of "right of association," as it has been employed in the cases just discussed, eliminates the possibility of creating and applying precise and concrete legal rules capable, in practical administration, of controlling government power in the interest of individual freedom. The concept is essentially obscurantist.

It will be noted that Mr. Justice Black, apart from silent acquiescence in the *Alabama* decisions, has refused to accept the doctrine of an independent constitutional right called "the right of association." He considers associational rights involved in the cases discussed above as simply one aspect of protecting freedom of speech, press, assembly and petition. The implications of this

57. For criticism of the balancing test see, in addition to many of Mr. Justice Black's dissents, Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963).

approach will be considered at a later point. Mr. Justice Douglas takes an intermediate position. He seems to accept "the right of association" as a separate constitutional safeguard. But, in the cases just reviewed, he gives "the right of association" full protection, equal to other first amendment rights. Thus he in effect adopts the Black approach, that freedom of association is to be treated as a part of the specific rights mentioned in the first amendment. The problem in Mr. Justice Douglas' analysis arises when he deals with "the right of association" in other contexts. These issues will likewise be discussed at a subsequent stage.

B. *Forced Association*

The second context in which associational rights come into issue is where governmental power operates to force an individual into membership in an organization, or some other form of participation in its activities. The right at stake here is, in effect, the right of non-association. The obverse of the basic principle of association — that since association is generally an extension of individual capacity, government can compel no more via compulsory association than it could compel directly — applies here. The question is not one of extending the liberties of the individual, but rather of protecting his immunities. The problem presented is one of the power of government to create political subdivisions through which to exercise public power, and of the limitations to be imposed upon such governmental authority.

In any event, the concept of "the right of association," as hitherto envisaged by a majority of the Supreme Court and by the commentators, would not seem to be of any real value in drawing the line between government power and private right in this context. Clearly the validity of a government regulation of this nature must turn upon the kind of association which the government seeks to compel. Some types of compelled association, as joining the armed forces or participating in a school district, the government plainly has the right to impose. Others, as compulsion to join a religious organization, are just as plainly outside government authority. Still others may fall on one side of the line or another, or be subject to special considerations. The notion of a single "right of association" is too broad and vague to point up the significant elements necessary to decide these problems, or to state a sufficiently definite rule for guidance. The issues turn on the nature of the association and again are better treated as associational aspects of freedom of religion, freedom of expression, the right to engage in an occupation or profession, and the like, subject to traditional constitutional doctrines.

The efforts of the Supreme Court to employ an independent constitutional "right of association" in solving problems of forced association bear out this analysis. *Railway Employees' Dept. v. Hanson* (1956)[58] involved a provision of the Railway Labor Act which authorized railroad unions, despite any State law to the contrary, to enter into union shop contracts. The statute provided,

58. 351 U.S. 225.

however, that no employee could be discharged for lack of membership in the union except where his non-membership was due to failure to pay regular dues and assessments. The problem posed was whether the Federal Government possessed the power to bring into operation an arrangement whereby an individual employee would be compelled to become associated with a labor organization in this manner. The objecting employees argued that the statute infringed their rights to "freedom of association," in violation of the first amendment. The Supreme Court, in an opinion by Mr. Justice Douglas, considered only the narrow issue of whether all employees could be required to contribute in this way to the costs of collective bargaining. It held that such a requirement did not violate the first amendment. The opinion, which was written two years before *NAACP v. Alabama ex rel. Patterson*, did not speak in terms of "the right of association."

Some of the problems latent in the *Hanson* case came to the fore in *International Ass'n of Machinists v. Street* (1961).[59] The same provision of the Railway Labor Act was under attack. This time, however, the protesting employees claimed a violation of constitutional rights because the dues they were forced to pay into the union treasury were being used in part to finance political causes to which they were opposed. Mr. Justice Brennan, speaking for five members of the Court, construed the *Hanson* case as holding that the forced payment of dues for purposes of financing the collective bargaining operations of the union did not "impinge upon protected rights of association." He avoided the additional constitutional issues raised in the case before him by construing the Railway Labor Act as not authorizing the union, over a member's objection, to use the dues of that member on behalf of political causes which he did not support.

A similar problem was presented to the Court in *Lathrop v. Donohue*,[60] decided at the same time as the *Street* case. Here the validity of the Wisconsin integrated bar was at issue. Under this arrangement all lawyers in Wisconsin were required to become members of "The State Bar of Wisconsin," and to pay dues to that organization. Plaintiff, a lawyer, claimed an invasion of his constitutional rights under the fourteenth amendment on the ground that he was forced to belong to and support an organization which engaged in "political and propaganda activities" to which he was opposed. Mr. Justice Brennan wrote the prevailing opinion, speaking for four members of the Court. He took the position that the only issue raised by the record was whether or not plaintiff could be compelled to pay dues to an organization whose principal purpose was to "promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."[61] This issue he termed a question of plaintiff's "rights to freedom of association" and, relying upon *Hanson*, held there was

59. 367 U.S. 740.
60. 367 U.S. 820 (1961).
61. *Id.* at 831-32.

no infringement of this right. He declined to pass upon the further questions arising out of plaintiff's claim that his dues were being used in part for "political and propaganda activities" which plaintiff opposed. These issues, he felt, were not adequately presented by the record before the Court. Yet, insofar as he dealt with these matters he treated them as involving, not a question of "right of association," but an "issue of impingement upon rights of free speech."[62]

While the prevailing opinions managed, in both *Street* and *Lathrop*, to sidestep the constitutional issues involved in using dues to promote causes to which the dissenting member objected, other justices thought that these questions could not be avoided. In the *Street* case, Mr. Justice Frankfurter, writing also for Mr. Justice Harlan, treated the issue as one of freedom of speech and, balancing the interests, concluded that the use of dues for political purposes did not violate the first amendment.[63] In the *Lathrop* case Mr. Justice Harlan wrote for himself and Mr. Justice Frankfurter. He started out by saying that he could not understand why the Court should distinguish between freedom of association and freedom of speech in this case. "This is a refinement," he said, "between two aspects of what, in circumstances like these, is essentially but a single facet of the 'liberty' assured by the Fourteenth Amendment . . . that is too subtle for me to grasp."[64] Nevertheless, treating the issue as a matter of freedom of speech, he applied the balancing test and found no violation of the fourteenth amendment.

