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## INDIVIDUAL FREEDOM VERSUS COMPULSORY UNIONISM: A CONSTITUTIONAL PROBLEM

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**I**F THERE are tides in the affairs of men which "when taken at their flood lead on to fortune,"<sup>1</sup> so too are there tides in the fortunes of social causes and movements which, if properly grasped, can propel them to dizzying heights. Just such a tide occurred for American labor in the mid-1930's, a tide which was to lead to union power and privilege exceeding the visionary dreams of the most zealous of labor partisans, and to result in passage of the National Labor Relations Act in 1935,<sup>2</sup> a statute which gave unions such an abundance of riches that for the next 20 years they virtually staggered under the load.

At the very top of the list of special benefits which this new federal bonanza gave unions was the exclusive right to represent all workers, union and non-union alike, in any bargaining unit in which a union achieved majority status. Coupled with this extraordinary privilege of exclusive representation, the Act also permitted agreements between unions and employers to require all employees to join the union and pay dues to the union as a condition of employment.<sup>3</sup>

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<sup>1</sup> SHAKESPEARE, JULIUS CAESAR, Act IV, Scene 3.

<sup>2</sup> National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-87 (1964).

<sup>3</sup> The original N.L.R.A., *ibid.*, permitted all forms of compulsory unionism, including the closed shop under which only union members could be hired. The Taft-Hartley Act amendments in 1947, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-44 (1964), outlawed the closed shop but permitted union shop agreements under which employees are

Taking this tide at its flood, union leaders were quick to make compulsory union membership one of their major organizing and bargaining goals. So successful were labor's organizing drives in the ten years following the enactment of the National Labor Relations Act that union membership skyrocketed from a level of approximately two million to an estimated high of seventeen million in the post-war period, and union treasuries practically burst at the seams from a ten-fold increase in dues payments, initiation fees and other types of assessments. No accurate estimate can be made as to how many of these seventeen million "members" were dragooned into the unions under compulsory union shop agreements, but a reasonable guess could place the figure somewhere between two and three million. By a similar process the amount of dues and fees paid by these unwilling captives could be estimated as in excess of one hundred million dollars each year.

In spite of this amazing success, the leaders of organized labor have never been able to convince the American people of the rightness of compulsory unionism. So unappealing is the idea that American workers should be forced to pay dues to a union against their will in order to keep their jobs that a number of states, beginning in 1944, adopted statutory and constitutional provisions outlawing compulsory unionism agreements. Florida, the first state to adopt such a law, put it in the form of a strikingly simple constitutional amendment, declaring:

[t]he right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.<sup>4</sup>

Other states followed Florida's lead in enacting "Right to Work" laws, and there are currently nineteen states in which such laws are in force.<sup>5</sup>

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required to join the union within 30 days after they are hired. The only difference between these two forms of compulsory union agreements is thus a lag of thirty days in the time the worker is required to join.

<sup>4</sup> FLA. CONST. art. I, § 12 (1885, as amended, general election, 1944).

<sup>5</sup> ALA. CODE tit. 26, §§ 375(1)-(7) (1953); ARIZ. REV. STAT. ANN. § 23-1302 (1947); ARK. STAT. ANN. § 201-202 (1948); FLA. CONST., *supra* note 4; GA. CODE ANN. § 54-902 (1947); IOWA CODE § 736A.1 (1947); KAN. GEN. STAT. ANN. § 44-802 (1949); MISS. CODE ANN. § 6984.5 (1954); NEB. CONST. art. XV, § 13 (1946); NEV. REV. STAT. § 613.250 (1953); N.C. GEN. STAT. § 95-78 (1947); N.D. CENT. CODE § 34-01-14 (1947); S.C. CODE ANN. § 40-46 (1954); S.D. CODE § 17.1101 (1952 supp.); TENN. CODE ANN. § 50-208 (1947); TEX. REV. CIV. STAT. art. 5154a, § 1 (1943); UTAH CODE ANN. § 34-1-7 (1937); VA. CODE ANN. § 40-64 (1946); WYO. STAT. ANN. § 27-245.2 (1963 supp.).

