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The Right of Association and Subversive Organizations: In Quest of a Concept

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COMMENTS

THE RIGHT OF ASSOCIATION AND SUBVERSIVE ORGANIZATIONS: IN QUEST OF A CONCEPT

In an era in which government, both federal and state, projects itself increasingly into the affairs of its citizens, it is not surprising that counter-reactions occur in an effort to safeguard traditional areas of individual privacy. In the face of legislative action granting government sweeping powers of inquiry and investigation, it has fallen increasingly to the judiciary to erect barriers safeguarding individual freedoms. Landmark cases, such as *Mapp v. Ohio*[1] and *Escobedo v. Illinois*[2] in the area of criminal procedure, are monuments to the importance of individual liberties; and the first amendment freedoms of speech and press have been judicially interpreted to allow wide latitude to individual expression.[3] In harmony with this trend, a new and fundamental civil right — the freedom of association — was enunciated in 1958 with the Supreme Court's decision in *NAACP v. Alabama*.[4] It is the origin, nature and application of this right, with special attention given to its use in cases involving subversive organizations, that this article will explore.

I. ORIGIN AND DEFINITION OF THE RIGHT OF ASSOCIATION

A. *NAACP v. Alabama*

In 1956, the state of Alabama brought suit in a state court seeking to enjoin the National Association for the Advancement of Colored People (NAACP), a foreign, nonprofit, membership corporation, from conducting further activities within the state and to oust the association from the state. Alabama's claim was that the NAACP, by failing to comply with a state statute requiring foreign corporations to file their charters with the Secretary of State and designate a place of business and an agent to receive service of process, had not qualified to conduct business within the state. The NAACP denied the applicability of the statute to itself. In upholding the state's contention, the state court, in separate orders, restrained the association, pendente lite, from engaging in further activities within the state and from taking further steps to qualify itself to do business therein,

1. 367 U.S. 643 (1961).
2. 378 U.S. 478 (1964).
3. See Freedman v. Maryland, 380 U.S. 51 (1965), and the cases cited therein; New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
4. 357 U.S. 449 (1958).

and also required the production of numerous NAACP records, including the names and addresses of all the association's Alabama members and agents. The NAACP ultimately produced all the required data with the single exception of the membership lists, which it claimed the state could not constitutionally compel it to disclose. The state court held the NAACP in contempt. After the Alabama Supreme Court had twice denied review,[5] the United States Supreme Court granted certiorari.[6]

Inasmuch as the question before the Court was narrowed so as to include only the right of a state to constitutionally compel production of an association's membership lists, the Court had no alternative but to make some pronouncement concerning the freedom to associate. Mr. Justice Harlan, speaking for a unanimous Court, articulated what has since become known as the "right of association." The precise language of the Court, together with the precedents it cites, are important:

> 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. *DeJonge v. Oregon,* 299 U.S. 353, 364 (1937); *Thomas v. Collins,* 323 U.S. 516, 530 (1945). 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. See *Gitlow v. New York,* 268 U.S. 652, 666 (1925); *Palko v. Connecticut,* 302 U.S. 319, 324 (1937); *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940); *Staub v. City of Baxley,* 355 U.S. 313, 321 (1958). Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[7]

Because they will arise again in future discussions, the following points in reference to the language just quoted should be particularly noted: (1) the freedom of association is enunciated in terms of first amendment liberties, though the Court bottoms its decision on the liberty assured by the due process clause of the fourteenth amendment; (2) the freedom of association is immediately modified by the phrase "for the advancement of beliefs and ideas"; and (3) in the concluding sentence, the Court seemingly invites the advocacy of this right in future litigation by members of associations spanning all fields of human endeavor as a device to forestall state encroachment on their privacy.

The Court went on to give vitality to the right which it had defined by recognizing the close relationship between the freedom to associate and the need for privacy in one's associations:

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5. Alabama *ex rel.* Patterson v. NAACP, 265 Ala. 699, 91 So. 2d 221 (1956); Alabama *ex rel.* Patterson v. NAACP, 265 Ala. 349, 91 So. 2d 214 (1956).