It is thus apparent that the Court has found the doctrine of "the right of association" to be of little use in the forced association decisions. The narrower conclusion — that nominal membership involving only the contribution of dues to support collective bargaining or professional services could be compelled — was reached initially, in the *Hanson* case, without benefit of the doctrine. The Brennan opinions in the *Street* and *Lathrop* cases did rely upon "the right of association" in reaffirming this holding. But it is difficult to see what the abstract notion of right of association contributed to this conclusion, and the opinions certainly do not make it clear. At any rate, beyond this point the doctrine of "the right of association" broke down, and the Brennan opinions dealt with further questions of compelled association, namely, the use of dues for political causes, as issues of freedom of speech. To Justices Frankfurter and Harlan it made no difference, for they considered both issues as merely problems of "liberty" protected by the fourteenth amendment. Thus in the context of forced association, the concept of "the right of association" as an independent constitutional right has not been used, and cannot be used, to solve the hard problems.

The views of Justices Black and Douglas in the forced association cases are also of interest. In *Street*, Mr. Justice Black remarked that the *Hanson* case "did not hold that railroad workers could be compelled by law to forego

62. *Id.* at 845.
63. *Id.* at 803-19.
64. *Id.* at 850.

their constitutionally protected freedom of association by participating as union 'members' against their will." And he went on: "That case cannot, therefore, properly be read to rest on a principle which would permit government — in furtherance of some public interest, be that interest actual or imaginary — to compel membership in Rotary Clubs, fraternal organizations, religious groups, chambers of commerce, bar associations, labor unions, or any other private organizations Government may decide it wants to subsidize, support or control. In a word, the *Hanson* case did not hold that the existence of union-shop contracts could be used as an excuse to force workers to associate with people they do not want to associate with . . . ."[65] The government could, Mr. Justice Black agreed, require workers "to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent under authority of Congress."[66] But "dues extorted from an employee by law" could not be used "for the promotion of causes, doctrines and laws that unions generally favor to help the unions, . . . [or for] any other political purposes." This "injects federal compulsion into the political and ideological processes" and "violates the freedom of speech guarantee of the First Amendment."[67]

The *Lathrop* case, Mr. Justice Black argued, was governed by the same principles. Apparently he saw no issue of compelling association in that case since the Wisconsin court had interpreted the law as not requiring a lawyer to participate in the state bar association but merely to pay annual dues. Agreeing that the state could require a lawyer to pay dues for the support of "non-political and non-controversial activities," Mr. Justice Black asserted that it cannot "compel him to pay his money to further the views of a majority or any other controlling percentage of the Wisconsin State Bar when that controlling group is trying to pass laws or advance political causes that he is against."[68] Such a requirement, as in *Street,* would violate first amendment rights to freedom of speech.

Mr. Justice Black thus arrives at his conclusions through the normal route he uses in deciding first amendment issues. His references to freedom of association, in discussing the *Hanson* case, are collateral to his main argument. Indeed, they are not directly concerned with the issue of formal organizational association, but rather with the problem of personal associations, a matter considered later.

Mr. Justice Douglas arrived at the same results as Mr. Justice Black, but he followed a somewhat different path. "Some forced associations," he said in *Street,* "are inevitable in an industrial society. One who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled. The very existence of a factory brings into being human colonies. Public housing in some areas may of necessity take the form of

65. *Id.* at 787.
66. *Ibid.*
67. *Id.* at 789-91.
68. *Id.* at 877.

apartment buildings which to some may be as repulsive as ant hills. Yet people in teeming communities often have no other choice. Legislatures have some leeway in dealing with the problems created by these modern phenomena."[69] And, he continued: "Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth and Fifth Amendments be lost and we all succumb to regimentation." Hence, "if an association is compelled, the individual should not be forced to surrender any matters of conscience, belief, or expression . . . and he should not be required to finance the promotion of causes with which he disagrees."[70] In *Lathrop* Mr. Justice Douglas elaborated his position further:

> The right of association is an important incident of First Amendment rights. The right to belong — or not to belong — is deep in the American tradition. Joining is one method of expression. This freedom of association is not an absolute. For . . . the necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown.[71]

The position of Mr. Justice Douglas is, in some respects, ambiguous. In the line of cases discussed in the prior section he recognizes a "right of association" and affords it complete protection. In *Street* and *Lathrop* he says the right is "not absolute," though "special safeguards are necessary." The explanation appears to be that Mr. Justice Douglas is referring to associational rights in various contexts — government regulation of association for purposes of expression, forced organizational association, and personal association — without explicitly distinguishing between them. The apparent inconsistency once again demonstrates the pitfalls in employing a general concept of "the right of association."

C. *Rights of Individuals or Minorities Vis-à-vis an Organization*

The third area in which associational rights play a part is that relating to the rights of an individual member of an organization, or a minority, against the organization itself or the dominant group in the organization. Here the general principle that associational rights may not override individual constitutional rights comes into play. But the application of that principle turns upon the established constitutional limitations upon the exercise of governmental power.