Eleven of these state right to work laws were in force at the time Congress adopted the Taft-Hartley Act amendments to the National Labor Relations Act in 1947,<sup>6</sup> and in order to eliminate any doubt as to the effect the federal law would have upon such state laws Congress wrote into the Taft-Hartley Act the now famous section 14(b), which expressly provides that nothing in the National Labor Relations Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.<sup>7</sup>

For 18½ years now, this provision of the law has been regarded by the leaders of organized labor as their nemesis, their *bête noir*, a thorn in their side, a burr under their saddle, a mote in their eye, and, in short, the bane of their existence. For 18½ years, they have sought unceasingly and unrelentingly to have this clause expunged, torn out by the roots and consigned to some hideous purgatory which they feel it so justly deserves. In Congress after Congress since 1947, the lobbyists of organized labor have had bills introduced to repeal section 14(b), but in Congress after Congress, they were met with only the chilliest of receptions. To most members of Congress it seemed that the decision made in 1947 to leave the matter of regulating compulsory unionism to the several states was a good decision, and, moreover, very few members had any great enthusiasm for the idea of giving general federal sanction to compulsory union membership and coerced payment of union dues.

In the face of these rebuffs, the union professionals turned their efforts towards getting Congressmen elected who would agree to vote for repeal of section 14(b). These efforts were not unfruitful, and by the time the 89th Congress was convened in January of 1965, the labor chiefs felt the time was ripe to make repeal of section 14(b) their major number one high priority legislative target. A repeal bill<sup>8</sup> passed the House of Representatives on July 28, 1965, by a vote of 221 to 203, after the proponents of the bill blocked every effort to consider amendments and imposed a rule which drastically limited debate. The bill then went to the Senate for appropriate action.

Under the rules of the Senate, in contrast to the House, debate on a

<sup>6</sup> *Supra* note 3.

<sup>7</sup> 49 Stat. 457 (1947), 29 U.S.C. § 164(b) (1964).

<sup>8</sup> H.R. 77, 89th Cong., 1st Sess. (1965).

measure can be curtailed only by adoption of a cloture motion supported by two-thirds of the Senators present and voting. Since the Senate supporters of the repeal bill were far fewer than the two-thirds required for cloture, the opponents of the bill had a full opportunity to debate its merits.

The extended Senate debate on the repeal question covered a period of several weeks in September and October 1965 and January and February of 1966, and filled the *Congressional Record* with hundreds of thousands of words of argument, entreaty, attack, defense, logic, emotion and general display of forensic fireworks. The debate was essentially non-partisan, with Senators on both sides of the aisle taking a stand for and against the repeal measure. Three efforts by opponents of repeal to limit debate through cloture failed and the bill was finally laid to rest by the majority leader, Senator Mansfield, on February 10, 1966. Twenty-two Democratic members joined with twenty-seven Republicans to block the repeal measure.

During the course of the extended debate, numerous constitutional arguments were made in support of the right to work principle, with a surprisingly large number of Senators expressing the view that compulsory union membership and coerced payment of union dues runs counter to the basic concepts of individual freedom expressed in the First, Fifth, and Fourteenth Amendments to the Constitution and seriously infringes those rights. No person, they argued, should be required to belong to or pay money to any private organization for the right to earn a living for himself and his family. In this, they seemed to be reflecting the instinctive reaction of the American public to compulsory unionism. The fantastic flood of mail which poured into congressional offices during the debates ran as high as twenty to one against repeal, and every opinion research poll taken throughout the country by newspapers and professional pollsters showed the general public overwhelmingly opposed to the idea of forcing a man to join a union in order to keep his job.