6. 353 U.S. 972 (1957).

7. NAACP v. Alabama, 357 U.S. 449, 460–61 (1958).

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[8]

Further significance was added to the right of association by rendering inconsequential the consideration that the repressive effect upon an organization's membership and activities stemming from compulsory disclosure of an association's members follows from private community pressures rather than from state action. The "crucial factor" is found to be the interplay of governmental and private action, "for it is only after the initial exertion of state power represented by the production order that private action takes hold."[9]

With the right of association delineated to this extent, the Court applied the new freedom to the facts at bar and held the membership lists of the NAACP immune from state scrutiny. In so doing, however, the Court asserted that the right of association may not in every case provide an absolute shield to state investigation. The application of the right was limited to the particular case at bar; in the instant case, Alabama fell short of demonstrating a controlling justification for the deterrent effect on the free enjoyment of the right to associate which is likely to result from disclosure of memberships. This point of a "controlling justification" was to become the crucial issue in the decision of subsequent association cases.

Earlier in the opinion, the Court dealt with the important correlative question of to whom the freedom of association extends. The NAACP urged both that it was constitutionally entitled to resist official inquiry into its membership lists and that it might assert, on behalf of its members, a right personal to them to be protected from compelled disclosure of their affiliation with the Association. The Court rejected the former contention, stating that "petitioner argues more appropriately the rights of its members and that its nexus with them is sufficient to permit that it act as their representative before this Court."[10] The right was thus given more meaningful protection in that, though the right belongs to the individual alone, the association could properly claim it in its members' behalf. To make the member himself assert this right would simultaneously destroy it. If this were not provided for, the right of association would have little value in contexts where the ill effects attendant on compulsory disclosure of associational ties stem from the private sector of our society.

8. *Id.* at 462.
9. *Id.* at 463.
10. *Id.* at 458–59. This view has been approved in all subsequent association cases. This result is not surprising since the freedom of association was created in a first amendment context and the rights contained therein have been traditionally those related to individuals.

B. *The Groundwork for NAACP v. Alabama*

The right of association, though first articulated in the *NAACP* case, is not without its judicial forerunners. Its pronouncement was most immediately forecast the preceding year in *Sweezy v. New Hampshire*,[11] a case involving an investigation of a suspected member of the Progressive Party by the state attorney general under the New Hampshire Subversives Act.[12] Writing for the majority, Mr. Chief Justice Warren found the legislation too broadly framed. Although the question of impairment of constitutional freedoms was not reached, the opinion significantly presaged the *NAACP* case in setting forth the necessity for definiteness in legislation authorizing investigations into political beliefs and activities:

> It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, . . .[13]
>
> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.[14]

The right was first averted to in 1927 when the Supreme Court held that a California syndicalism act was not repugnant to the due process clause of the fourteenth amendment "as a restraint of the rights of free speech, assembly, and association."[15] With one exception,[16] no mention was then made of a "right of association" for twenty-two years.[17] In the interim, however, *DeJonge v. Oregon*[18] was decided. In that opinion, the Court spoke in terms of the right of assembly but connoted a concept akin to that of the freedom of association.[19] The following language of Mr. Chief Justice Hughes is particularly noteworthy:

> The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L. Ed. 588: 'The very idea of a government, republican in form, implies a right on the

11. 354 U.S. 234 (1957).
12. N.H. REV. STAT. ANN. ch. 588, §§ 1-16 (1955).
13. Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957).
14. *Id.* at 250.
15. Whitney v. California, 274 U.S. 357, 371 (1927).
16. See People *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928).
17. AFL v. American Sash & Door Co., 335 U.S. 538, 546 (1949).
18. 299 U.S. 353 (1937).
19. It is questionable why the Court is not content to base the "right of assembly" solely in the first amendment where it is specifically stated to exist.