Issues of this sort may arise in several ways. The individual or minority may be appealing to the courts for enforcement of private rights, based on property, contract or tort. Or such parties may seek the protection of constitutional guarantees, asserting that the organization exercises or is supported

69. *Id.* at 775-76.
70. *Id.* at 776.
71. *Id.* at 881-82.

by government power and is therefore subject to constitutional limitations. Or the legislature may affirmatively undertake to protect individual or minority rights in one or another form of association. In all these situations questions are presented both as to the rights of the individual or minority, and rights of the organization or majority to be free of government control. All such rights are, in the broad sense, associational rights. But there are no Supreme Court decisions attempting to deal with them under a constitutional doctrine of "the right to association." And, again, it would seem evident that these issues are not solved by any such generalized notion. The phrase, "the right of association," may be convenient as a rubric for describing a polyglot assortment of claims. But it is of very little use as embodying a coherent, self-contained legal rule. The issues must still be resolved in terms of standard doctrines of property, contracts, torts or constitutional limitations.

D. *Personal Associations*

The fourth and last group of issues involving associational rights is that concerned with private relations of one individual to others, or rights of personal association. As already stated, these issues may arise where the government, or some person or group supported by government power, attempts either to prohibit association, as in laws forbidding association with criminals or with members of another race, or attempts to compel association, as in desegregation cases. Once more, this would not appear to be an area where legal issues are usefully framed in terms of whether the regulation attacked violates a general "right of association." That concept takes us only a very short distance in our search for an answer and, indeed, obscures analysis of the real issues.

One may concede that in situations where the government undertakes to *prohibit* personal associations, a doctrine of "the right of association" comes closest to providing a useful tool for decision. Mr. Justice Black's remarks in *Street* may perhaps be interpreted as indicating his support for the use of such a doctrine in this context. The reason is that in this situation — an official proscription of personal association — the right to associate in its literal meaning comes nearest to being an absolute right, untouchable by government power. The concept would therefore be reducible to a meaningful legal formula. Yet even here there may be exceptions needed, as in the case of a government official associating with known espionage agents or criminal conspiracies. The right of the government to *compel* personal associations, as by forbidding racial discrimination in schools, housing, public facilities, clubs and the like, however, is surely not subject to resolution in terms of a blanket right of association or non-association. Rather such problems, as is also the case with measures prohibiting personal association, must be framed in terms of drawing the line between the public and private sectors of our common life. The question is, in short, one of the right of privacy, or the fundamental right of the individual to engage in any conduct not prohibited by lawful gov-

ernmental regulation meeting the due process standard of being reasonably related to a legitimate end or the equal protection standard of being nondiscriminatory.

III. A Proposed Doctrinal Structure For Determining Questions Of Associational Rights In The Area Of Freedom Of Expression

In the remaining part of this article an attempt is made to apply a different conceptual framework to problems of associational rights arising in one area, that of freedom of expression. Limitations of time and space permit consideration of only one part of this area: the issues presented when the government seeks to impose restrictions on an organization or its members for the purpose of reconciling interests in freedom of expression with other social interests. Treatment of these matters in detail is not attempted. The most that can be done here is to sketch out roughly the issues involved and the major doctrines which should guide the courts in resolving them.

The premises underlying the doctrinal structure here proposed are those set forth in the first section of this article, dealing with the theory of association, and those discussed in my previous article, *Toward A General Theory Of the First Amendment.*[72] In briefest summary the thesis of the earlier article is that maintenance of a system of freedom of expression requires recognition of the distinction between those forms of conduct which should be classified as "expression" and those which should be classified as "action"; and that conduct classifiable as "expression" is entitled to complete protection against government infringement, although "action" is subject to reasonable and nondiscriminatory regulation designed to achieve a legitimate social objective. The definition of "expression" is a functional one. It is based upon the proposition that normally no harm inheres in such conduct itself, but only from the ensuing "action"; upon the individual and social purposes served by freedom of expression in a democratic society; and upon the administrative requirements for maintaining an effective system of free expression in actual operation.

Translated into legal doctrine based upon the first amendment, this theory requires the court to determine in every case whether the conduct involved is "expression" and whether it has been infringed by the exercise of governmental authority. Where the court so finds, the regulation must be declared invalid under the first amendment. The test is not one of clear and present danger, or clear and probable danger, or balancing interests. The balance of interests was made when the first amendment was put into the Constitution. The function of a court in applying the first amendment is to define the key terms of that provision — "freedom of speech," "abridge," and "law." The definition of "abridge" and "law," like the definition of "expression," must

72. 72 Yale L.J. 877 (1963). An effort to apply the same general theory of freedom of expression to some of the problems of academic freedom appears in Emerson & Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 Law & Contemp. Prob. 525 (1963).

be functional in character, derived from the basic considerations underlying a system of freedom of expression.

In the area here chosen for analysis — governmental regulation of an organization or its members, which attempts to restrict expression in the interest of other social values [73] — the problems arise from communication uttered by, through or in connection with an organized group. Such conduct takes a variety of forms, as will appear shortly, but may be referred to broadly as "associational expression." Within the theoretical framework just outlined, the principal issues are (1) whether associational expression is entitled to the same full protection as individual expression; (2) what associational conduct is to be classified as "expression" and what as "action"; (3) when an organization engages in both "expression" and "action," what is the effect of any illegal action upon the association's right of expression; and (4) to what extent is the conduct of the organization attributable to its members or the conduct of some members attributable to others.