Going beyond this broad public sentiment, many constitutional scholars are convinced that compulsory unionism must ultimately be held unconstitutional by our courts as an infringement of the fundamental human rights protected by the Constitution. Although the right to work is not specifically mentioned anywhere in the Constitution, it is undoubtedly one of those rights which the Founding Fathers felt were so basic that express enumeration was unnecessary. Under the

American concept of individual liberty and the dignity of man, every man must necessarily have the opportunity to procure the means of survival. To deny this right is not only a deprivation of liberty but a danger to advancement in life, and even to life itself. This noble idea was eloquently expressed by Shylock in the *Merchant of Venice*, when he said "You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."<sup>9</sup> In more recent times, it found expression in language such as that of Mr. Justice Terrell of the Florida Supreme Court, in *Carpenters Dist. Council v. Miami Chapter, Associated General Contractors*,<sup>10</sup> wherein he wrote:

The right to work is equivalent to the right to eat and the right to eat and provide raiment for his dependents is man's most dominant urge. In a free country like ours such a right should not depend on one's race, color, the lodge, craft, church or other organizations to which he belongs. Such a requirement is contrary to the spirit of our institutions, the basis on which our democracy was founded and every impulse of the forefathers who gave it existence. I can think of nothing more out of harmony with true Americanism. Membership in one's lodge, craft or church may be a means of enlarging spiritual, cultural and physical assets but to make his bread depend on craft or church membership would be the worst species of anti-Americanism.<sup>11</sup>

The American Civil Liberties Union similarly supported the right to work principle in an *amicus curiae* brief filed in *Wilson v. Loew's, Inc.*,<sup>12</sup> a case challenging the action of a group of movie studios in blacklisting the famed "Hollywood Ten" writers who had refused to answer questions of a congressional committee as to their Communist party connections. In that brief, the ACLU pointed out that:

The right to work is a human right, a personal right, a constitutional right; and the opportunity to earn a living cannot be unjustly withheld from a man without doing violence to the constitutional guarantees protecting his life, liberty, property and assuring him equal protection of the law.<sup>13</sup>

The constitutional protection of the right to work was first proclaimed by the United States Supreme Court in the case of *Cummings v. Missouri*,<sup>14</sup> a decision which invalidated a provision in the Missouri Constitution under which a Catholic priest was fined for continuing to

<sup>9</sup> SHAKESPEARE, *MERCHANT OF VENICE*, Act IV, Scene 1.

<sup>10</sup> 55 So. 2d 794 (Fla. 1952).

<sup>11</sup> *Id.* at 796.

<sup>12</sup> 26 CCH Lab. Cas. at ¶ 68,600 (1954).

<sup>13</sup> *Wilson v. Loew's, Inc.*, *amicus curiae* brief of the American Civil Liberties Union.

<sup>14</sup> 71 U.S. (4 Wall.) 277 (1866).

perform the offices of his religion without taking a prescribed oath. As there stated by the court:

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law.<sup>15</sup>

In many decisions following the *Cummings* case, the right to work principle was applied to protect Chinese laundrymen, railroad men, teachers, and Japanese fishermen. In 1915, the right to work was declared to be plain and self-evident principle of American Constitutional Law by Justice Charles Evans Hughes in *Truax v. Raich*,<sup>16</sup> holding that a state may not deny to lawful inhabitants, because not native-born, the ordinary means of earning a livelihood. As therein stated:

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] amendment to secure.<sup>17</sup>

The right to work is not a guarantee of employment by a paternalistic system controlling all means of production. It only signifies the inherent right of every man to an opportunity to seek and retain the gainful employment which he desires. This is all that state Right to Work laws ever were intended to preserve for the individual.

It is, of course, evident that compulsory unionism is an abnormal departure among private associations. No other organizations, not even churches, have the right to conscript members. So, the public asks, why should unions? If a man can be compelled to join a union or contribute to its financial support, what other private organization may conscript members, or in effect levy taxes on the privileges of citizenship?