> part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions — principles which the Fourteenth Amendment embodies in the general terms of its due process clause.[20]

Later, in *American Communications Ass'n v. Douds*,[21] the Court assumed a "freedom of association" without definition or elaboration; the opinion in *Watkins v. United States*[22] did likewise.

Little light can be cast upon the present "concept" of the right of association through any detailed analysis of the cases foreshadowing it; it is the subsequent application of that right which is illuminating. However, it is interesting to note that these cases, approaching the brink of definition but daring not to tread the final step, are identical in nature to those in which the right of association has been subsequently applied. Perhaps the Court wished to avoid as long as possible the problems, since having arisen, of rooting and delineating the right. Perhaps its reluctance is explainable on the ground that the association problem did not loom as large nor become as recurrent as it did in the fifties. The answer probably lies in a combination of the two.

C. *The "Reality" of the Right of Association*

Theoretically, it is possible to deny the reality of a true "right of association" in light of the Court's varied application of it since its inception as a judicial technique to decide certain difficult cases.[23] Indeed, the Court's assertion in *NAACP v. Alabama* that the existence of the freedom is "beyond debate" was not supported by citation of a single Supreme Court decision establishing freedom of association. Practically, however, to dismiss the concept would be foolhardy, as it would necessarily involve an intentional disregard of contemporary judicial thought in an area of ever-increasing importance. The Supreme Court itself must believe that the basic freedom exists. Indeed, since its 1958 decision in *NAACP*, it has referred to the right of association in both association and non-association cases alike.[24] But it would likewise be foolhardy to assert

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20. DeJonge v. Oregon, 299 U.S. 353, 364 (1937).
21. 339 U.S. 382, 409 (1950).
22. 354 U.S. 178, 188 (1957).
23. See Note, 46 VA. L. REV. 730 (1960).
24. See, *e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544 (1963); Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 90 (1961). By reference to the right of association in cases where the ultimate rationale does not necessarily require such mention, as in the right to travel cases cited above, the Court lends added, though indirect, authority for the existence of the freedom.

that the concept has since met with unanimity of opinion as to origin and scope. Nothing could be further from the truth.

The real problem, therefore, is to determine what the Court believes the concept to embrace and in what manner it is to be applied. The only fruitful avenue of inquiry must root itself in comparing and contrasting the different views within the Court's own pronouncements. The following sections deal with this task as well as with an attempt to evolve a workable concept of the right of association.

II. THEORIES SURROUNDING THE CONCEPTUAL ORIGIN OF RIGHT OF ASSOCIATION

One might legitimately inquire: "Whence the idea of the freedom of association?" Unlike the freedoms of speech and assembly with which it was linked in the *NAACP* case, the right to associate or the freedom of association is nowhere contained in the Constitution. Where, then, did the Court find its justification for such a freedom and for its enunciation in the context of the *NAACP* decision?

An initial reflection, well-considered, is that *a* right of association is not *per se* a novel concept. Although its strictly "legal" aspect may be short-lived, it has a firm foundation in social theory. Beginning at least with the writings of Thomas Aquinas, man appeared not as an isolated entity but as a member of a group, as having an innate tendency to association with his fellow man. De Tocqueville held the right in high esteem:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[25]

The same author observed that association held particular appeal to the nascent American culture:

> In their political associations the Americans, of all conditions, minds, and ages daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings. They afterwards transfer to civil life the notions they have thus acquired and make them subservient to a thousand purposes. Thus it is by the enjoyment of a dangerous freedom that the Americans learn the art of rendering the dangers of freedom less formidable.[26]

Even at the time of De Tocqueville, however, "freedom of association" was a *de facto* condition, if not a *de jure* right. Small wonder, given this

25. 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 203 (Bradley ed. 1954).
26. 2 DE TOCQUEVILLE, *op. cit. supra* note 25, at 129. The autocracies on the Continent, fearful that "association" might provide an effective tool to undermine and replace their rule, looked less favorably on the right of association.

background, that efforts were made to give it roots in a legal sense in order to stabilize the freedom in American jurisprudence. No single origin has yet met with unanimous acceptance; yet each view postulated is important in the sense that it necessarily shapes the concept of the right of association which the individual espouses.