A. *Associational Expression as Entitled to the Same Complete Protection as Individual Expression*

Both the general principle of association and the basic theory of freedom of expression support the proposition that associational expression should be entitled to the same complete protection as individual expression. Associational expression is of the same nature as individual expression. Organization primarily supplies the mechanism for reaching a wider audience; it does not change the character of expression as the communication of beliefs, opinions, information and ideas, or its content. Thus associational expression is simply an extension of the individual right of expression and, for the same reasons and to the same extent, should be free of governmental abridgement. The same conclusion follows from the whole theory of free expression. The purpose of a system of freedom of expression — to allow individuals to realize their potentialities and to facilitate social change through reason and agreement rather than force and violence — cannot be effectively achieved in modern society unless free rein is given to association designed to enhance the scope and influence of communication. Such hostility as the state may have had for association when the government was weak is hardly justified when the government is powerful and pervasive. Moreover, the government still retains the power to deal with action. It may not only apply its controls against force and violence or other overt acts, but it may and must take steps to assure those basic economic and social conditions in the nation which are essential to the survival of the democratic process. Further, the controls and apparatus necessary for the restriction of associational expression — investigations, files, informers, constant surveillance — are incompatible with a free

73. The general problems of this area of freedom of expression are considered in Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 928-46 (1963).

society. Restriction of associational expression is likely to become, in practice, an effort to suppress a whole social or political movement. History and experience warn us that such attempts are usually futile and merely tend to obscure the real grievances which a society must, if it is to survive, face squarely and solve. Finally, it is clear from the very language of the first amendment that it was designed to safeguard associational expression. Both "the right of the people peaceably to assemble" and the right "to petition the Government for a redress of grievances" plainly were intended to bring associational expression within the ambit of the constitutional protection extended to individual expression.

Under the construction of the first amendment which forms the premise of this discussion, therefore, any "law" which "abridges" "freedom of associational expression" must be deemed a violation of that constitutional guarantee. From this principle it is clear that any restraint upon the mere forming or joining an organization for purposes of expression must be held in conflict with the first amendment. To the extent that this was involved in the NAACP cases previously discussed, the answer is plain. And, indeed, none of the justices participating in those decisions would hold otherwise.

The principle enunciated also solves the remaining problems of the two *Alabama* cases, *Bates, Shelton,* and *Louisiana.* The restrictions imposed by the state in all these cases clearly "abridged" "freedom of expression." In four of the cases the issue was raised in terms of the rights of the organization; in the *Shelton* case it was posed as the right of the individual. But this difference goes only to the question of standing. The essential point was the same in all five cases: the ostensible purpose for which the regulation was enacted could not constitutionally be achieved by means of restricting expression. Hence the restriction must be held, regardless of any balance of interests, a violation of the first amendment. This was, of course, the position taken by Justices Black and Douglas, apart from their concurrence in the *Alabama* cases.

Problems of associational rights have arisen in numerous other cases where the Supreme Court has not dealt with the issue under the doctrine of an independent "right of association." In many of these decisions the Court has assumed that associational expression is entitled to the same protection as individual expression. Thus, in upholding the right of a labor organization to conduct a meeting or solicit members without prior registration, the Court has applied the same rule as would be employed in the case of individual expression.[74] There are, indeed, no cases where the Court has expressly laid down a different rule for associational expression from that which protects individual expression.

Yet the doctrines under which a majority of the Court has given less than complete protection to freedom of expression frequently have been applied

74. See Thomas v. Collins, 323 U.S. 516, 534 (1945); Staub v. City of Baxley, 355 U.S. 313 (1958); and compare Lovell v. City of Griffin, 303 U.S. 444 (1938). See also Talley v. California, 362 U.S. 60 (1960).

in a way which affords less protection to associational expression. Thus in *Dennis v. United States* (1951),[75] involving a conspiracy under the Smith Act to advocate overthrow of the government by force and violence, the prevailing opinion of Chief Justice Vinson applied a probable danger test which relied heavily upon the closely knit and highly organized character of the Communist Party. Under the doctrine here proposed the associational character of the group would not be a relevant factor. The defendants would be entitled to the same freedom of expression whether they were highly organized or not. And since that expression was clearly abridged in the *Dennis* case, the statute should have been held to violate first amendment rights.

Similarly, the *ad hoc* balancing test operates to give less protection to associational expression than to individual expression. In *Communist Party v. Subversive Activities Control Board* the majority opinion of Mr. Justice Frankfurter, in striking the balance against freedom of expression, made much of the "extensive, long-continuing organizational" activity of the Communist Party.[76] It would appear highly doubtful that the Court would have sustained similar registration and disclosure required of an *individual* who was "subject to foreign domination" and sought "to advance the objectives of the world Communist movement" by methods other than force and violence.

The appropriate principle was applied in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* (1961).[77] Here a group of motor carriers brought suit under the Sherman Act against an organization of railroads alleging that the latter had combined with others to obtain the passage and enforcement of laws detrimental to the motor carriers. Mr. Justice Black, writing for a unanimous Court, held that the anti-trust laws could not be interpreted to forbid such conduct for the reason, among others, that "such a construction of the Sherman Act would raise important constitutional questions" under the first amendment. Since a single individual could clearly have engaged in this expression, an association for the same purpose could not be forbidden. It should be noted that, although the *Noerr* case was decided after the *Shelton* case and before the *Louisiana* case, Mr. Justice Black did not deal with the issue as one of "the right of association" but rather as an aspect of the first amendment right to petition.

B. *Classification of Associational Conduct as "Expression" or "Action"*

Under the general theory of the first amendment here urged, it becomes essential to determine in each case — in most cases it is the critical issue — whether the conduct involved is properly classifiable as "expression," and hence fully protected, or is classifiable as "action," and hence subject to a greater measure of government regulation. This classification, as already noted, cannot be made upon a purely literal or semantic basis. The terms "expression"

75. 341 U.S. 494.
76. 367 U.S. at 90.
77. 365 U.S. 127.

and "action" are functional ones, rooted in the fundamental character of a system of free expression and in the factors necessary to maintain its effective operation. Hence it is clear that the term "expression" must include more than the mere utterance of words or other forms of communication. It must embrace a surrounding area of conduct closely related to the making of the utterance or necessary to make it effective. Under the English censorship laws of the sixteenth and seventeenth centuries, for example, official control of the printing industry, whereby the number of presses, printers and apprentices was strictly limited, was fully as drastic a restriction upon freedom of expression as was the requirement of a license to publish. And in modern times, the operation of a sound truck or a public address system may be equally essential to effective expression.