More to the point, however, is the question as to whether and to what extent compulsory membership or coerced payment of dues infringes upon the freedom of association which the First Amendment seeks to protect. Freedom of association, it has been held, is a composite right derived from freedom of speech, freedom of assembly, freedom to petition and the general right to liberty of action recog-

<sup>15</sup> *Id.* at 321-22.

<sup>16</sup> 239 U.S. 33 (1915).

<sup>17</sup> *Id.* at 41.

nized by the First Amendment. It is actually the legal basis for the recognition of the right to organize labor unions.

Labor unions have themselves relied very heavily on this concept of freedom of association to protect their right to engage in organizing activities and to resist any state laws which placed limitations upon such organizing activities. For example, in *Thomas v. Collins*,<sup>18</sup> the Supreme Court reversed the conviction of R. J. Thomas, an organizer for the United Automobile Workers, for failure to comply with a Texas statute which required the licensing of union organizers. In arguing Thomas' case, union lawyers contended that this licensing requirement infringed upon the freedom of association guaranteed under the First Amendment. The Supreme Court agreed in the following eloquent language:

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

This conjunction of liberties is not peculiar to religious activities and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. . . . Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest. . . .

There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.<sup>19</sup>

Having thus recognized the right to organize workers into unions as part of the protected freedom of association under the First Amendment, it must follow that the right not to join a union is a necessary corollary of the right to join, for without a right not to join there can be no such thing as a right to join. Freedom rests on choice, and where choice is denied freedom is destroyed as well.

Thus it is that the Supreme Court has recognized the affirmative and negative sides of constitutional liberties in *Board of Education v. Barnette*,<sup>20</sup> in upholding the right of members of a religious sect

<sup>18</sup> 323 U.S. 516 (1945).

<sup>19</sup> *Id.* at 530, 543.

<sup>20</sup> 319 U.S. 624 (1943).



to refuse to join in the oath of allegiance to the flag. The court specifically pointed out that freedom of speech carries with it a freedom to remain silent. In *Atchison, Topeka and Santa Fe Ry. Co. v. Brown*,<sup>21</sup> the Supreme Court of Kansas said "[i]t would seem that the liberty to remain silent is correlative with the freedom to speak. If one must speak, he cannot be said freely to speak."<sup>22</sup>

By the same token, if men are to be free to join unions, they must also be free not to join, for otherwise they will be burdened with a duty or obligation to join an organization selected, not by themselves but by others, which is the very antithesis of the freedom of choice of the individual which is the core of American constitutional liberty. This premise was explicitly recognized as recently as 1955, in a unanimous decision of the Supreme Judicial Court of Maine in *Pappas v. Stacey*,<sup>23</sup> a case involving a Maine statute which was construed to prohibit a strike and picketing by three restaurant employees, who were union members, for the purpose of forcing the employer to make the other twenty-seven non-union employees join the union. In the course of its opinion, the court said "[F]reedom to associate of necessity means as well freedom not to associate."<sup>24</sup>

It is a sorry commentary that organized labor, which has so frequently invoked these constitutional protections in the process of raising itself up from the impoverished days of the 1930's to its present position of wealth and power, has now become the usurper of the constitutional protections of the individual worker. Although unions zealously claim the right of freedom of association, they seek to deny it to others, and under sanction of a federal statute, the National Labor Relations Act, they are free in 31 of the 50 states of the union to do so.

Through compulsory unionism, the worker is not only deprived of his freedom of association, but is also deprived of his freedom of conscience and of speech. It is well known to everyone that American unions have for the past many years been highly active in politics and have played a very important role in election campaigns of members of Congress, of state legislators, state officials; and local city and county officials. The union chiefs make no apologies for this, but rather assert that it is their right to make sure that those elected to

<sup>21</sup> 80 Kan. 312, 102 Pac. 459 (1909).

<sup>23</sup> 116 A.2d 497 (Maine 1955).