In an early case,[27] concerned with freedom of association, Justices Black and Douglas, in their concurring opinion, indicated that the right of association was inherent in that of assembly: "One of those rights [First Amendment rights], freedom of assembly, includes of course freedom of association; . . ."[28]

Such a dogmatic pronouncement, without a single citation supporting it, is difficult to justify. The freedom of assembly has historically been interpreted to embrace the right to meet peaceably in a group.[29] To say that this freedom is more pervasive than that it "includes" the right of association as enunciated in the *NAACP* case is to attribute to it disproportionate significance. The right of association not only presupposes the right to assemble peaceably but includes also the right to advance beliefs and ideas with personal anonymity. Therefore, though the rights of assembly and association may be co-extensive in some areas, surely it is the latter which is the more pervasive. This line of reasoning renders implausible the above-quoted view of Justices Douglas and Black.

A second view often propounded by Mr. Justice Douglas[30] is that expressed in *NAACP v. Louisiana*[31] to the effect 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. . . ."[32] This thesis fails to specify the derivation of the right; freedom of association is somehow "assumed" to the level of the fundamental freedoms explicitly stated in the first amendment. Perhaps the reasoning underlying this conception (though nowhere stated) is that there are rights latently inherent in the first amendment, that the Bill of Rights should not be read as "frozen" at its conception, but rather as a viable source of new fundamental rights as the need for such rights arises.

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27. Bates v. City of Little Rock, 361 U.S. 516 (1960).

28. *Id.* at 528. In no other association case do we find this view so baldly stated.

29. See DeJonge v. Oregon, 299 U.S. 353 (1937); United States v. Cruikshank, 92 U.S. 542 (1876).

30. See the opinions of Mr. Justice Douglas in Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 559 (1963) (concurring); Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 169 (1961) (dissenting); Noto v. United States, 367 U.S. 290, 302 (1961) (concurring). See also Douglas, *The Right of Association,* 63 COLUM. L. REV. 1361 (1963).

31. 366 U.S. 293 (1961).

32. *Id.* at 296. Douglas, *The Right of Association,* 63 COLUM. L. REV. 1361 (1963), contains these similar sentiments:

> The right of association is closely related to the right to believe as one chooses and to the right of privacy in those beliefs. [*Supra* at 1361.]
>
> The First Amendment provides a shield of anonymity for the members of popular but unlawful groups. [*Supra* at 1376.]
>
> The right of association, which the First Amendment protects. . . . [*Supra* at 1383.]

This view presents certain difficulties since one may legitimately inquire as to the identity of the other rights included in the "bundle" of first amendment freedoms. If the Constitution is the supreme law of the land, should not at least its basic tenets, those basic rights to which protection is guaranteed, be ascertainable from a reading of the document? Indeed, the first amendment[33] lends itself more readily to a restrictive rather than to an expansive interpretation in view of the language of the ninth amendment[34] and the fact that certain individual liberties are enumerated in the first amendment. Though the judiciary has, as well it should, varied its interpretation of the Constitution as times and conditions have changed, the Supreme Court has never been thought to possess the power to amend the Constitution.