A vital part of this surrounding conduct, which must be classified as "expression," is associational in character. As previously observed, organization is mainly a technique for reaching a larger audience. This is, of course, especially true in the highly industrial and organized society of today. Thus the hiring of a hall, the purchase of supplies, the organization of a meeting, the marching in a parade, the maintaining of office space and records, the solicitation of signatures, and much other like conduct, though not literally speech, is clearly to be considered as part of "expression." In dealing with problems of associational rights in the sphere of free expression, therefore, the delineation of this area of conduct is of central importance.

The Supreme Court has frequently recognized varying forms of associational conduct as falling within the protected area of the first amendment. The holding of a public meeting is an obvious example.[78] Activities in the form of distribution of literature, the ringing of door bells, and the solicitation of members have been considered within the protected area.[79] So have parades, demonstrations, and the use of sound trucks.[80] And general organizational activities, including the conduct of schools, are recognized as part of the protected expression.[81] All these forms of activity are essential to associational expression and must be as fully safeguarded as the actual utterance of the words themselves.

Turning to the other side of the coin, the question is what forms of associational conduct are properly classified as "action." Many types of overt action, not an integral part of an association's efforts to communicate within the framework of a system of "expression," are easily marked as "action." Conduct that involves the use of force and violence is thus plainly subject to regu-

78. De Jonge v. Oregon, 299 U.S. 353 (1937).

79. Staub v. City of Baxley, 355 U.S. 313 (1958); Thomas v. Collins, 325 U.S. 516 (1945); Martin v. City of Struthers, 319 U.S. 141 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

80. Edwards v. South Carolina, 372 U.S. 229 (1963); Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948); Cox v. New Hampshire, 312 U.S. 569 (1941); Hague v. C.I.O., 307 U.S. 496 (1939).

81. Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Yates v. United States, 354 U.S. 298 (1957).

lation, whether an individual or an organization engages in it. In addition, other forms of conduct are properly termed "action." Thus the use of military-type uniforms, instruction in para-military operations, and the like should be so classified. Similarly the wearing of masks under circumstances where such conduct is closely linked to force and violence, can be considered as part of a course of "action" and legitimately prohibited. Hence laws directed against these aspects of organizations such as the Ku Klux Klan do not infringe upon associational rights of expression.[82] Again, certain forms of picketing, having consequences other than those flowing from the ideas communicated, have properly been held to be "action" and subject to regulation.[83] Substantial leeway in formulating the distinction between "expression" and "action" in this sphere of organizational activity allows the government adequate scope to intervene when an association engages in conduct that extends beyond the bounds of democratic procedures.

This problem of determining what forms of conduct are so related to communication as to be an integral part of expression was the principal issue in the *Button* case. The key question there was whether solicitation of litigation by the NAACP, designed to secure the rights of Negroes under the equal protection clause, was properly classifiable as "expression" rather than "action." Mr. Justice Brennan addressed himself to this problem, and pointed out that the first and fourteenth amendments "protect certain forms of orderly group activity." Unfortunately, he inclined to view this activity as part of a general "right of association" rather than as coming within the "conception of freedom of speech, petition or assembly." The issues would have been sharpened if he had dealt with the conduct as an associational aspect of "expression." Mr. Justice Black, treating a similar issue in the *Brotherhood* case, took this position. In any event, the decisions mark an advance of first importance in the Court's approach to first amendment issues. By recognizing the conduct there involved as an essential element of an effective system of free expression the Court has carried the type of conduct classified as "expression" beyond any point it had previously been taken.

Mr. Justice Douglas in *Gibson* also dealt with the question of what conduct is included within expression and hence protected by the first amendment. He noted that "joining a group is often as vital to freedom of expression as utterance itself"; and that "joining a political party may be as critical to expression of one's views as hiring reporters is to the establishment of a free press." There was no real doubt in the *Gibson* case, however, that the conduct affected by the State's action did constitute "expression," and the case does not add anything to the law as it already existed on this point.[84] Mr. Justice

82. For reference to these laws see 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 10 (2d ed. 1958).

83. International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957).

84. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Barenblatt v. United States, 360 U.S. 109 (1959); and the NAACP cases discussed above. The majority of the Court, of course, applied the *ad hoc* balancing test in these cases.

Douglas also adverted to the issue in the *Lathrop* case, saying that "joining is one method of expression."[85] Under the principles here urged, however, Mr. Justice Douglas' dictum would appear too broadly stated. Joining or belonging to an organization engaged in "expression" should be classified as "expression." But joining or belonging to an organization engaged in "action" cannot be considered a "method of expression," and the associational rights there involved would be governed by the constitutional doctrines concerned with governmental powers over "action." Had Mr. Justice Douglas made these distinctions, his views as to whether associational rights were "absolute" or not would have been less ambiguous.

C. *Separation of "Expression" and "Action" Within the Same Organization*

Frequently an organization, or members acting in connection with it, will engage in both "expression" and "action." The problem is then presented as what effect, if any, the existence of conduct classified as "action" may have upon the government's power to regulate, directly or indirectly, the organization's conduct classified as "expression." The "action" involved may be illegal, or it may be legal but subject to governmental regulation. The more difficult case, in practice if not in theory, occurs when the action is of a clearly illegal nature, such as the use of force or violence, and we will be concerned principally with that problem. The issue is of prime importance in maintaining a system of freedom of expression.

Under the theory of the first amendment previously suggested, the basic doctrine is clear: Conduct in the form of "expression" cannot be abridged, either directly or as a method of regulating "action." In the case of the individual, punishment for illegal action does not, under any theory of the first amendment, justify the government in suppressing that individual's freedom of expression, except in the sense that incarceration or a similar penalty necessarily restricts it. Associational expression should be governed by the same rule. This follows from the general principle of association, as an extension of individual liberty, and from the whole theory of free expression. Any other rule, in effect, permits the outlawry of the association. It would mean a precarious existence for those organizations which militantly advocate unpopular causes, for any illegal action attributable to the organization or its members could form the basis for suppression of all its associational expression. Thus, the NAACP, CORE, SNCC, and other similar groups would be in imminent danger of official dissolution.