<sup>22</sup> *Id.* at 315, 102 Pac. at 460.

<sup>24</sup> *Id.* at 500.

public office are sympathetic towards the aims and purposes of labor unions. Large armies of union staff personnel are assigned to work in political campaigns at the precinct level in getting out the vote for union-endorsed candidates; union newspapers and other publications are heavily devoted to promoting favored candidates, and union funds derived from membership dues and fees are liberally distributed to such candidates.

Where does this leave the individual worker who is required under a compulsory unionism agreement to pay his dues and fees into the union as a necessary condition to holding his job? Is he thus compelled to contribute money to election campaigns for candidates to which he may be completely opposed, or to support with his dues dollar causes and ideologies with which he himself may have no sympathy? And, if so, what is the effect upon his constitutionally protected liberties? The answer was resoundingly expressed by Justice Hugo Black, in his dissent in *International Association of Machinists v. Street*,<sup>25</sup> as follows:

There can be no doubt that the federally sanctioned union-shop contract here, as it actually works, takes a part of the earnings of some men and turns it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law. This injects federal compulsion into the political and ideological processes, a result which I have supposed everyone would agree the First Amendment was particularly intended to prevent. And it makes no difference if, as is urged, political and legislative activities are helpful adjuncts of collective bargaining. Doubtless employers could make the same arguments in favor of compulsory contributions to an association of employers for use in political and economic programs calculated to help collective bargaining on their side. But the argument is equally unappealing whoever makes it. The stark fact is that this Act of Congress is being used as a means to exact money from these employees to help get votes to win elections for parties and candidates and to support doctrine they are against. If this is constitutional the First Amendment is not the charter of political and religious liberty its sponsors believed it to be. James Madison, who wrote the Amendment, said in arguing for religious liberty that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." And Thomas Jefferson said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." These views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment. That Amendment leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money to advance the fortunes of

<sup>25</sup> 367 U.S. 740 (1961).

candidates he would like to see defeated or to urge ideologies and causes he believes would be hurtful to the country.<sup>26</sup>

Justice Douglas, not known for his hostility to organized labor, writing a separate opinion in the same case had the following to say:

The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action. . . . I think the same must be said when union dues or assessments are used to elect a Governor, a Congressman, a Senator, or a President. It may be said that the election of a Franklin D. Roosevelt rather than a Calvin Coolidge might be the best possible way to serve the cause of collective bargaining. But even such a selective use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority. I do not see how that can be done, even though the objector retains his rights to campaign, to speak, to vote as he chooses. For when union funds are used for that purpose, the individual is required to finance political projects against which he may be in rebellion.<sup>27</sup>

The *Street* case originated in the state courts of Georgia as an action brought by a group of railroad workers covered by a union shop agreement to challenge the constitutionality of the union shop authorization set forth in the Railway Labor Act.<sup>28</sup> The trial court found that the defendant unions were using union dues exacted from plaintiffs to support the political campaigns of candidates for national, state and local offices, to propagate political and economic doctrines, concepts and ideologies, and to promote legislative programs, all of which were opposed by the plaintiffs.<sup>29</sup>

<sup>26</sup> *Id.* at 789-90.

<sup>27</sup> *Id.* at 777-78.

<sup>28</sup> 45 U.S.C. § 152 at 11 (1964).