A third thesis expounded by commentators upon an analysis of the association cases denies the existence of a satisfactory legal basis for the right of association. Their position is that this "right" is merely a judicial technique evolved for judicial convenience:

> [T]his "freedom" may at present be claimed only under particular conditions in a certain type of case, so that the concept of "freedom of association" illustrates the development of a judicial technique for dealing with that type of case rather than the enunciation of an independent constitutional right.[35]

As with the other views which have been examined, this thesis is not easily accepted. The basic difficulty is that its proponents confuse the *extent* of the right of association with the *existence* of the right. The mere fact that the right is subject to certain ill-defined limits and is not universally applied is no reason to deny its existence as a right.[36] Further, it is doubtful that the Court in the *NAACP* case would have held out the right to groups of every nature[37] had it desired merely to forge a "weapon" for further use at its discretion. Lastly, and most convincingly, the Court has spoken of association in terms of a "freedom"; it has recognized the right when pleaded, though it has not in every instance given it precedence over state interests, and the various Justices have expounded their views as to its legal bases. It is contended that the evidence is sufficient to warrant the conclusion that the right does exist.

A fourth view — and that most frequently encountered in the association cases[38]— provides the most plausible legal basis for the right of

33. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

34. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

35. Note, 46 VA. L. REV. 730 (1960).

36. Though first amendment rights are not absolute, their "existence" is everywhere conceded.

37. See *supra* note 7 and accompanying text.

38. See Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960).

association. It is the view posited in the *NAACP* case to the effect that the freedom of association is "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . ."[39] Though it would be unsatisfactory to treat the right of association as an aspect of liberty[40] under the due process clause of the fourteenth amendment apart from first amendment connotations, the Court avoids this pitfall by speaking in a first amendment context throughout the opinion. The Court implied that the right is not simply an aspect of liberty under due process nor simply another first amendment right; rather, it implied that it is a cognate of the enumerated first amendment freedoms and, as such, essential to their untrammeled exercise. It is contended that this basis is the only one which adequately accounts for the preferential treatment given the right of association while at the same time preserving the integrity of the Constitution.

It is true that not every right protected from impairment by state action by the due process clause of the fourteenth amendment rises to the preferred position of a first amendment freedom. However, a reading of *NAACP v. Alabama,*[41] in conjunction with *Sweezy v. New Hampshire*[42] and the association cases following *NAACP,*[43] affords more than adequate support for the view that the newly declared freedom of association is a cognate of these first amendment freedoms — one necessary to their vitality — and enjoys coordinately their preferred status.

III. VIEWS CONCERNING THE APPLICATION OF THE RIGHT OF ASSOCIATION

The lack of unanimity among the Supreme Court Justices which exists as to the conceptual basis of the right of association is also found in their views concerning the "extent" of the right, that is, is it absolute when applicable, taking immediate, universal precedence over all other considerations, or is it subject to limitation when opposed by strong countervailing interests? The divergence among the Court on this question takes the form of a well-defined dichotomy, with only Justice Douglas' precise position left uncertain.

Mr. Justice Black, with whom Mr. Justice Douglas has concurred at times, believes the freedom to associate to be absolute and would allow no infringement upon it.[44] When the right is properly assertable, there

39. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

40. "Liberty" includes the right to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Meyer v. Nebraska, 262 U.S. 390 (1922). In this regard, the text accompanying notes 25 and 26 *supra* assumes added significance.

41. 357 U.S. 449 (1958).

42. 354 U.S. 234 (1957).

43. See, *e.g.,* the cases cited at note 38 *supra.*

44. This view is consistent with their belief as to the basis of the right of association — the first amendment — since they regard the rights therein enumerated to be absolute. See, *e.g.,* United States v. Rumely, 345 U.S. 41, 56 (1953) (concurring); Dennis v. United States, 341 U.S. 494, 579 (Black, J., dissenting); 341 U.S. at 581 (Douglas, J., dissenting) (1951).

can be no circumstance or set of circumstances which will justify federal or state legislation or action abridging the right since "First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harrassment, humiliation, or exposure by government."[45] This same view pervades the dissenting opinions of Justices Black and Douglas in *Communist Party of United States v. Subversive Activities Control Bd.*[46] Mr. Justice Black has concluded:

> I think also that this outlawry of the Communist Party and imprisonment of its members violate the First Amendment. The question under that Amendment is whether Congress has 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. In my judgment, neither of these factors justifies an invasion of rights protected by the First Amendment.[47]