The issue then becomes one of separating illegal action by an association from protected expression. The task may at times be difficult, but it is by no means impossible. The Supreme Court has in the past accepted the basic doctrine here urged and has made the necessary separation. The leading decision is *De Jonge v. Oregon* (1937).[86] In that case the Court was asked to

85. 367 U.S. 820, 881-82 (1961).

86. 299 U.S. 353.

uphold the conviction of a member of the Communist Party who had presided at a meeting devoted to protests against police brutality in a labor dispute. The Court proceeded upon the assumption that the Communist Party had elsewhere engaged in illegal acts in violation of the State law. But Chief Justice Hughes ruled that the State power extended only to punishment of specific evils and could not prevent the associational expression of holding a peaceful meeting. He stated the principle in the following terms:

> These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.[87]

Similar issues had been potentially involved, but never reached, in *New York ex rel. Bryant v. Zimmerman* (1928).[88] A New York statute which required registration and disclosure of membership of oath-bound societies was upheld as applied to the Ku Klux Klan. The first amendment issue was not explored. Applying the principle of separating "action" and "expression," the validity of the law would depend upon facts not developed in the Court's opinion. If the Ku Klux Klan engaged only in "action," registration and disclosure might be considered a reasonable requirement conforming to due process. On the other hand, if a substantial part of the organization's conduct involved "expression," disclosure abridging that expression would not be a permissible form of dealing with the evils of "action."[89]

A majority of the Supreme Court accepted the principle of separating "action" from "expression" in *American Communications Ass'n v. Douds* (1950).[90] The issue there involved the validity of Section 9(h) of the Taft-Hartley Act, which withdrew the benefits of the National Labor Relations Act from unions whose officers refused to sign a non-Communist affidavit. Chief Justice Vinson, in the prevailing opinion of the Court, reasoned that "Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage . . . ."[91] If no more than regulation of this activity were involved, he went on, "the foregoing would dispose of the case." But "the problem is this: Communists, we may assume, carry on legitimate political activities"; and hence Section 9(h) has "the further necessary effect of dis-

87. *Id.* at 364-65.

88. 278 U.S. 63.

89. Of course, the privilege against self-incrimination, as guaranteed under the state constitution or to the extent incorporated in the fourteenth amendment, would impose severe limitations upon any requirement for disclosure in cases involving illegal action, or foreclose such regulation altogether. See Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 968 (1964).

90. 339 U.S. 382.

91. *Id.* at 391.

couraging the exercise of political rights protected by the First Amendment." In resolving this issue Chief Justice Vinson employed the *ad hoc* balancing test, and found that the interest of the government in preventing political strikes outweighs the infringement upon freedom of expression. Thus the Court did not protect the expression, but it did deal with it as a separate issue. In sharp contrast was the well-known concurring opinion of Justice Jackson, which in essence took the position that the illegal actions of the Communist Party justified the infringement upon its freedom of expression.[92]

On the other hand, in *Communist Party v. Subversive Activities Control Board* (1961)[93] the majority of the Court seems to have ignored altogether the need for divorcing "expression" from "action" in associational conduct. The registration provisions of the Internal Security Act involved, operating in practice to outlaw any organization forced to register, were justified in the legislative findings in large part on the ground that the organizations designated were "constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of . . . through the freedom-preserving means employed by a political party. . . ."[94] Mr. Justice Frankfurter, on behalf of the majority, refused to separate "action" from "expression," saying, "The present statute does not, of course, attach the registration requirement to the incident of speech, but to the incidents of foreign domination and of operation to advance the objectives of the world Communist movement — operation which, the Board has found here, includes extensive, long-continuing organizational, as well as 'speech,' activity."[95] And Mr. Justice Douglas, joined in this respect by Mr. Chief Justice Warren and Mr. Justice Brennan, similarly found that "more than debate, discourse, argumentation, propaganda, and other aspects of free speech and association are involved. An additional element enters, *viz.*, espionage, business activities, and the formation of cells for subversion, as well as the use of speech, press, and association by a foreign power to produce on this continent a Soviet satellite."[96] The result was that both "action" and "expression" were lumped together and all associational rights destroyed.[97]

92. *Id.* at 422. See also Killian v. United States, 368 U.S. 231 (1961), where the majority held that membership in the Communist Party, as that term is used in the Taft-Hartley Act, can be proved by conduct taking the form of expression. Mr. Chief Justice Warren and Justices Black and Douglas dissented on the ground that the majority had failed to separate legal from illegal conduct in determining membership. The result, however, would seem implicit in the *Douds* decision, which, as pointed out, distinguished legal from illegal conduct but refused to protect the legal conduct.

93. 367 U.S. 1.

94. 64 Stat. 987 (1950), 50 U.S.C. § 781(6) (1958).

95. 367 U.S. at 90.

96. *Id.* at 172-73.

97. The same issues are raised in even more acute form in the cases ordering registration of "Communist front organizations." See American Committee for Protection of Foreign Born v. Subversive Activities Control Bd., 331 F.2d 53 (D.C. Cir. 1963), *cert. granted*, 377 U.S. 915 (1964); Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Bd., 331 F.2d 64 (D.C. Cir. 1963), *cert. granted*, 377 U.S. 989 (1964).