<sup>29</sup> *International Association of Machinists v. Street*, 215 Ga. 27, 108 S.E.2d 796 (1959), wherein the court set out the pertinent findings as follows:

(5) The funds so exacted from plaintiffs and the class they represent by the labor union defendants have been, and are being, used in substantial amounts by the latter to support the political campaigns of candidates for the offices of President and Vice President of the United States, and for the Senate and House of Representatives of the United States, opposed by plaintiffs and the class they represent, and also to support by direct and indirect financial contributions the political campaigns of candidates for State and local public offices, opposed by plaintiffs and the class they represent. The said funds are so used both by each of the labor union defendants collectively and in concert among themselves and with other organizations not parties to this action through associations, leagues, or committees formed for that purpose. (6) Those funds have been and are being used in substantial amounts to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by plaintiffs and the class they represent. Those funds have also been and are being used in substantial amounts to impose upon plaintiffs and the class they

The Supreme Court of Georgia, in sustaining a judgment in favor of the plaintiffs, stated:

One who is compelled to contribute the fruits of his labor to support or promote political or economic programs or support candidates for public office is just as much deprived of his freedom of speech as if he were compelled to give vocal support to doctrines he opposes.<sup>30</sup>

On review, the United States Supreme Court ducked the constitutional issue thus squarely presented, and disposed of the case by holding that under the regulatory scheme created by the Railway Labor Act, Congress did not intend that a union may, over an employee's objection, spend his money for political causes which he opposes. In devising a remedy for such unauthorized union spending, however, the court left much to be desired. The appropriate remedy, the Court held, would be not to enjoin the enforced collection of dues, or the improper spending of the money, but to leave it up to the union to refund to protesting employees such portion of their dues as represents the proportionate amount that the union spends for political purposes. On this basis the case was sent back to the Georgia courts, which then proceeded to direct the defendant unions to produce their books and records in order that a determination might be made as to the amounts spent on political action. The unions violently resisted such order, and after four years of additional legal maneuvers proposed that as an alternative to producing their books they would refund all dues previously paid by plaintiffs and would relieve plaintiffs of all future obligations to pay dues under the compulsory union shop agreements. Plaintiffs, weary of the expense and effort of more than eleven years of litigation, accepted this proposal and a stipulation was entered on December 19, 1964 dismissing the case.

In an earlier case, *Railway Employees Dept. v. Hanson*,<sup>31</sup> the Supreme Court reversed a decision of the Supreme Court of Nebraska holding that use of union dues money for political purposes resulted in violation of the freedom of association guarantee of the First Amendment and the due process clause of the Fifth Amendment. In its decision, the Court pointed out that on the record before it this question was not properly raised, and it went on to hold that

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represent, as well as upon the general public, conformity to those doctrines, concepts, ideologies and programs.

<sup>30</sup> *Id.* at 808.

<sup>31</sup> 351 U.S. 225 (1956).

the requirement for the financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate the First or Fifth Amendments.<sup>82</sup>

Since the impact of a union shop agreement on constitutional rights must necessarily be related to its practical operation and effects, it is useless to look at it in only an abstract or theoretical sense as the court did in the *Hanson* case. The subsequent *Street* case gave the court clear opportunity to get squarely into these First and Fifth Amendment issues, but it declined to do so. In his dissenting opinion, Justice Black sharply criticized the majority for evading the issue, and prophesied:

The constitutional question raised in this case . . . is bound to come back here soon with a record so meticulously perfect that the court cannot escape deciding it.<sup>83</sup>

If such a case were presented to today's court, there is reason to believe that the majority would find compulsory unionism in any of its forms contrary to the express and implied constitutional guarantees of individual liberty. The recent trend of the court's decisions in civil rights cases has so vastly expanded the safeguards of the First, Fifth, and Fourteenth Amendments that it is almost inconceivable that the court could now fail to include the right to work within their protection.

Of particular interest in this connection is the recent discovery of the Ninth Amendment as a reservoir of individual rights not expressly or impliedly covered elsewhere in the Constitution. This short and heretofore obscure amendment reads, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>84</sup> In a very recent decision of the Supreme Court,<sup>85</sup> three of the judges, including the Chief Justice, found that this clause protects a wide range of individual rights not expressly mentioned in the first eight amendments. Justice Goldberg, writing for himself, the Chief Justice and Mr. Justice Brennan, stated that:

The concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. . . . The language and history of the Ninth Amendment reveals that the Framers of the Constitu-

<sup>82</sup> *Id.* at 238.

<sup>83</sup> International Association of Machinists v. Street, *supra* note 25 at 785.

<sup>84</sup> U.S. CONST. amend. IX.

<sup>85</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

tion believed that there are additional fundamental rights protected from governmental infringement, which exist along side those fundamental rights specifically mentioned in the first eight constitutional amendments.<sup>36</sup>

The *Griswold* case involved a challenge to the constitutionality of a Connecticut statute which made dissemination of birth control devices a criminal offense. Two officers of the Planned Parenthood League of Connecticut were convicted in a state court under this statute, and their conviction was affirmed by the Supreme Court of Errors of Connecticut.<sup>37</sup> On appeal, the Supreme Court of the United States reversed the conviction on the ground that the statute infringed the "penumbral" protection of individual privacy contained in the Bill of Rights. The majority opinion, after citing a number of cases dealing with the protected freedom of association, stated:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. The right of association contained in penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner is another. The Fourth Amendment explicitly affirms the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.<sup>38</sup>

Expanding on this application of the Ninth Amendment, as a residue of rights not otherwise referred to, the separate opinion written by Justice Goldberg stated:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] as to be ranked as fundamental. The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.<sup>39</sup>

This language of Justice Goldberg is strikingly applicable to the right to work. There can be little question that the right of a man to work to earn a living for himself and support his family is so deeply

<sup>36</sup> *Id.* at 487-88.

<sup>37</sup> *State v. Griswold*, 151 Conn. 544, 200 A.2d 479 (1964).

<sup>38</sup> *Supra* note 35 at 484.

<sup>39</sup> *Id.* at 493.

rooted in "the traditions and collective conscience of our people . . . as to be ranked as fundamental."<sup>40</sup>

On the assumption, then, that a man's right to work at his chosen occupation is, under the principles expressed in the *Griswold* case, to be regarded as one of the fundamental rights protected by the Constitution, does the restriction which the compulsory union shop places on such right breach the Constitution? Can it not be argued that the Constitution is intended only to protect the citizen against *government* action affecting such rights, and that labor unions in enforcing union shop agreements are acting purely in a private capacity? Can it not be said that while such union conduct may result in an actionable tort it is not prohibited by the Constitution because it is neither an act of the state nor the federal government, nor of any other governmental entity? As stated in *Teague v. Brotherhood of Locomotive Firemen*:<sup>41</sup>

Private parties acting upon their own initiative and expressing their own will, however else they may offend and their acts give rise to justiciable controversies, do not thereby offend the guarantees of the Constitution.<sup>42</sup>

Surely if one private citizen by coercion or restraint prevents another private citizen from exercising his freedom of speech or any other constitutionally protected right, there is no basis for invoking the Constitution as against the tortfeasor. Does not this apply as well to labor union efforts to enforce compulsory membership?

The answer is No. The authority which unions have to enforce compulsory unionism derives from a legislative act of the federal government, the National Labor Relations Act,<sup>43</sup> which expressly authorizes union shop agreements. Moreover, the entire scheme of regulation contained in the National Labor Relations Act is directed toward encouragement of unionization and collective bargaining,<sup>44</sup> and

<sup>40</sup> *Ibid.*

<sup>41</sup> 127 F.2d 53 (6th Cir. 1942).

<sup>42</sup> *Id.* at 56.

<sup>43</sup> National Labor Relations Act § 8(a) (3), 49 Stat. 449 (1935), 29 U.S.C. § 158(a) (3) (1964).