In the NAACP cases, in some contrast to the recent Communist Party cases, the Supreme Court has taken pains to make the necessary separation between illegal "action" and constitutionally protected "expression." It adhered to this distinction in the last *Alabama* case, and gave protection to the expression. This problem, in more difficult form, was at the heart of the *Gibson* case. The claim put forward by the Florida Investigation Committee was that it could demand production of the Miami Branch membership lists in order to ascertain whether certain alleged members of the Communist Party or Communist-front organizations were active in the NAACP. Here the alleged illegal action was that of isolated members of the association, not directly connected with the organization's own activities. But the same principles would apply. The Committee had constitutional authority to investigate in the realm of "action" but not in the realm of "expression." Even assuming the Communist Party had engaged in illegal conduct, which assumes that advocacy of its views was illegal, the Court should have undertaken to limit the investigation to such areas. Obviously the issue of membership in the Communist Party, and *a fortiori* membership in a Communist-front organization, combines aspects of such illegal action and legitimate expression. Inquiry was therefore permissible only as to actual conduct amounting to "action" occurring in connection with the activities of the Miami Branch. To permit the inquiry to proceed in the blanket fashion attempted by the Committee plainly invaded the protected area of expression.

Mr. Justice Goldberg invoked the doctrine of "the right of association" and accepted the balancing test. It is significant, however, that he did not stop at this point. Rather he went some distance in the direction of making the crucial separation between "expression" and "action." For he rested his case ultimately upon the fact that the record did not show a "nexus between the N.A.A.C.P. and subversive *activities*."[98] In this respect the *Gibson* decision marks an important departure from the Court's previous holdings in legislative committee cases. Earlier rulings — notably in the *Barenblatt, Braden* and *Wilkinson* cases — had consistently refused to separate committee questions regarding Communism into the elements of "expression" and "action."[99] The Goldberg opinion, unfortunately, is not entirely clear on this point. The opinions of Justices Black and Douglas struck closer to the mark.

The doctrine that the regulation may not be "too broadly drawn" serves a useful function in maintaining the separation between "expression" and "action" in associational conduct. Thus, in the last *Alabama* case, the doctrine was specifically applied to strike down a statute which failed to distinguish conduct not protected by the first amendment from conduct which was so protected. And it was employed, with somewhat the same effect, in the *Louisi-*

98. 372 U.S. 539 (1963).

99. Barenblatt v. United States, 360 U.S. 109, 129-32 (1959); Braden v. United States, 365 U.S. 431, 433-35 (1961); Wilkinson v. United States, 365 U.S. 399, 414-15 (1961). *Cf.* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

ana and *Button* cases. The significance of the doctrine is brought out even more sharply by the recent decision in *Aptheker v. Secretary of State* (1964).[100] At issue there was the validity of Section 6 of the Internal Security Act which makes it a criminal offense for any member of a "Communist organization," registered or ordered to register under that Act, to apply for or use a passport. Mr. Justice Goldberg, in the majority opinion, first established the constitutional right at stake: "Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."[101] He then proceeded to analyze in detail the impact of Section 6, pointing out that it applied regardless of the member's knowledge of the nature of the organization, regardless of the degree of his activity in the organization or his commitment to its objectives, and regardless of the purposes for which he wished to travel. He also emphasized that "Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security." On the basis of these considerations he concluded that the statute "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment," and hence was invalid on its face.[102]

The doctrine that legislation affecting basic freedoms cannot be "too vague and indefinite" operates in the same manner. Two recent decisions of the Court illustrate its significance. *Cramp v. Board of Public Instruction* (1961)[103] involved a Florida statute requiring that every state employee execute a written oath swearing, among other things, that he had never lent his "aid, support, advice, counsel or influence to the Communist Party." After a detailed exploration of the ambiguities latent in such an oath, Mr. Justice Stewart, speaking for a unanimous Court, held the statute invalid because of the "vice of unconstitutional vagueness."[104] The Court went even further in *Baggett v. Bullitt* (1964).[105] In this case Washington statutes required all state employees to take two oaths. One required the employee to swear that he would "by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." The other imposed an oath that the employee was not a "sub-

100. 378 U.S. 500.

101. *Id.* at 507.

102. Justices Clark, Harlan and White dissented. For a similar application of the rule against undue breadth, see Brown v. United States, 334 F.2d 488 (9th Cir. 1964), *cert. granted*, 33 U.S.L. WEEK 3171, Nov. 10, 1964, in which the court held invalid the successor to the Taft-Hartley provision, imposing a criminal penalty upon a member of the Communist Party who holds office in a union.

103. 368 U.S. 278.

104. *Id.* at 287. Justices Black and Douglas concurred in the Court's opinion but added other grounds.

105. 377 U.S. 360.

versive person" as defined in the applicable statute. Again the Court, in an opinion by Mr. Justice White, examined at length the "possible coverage" of the two oaths and held them void for indefiniteness.[106]

The increasing reliance of the Supreme Court upon the doctrines of undue breadth and undue vagueness marks a significant advance in the protection of associational rights of expression. The use of these doctrines focuses attention upon the separate aspects of associational conduct and forces the legislature to limit its regulation to those parts of the conduct which are properly subject to restriction, while leaving the remainder unimpaired. Thus far, however, the majority of the Court has gone only part of the way. The rules of undue breadth and undue vagueness do not squarely meet the issue of marking the line between "expression" and "action." And the use of the *ad hoc* balancing test to define the limits of control over "expression" does not afford that right adequate protection. Until the Court carries its doctrines to the point of clearly separating conduct classifiable as "action" from conduct classifiable as "expression," and extends full protection to "expression," the requirements of the first amendment in safeguarding freedom of associational expression are not met.

D. Attribution of the Conduct of the Organization or of Some Members to Other Members

A fourth issue of associational rights in the field of freedom of expression relates to the extent to which the conduct of an organization is attributable to its members or the conduct of some members attributable to others. This, in a general way, is the question of "guilt by association." The issues usually arise as a problem of determining what punishment or restriction may be imposed upon an individual member by reason of his relationship to an association which has engaged in illegal activity, or some of whose members have done so.

If one accepts the theory of the first amendment here being urged, the basic lines of decision are not difficult to discern. Where the conduct of the organization, or some of its members, is classifiable as "expression," such conduct would be fully protected and hence could not be used as grounds for punishing or otherwise restricting other members. To hold contrariwise would, in effect, abridge the freedom of expression of both parties. Or, to put the matter another way, there is no conduct punishable or restrictable which can be attributed to the other members.