<sup>44</sup> National Labor Relations Act § 1, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1964), which states the policy of the Act in the following terms: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

by giving unions the extraordinary status of exclusive bargaining representative, this Act has created and perpetuated the conditions under which unions may enforce compulsory unionism. As stated by the Supreme Court in *American Communications Association v. Douds*:<sup>45</sup>

When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin in some respects to its exercise by Government itself.<sup>46</sup>

In *Railway Employees' Dept v. Hanson*,<sup>47</sup> the United States Supreme Court expressed approval of the reasoning of the Supreme Court of Nebraska that the union shop provisions of the Railway Labor Act were a necessary part of every union shop contract entered into on the railroads, and that such contracts could not otherwise be enforced in Nebraska. The Supreme Court stated:

We agree with that view. If private rights are being invaded it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

A union agreement made pursuant to the Railway Labor Act has therefore the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provisions of the laws of a state.<sup>48</sup>

Although the Supreme Court in the *Hanson* case was dealing only with the union shop provisions of the Railway Labor Act, similar reasoning can be applied to the union shop provisions of the National Labor Relations Act. It is equally true that a union shop agreement entered into pursuant to section 8(a)(3) of the National Labor Relations Act<sup>49</sup> has "the imprimatur of the federal law upon it."<sup>50</sup> Moreover, the exclusive bargaining status which unions are given under the Act is the principal source of their power to demand and enforce union shop contracts. The value of this "exclusive" status to unions was well summarized by Professor Archibald Cox of the Harvard

<sup>45</sup> 339 U.S. 382 (1950).

<sup>47</sup> *Supra* note 31.

<sup>46</sup> *Id.* at 401.

<sup>48</sup> *Id.* at 232.

<sup>49</sup> *Supra* note 43.

<sup>50</sup> *Railway Employees Dept. v. Hanson*, *supra* note 31 at 232.



Law School when testifying before the Senate Labor Subcommittee in 1959. As expressed by Professor Cox:

labor unions enjoy their present power by virtue of Federal statutes, chiefly the National Labor Relations Act. Other voluntary associations are different in two respects: (1) they lack the statutory power of a union designated as a bargaining representative; (2) no other voluntary association has as much power over an individual's livelihood and opportunities or over the rules governing his daily life. The union bulks much larger in the life of a worker than a corporation in the affairs of a stockholder.<sup>51</sup>

This status of "exclusive" bargaining representative is a unique condition enjoyed only by labor unions in the United States, contrasted with the conditions under which unions function in the countries of Europe and other developed areas. In the Western European countries with their long history and tradition of unionism and collective bargaining, the bargaining process remains a private process with practically no government intrusion, no special legal status for labor unions and no legally sanctioned compulsory unionism in any of its forms. Public policy in these European countries affirms the concept of the right of private association as both an affirmative and negative right; that there is a positive right to form or join a private association such as a labor union, and that there is necessarily also a positive right not to join.

It is curious that we here in the United States who are so preoccupied and concerned with individual liberties have so long tolerated such a flagrant abuse of individual liberty as compulsory unionism. It is not likely that this tolerance will continue indefinitely because the American public is becoming more and more aware of the problem. The most direct manner of meeting the problem would be, of course, to eliminate from the National Labor Relations Act the proviso to section 8(a)(3) which authorizes compulsory union contracts.<sup>52</sup> This is not a practical solution at present, because it would not be possible in the face of the political power wielded by organized labor to get such an amendment through Congress. There is also the fact that many members of Congress who oppose compulsory unionism feel that this is a matter which should be left to the states, as it has been left to the states under section 14(b),<sup>53</sup> rather than preempted by federal law.

<sup>51</sup> *Hearings Before the Senate Subcommittee on Labor*, 86th Cong., 1st Sess. at 112 (1959).

<sup>52</sup> *Supra* note 43.

<sup>53</sup> *Supra* note 7.

Accordingly, looking down the road which lies ahead, our best hope for outlawing compulsory unionism in America must lie with our courts and their recognition of the Constitution as a shield between the working man and the union officials who seek to force him to join a union or pay tribute to a union as the price of keeping his job. We can only wait in anticipation of that bright Monday morning when the Supreme Court will at last announce the restoration of this important principle of civil rights which has been so long and so sadly ignored.