The application of this doctrine is well illustrated by reference to the government loyalty programs, in which issues of "guilt by association" have most frequently arisen. Membership in an organization, or association with it, has usually constituted the major evidence in determining whether an individual is qualified for government employment on loyalty grounds. Exercise of the right to freedom of expression cannot, under the first amendment, be made the basis for disqualification from government employment or for deprivation of any other government benefit or privilege. Hence the question of whether

106. Justices Clark and Harlan dissented.

the beliefs, opinions, utterances, or other forms of expression of an organization should be attributed to one of its members seeking government employment is quite beside the point. Whether the member approved or disapproved of the expression, engaged in it or did not, must be held entirely irrelevant.[107] The rule would also dispose of the issues involved in the *Scales* case.[108] According to the position here taken the conduct of the Communist Party revealed in that case, amounting to no more than advocacy, would be classified as "expression" and thus protected by the first amendment. Hence Scales' membership, whether active or not, and regardless of knowledge or intention, could not constitute grounds for criminal prosecution.

On the other hand, when the conduct sought to be attributed to an individual member of an association is classifiable as "action," different considerations obtain. If the action is illegal, the rules of criminal conspiracy may apply. If the action is not illegal, the issue may be governed by the rules of due process or other constitutional doctrine. Thus prohibiting a person associated with a firm underwriting securities from becoming a director of a national bank is entirely different from imposing disqualification for associational conduct taking the form of "expression."

The more difficult questions arise when the conduct of the organization or its members involves both "expression" and "action." The issues here are similar to those discussed in the previous section. In this situation, however, the associational rights are viewed primarily from the standpoint of the individual rather than the organization. The rules for punishing or restricting a member because of his relationship to an organization which engages in both "action" and "expression" must undertake to separate the two forms of conduct and their consequences. This requires adherence to two basic doctrines. In order for such punishment or restriction to be valid under the first amendment, the individual must be closely linked to the "action" features of the conduct of the organization or its members. And any resulting punishment or restriction imposed upon the individual as a result of that relationship must not "abridge" his or the organization's rights of "expression."

These issues were presented in the *Scales* case, if we accept the majority position that the conduct of the Communist Party proved in that case was "not constitutionally protected speech," that is, under the terminology adopted here, was "action." The opinion of Mr. Justice Harlan explicitly recognized the problem:

> It is, of course, true that quasi-political parties of other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and

107. In certain limited situations, involving high government posts, the imposition of political qualifications for office would not necessarily "abridge" freedom of expression.

108. *Supra* note 22.

illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired.[109]

Mr. Justice Harlan went on to hold that the membership clause of the Smith Act "does not make criminal all association with an organization, which has been shown to engage in illegal advocacy." But he found the criminal sanction applicable where the defendant has "knowledge of the proscribed advocacy" and "the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.' "[110] The Court thus undertook to separate "expression" and "action" to some degree. But its decision did not go far enough to avoid the danger the Court has itself pointed out. To make proof of knowledge and intent, shown to the satisfaction of a jury, a sufficient link with illegal action to sustain the criminal penalty, does not draw the line with the necessary precision and does not, realistically or effectively, prevent impairment of "legitimate political expression." Under the circumstances, only a requirement of actual participation in the illegal action would serve to separate action and expression in a manner consistent with maintenance of free expression.

The rules stated above would also apply to indirect forms of sanction against members in an organization found to have engaged in both "expression" and illegal "action." This approach was, in substance, taken by Mr. Justice Black in *Schware v. Board of Bar Examiners* (1957).[111] The question was whether an applicant could be denied admission to the bar of New Mexico on the ground, among others, that he lacked "good moral character" by reason of past membership in the Communist Party. Holding there was no basis for finding that the requisite moral character was lacking, Mr. Justice Black pointed out that there was no evidence "to show that petitioner participated in any illegal activity or did anything morally reprehensible as a member of that Party." And he went on: "Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct."[112]

In other cases of a similar nature, however, a majority of the Supreme Court has not adequately separated "action" from "expression" in determining whether membership in an organization is subject to government restriction.[113] The most the Court has done is to require a showing that the member has knowledge of the illegal purposes of the organization.[114] The recent

109. 367 U.S. at 228, 229.

110. *Id.* at 229-30.

111. 353 U.S. 232.

112. *Id.* at 246. The Court did not, however, pass on the first amendment issue. See also Schneiderman v. United States, 320 U.S. 118 (1943). *But cf.* Konigsberg v. State Bar, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961).

113. See Garner v. Board of Public Works, 341 U.S. 716 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952); Nelson v. County of Los Angeles, 362 U.S. 1 (1960). See also the legislative investigating committee cases, *supra* note 99.

114. Wieman v. Updegraff, 344 U.S. 183 (1952).

tendency to invoke the rule against undue breadth and undue vagueness in such cases, as discussed above, has done much to sharpen these issues. Yet again, unless the Court insists upon a clear separation, and limits government infringement to conduct closely tied to "action," it does not fully protect that freedom of associational expression which is guaranteed by the first amendment.

CONCLUSION

As pointed out at the beginning, freedom of association in the United States has assumed increasing significance as modern society has developed, and problems of associational rights have given rise to new and perplexing constitutional issues. These issues demand analysis, discussion and resolution. For the reasons here outlined, however, it seems doubtful that adequate solutions can be achieved, for all these varied questions, through development of a constitutional doctrine of "the right of association." As a basic principle of a democratic society freedom of association is fundamental. But the new constitutional doctrine has proved of limited value at best, and indeed has tended to obscure the real issues. Questions of associational rights must be framed and decided in terms of other constitutional doctrines. This article has attempted to explore some of these doctrines as they relate to the field of freedom of expression. The particular solutions advanced may or may not be accepted. But it is along such lines that the ultimate answers will have to be sought.