Mr. Justice Douglas states more succinctly but just as absolutely that "there is, in my view, a disability on the part of government to probe the intimacies of relationships in the myriad of lawful societies and groups in this country."[48] Similar sentiments from both Justices appear in their opinions in *Scales v. United States*[49] and *Gibson v. Florida Legislative Investigation Comm.*[50]

While Mr. Justice Black holds unwaveringly to this position, Mr. Justice Douglas is not so consistent. Speaking for the Court in *Louisiana v. NAACP*,[51] Mr. Justice Douglas based his decision on the fact that the statute involved was too broadly drawn rather than on the "absolutist" concept of the freedom. It might be suggested that, as spokesman for the Court, his view was modified, but such a possibility does not explain his separate opinions in the cases cited above.

The *Gibson* case[52] presents an instance where Mr. Justice Douglas more fully states his "natural rights" position, although strains of absolutism are also present. Agreeing with the sentiments of Thomas Jefferson, Mr. Justice Douglas declared that "government can intervene only when belief, thought, or expression moves into the realm of action that is inimical to society."[53] The Justice does suggest, however, that an occasion might arise in which he would subordinate a first amendment right in

45. Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (concurring).
46. 367 U.S. 1, 137 (Black, J., dissenting), and at 169 (Douglas, J., dissenting) (1961).
47. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 147 (1961) (dissenting). Note especially the connection between the posited origin, characterization and extent of the freedom of association.
48. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 172 (1961) (dissenting).
49. 367 U.S. 203, 260–62 (Black, J., dissenting), and at 270–71 (Douglas, J., dissenting) (1961).
50. 372 U.S. 539, 559 (Black, J., concurring), and at 565 (Douglas, J., concurring) (1963).
51. 366 U.S. 293 (1961).
52. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 559 (1963).
53. *Id.* at 573.

favor of a more pressing need. Such an instance presented itself in the *Subversive Activities Control Bd.* case[54] where Mr. Justice Douglas denied that the Communist Party could assert the right to further its avowed purpose of overthrowing the Government and installing in its stead a Soviet style dictatorship.[55]

In summation, it is fair to state that Mr. Justice Black, having characterized freedom of association as a first amendment right, consistently construes it to be absolute and not susceptible to governmental abridgement. On the other hand, Mr. Justice Douglas' construction has wavered between absolutism and the natural rights theory. While the expression of these views cannot be consistently grouped with any topical grouping of the cases in which they are found, it would follow from the cases examined above that where Mr. Justice Douglas has found a state interest to prevail, that state interest has been shown to be *overriding* or *compelling* — a finding which requires something more than a straight comparison of state and individual interests. It is in this respect that he borrows from the approach of the "balancers."

The other Justices sitting on the Court have adopted a view of the right of association which has been the underlying rationale of every association case to date — a view to the effect that, despite the right's admitted importance under given circumstances it must yield in precedence. This approach is commonly termed the "balancing" test — the values to be weighed being, on the one hand, the right of association, and on the other, the particular governmental interest involved in disclosure of associational relationships.[56] The Court has succinctly stated this "test": "Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve."[57] In recent years, this has consistently remained the Supreme Court's approach in analogous first amendment cases[58] and has accounted for nearly all the equities in freedom of association cases.[59]

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54. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

55. *Id.* at 172–75. Note the analogy between picketing as involving more than free speech and association by the Communist Party as involving more than meeting for the mere dissemination of ideas.

56. Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 373 (1927), provides an early expression of this approach:

> The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. [Citations omitted.] These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.

57. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961).

58. See, *e.g.*, Shelton v. Tucker, 364 U.S. 479, 486–89 (1960); Barenblatt v. United States, 360 U.S. 109, 126–34 (1959); Dennis v. United States, 341 U.S. 494, 508–09 (1951).

59. See, *e.g.*, Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 91–94 (1961); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 463–66 (1958).

Justices Black and Douglas vigorously oppose the "balancing test" as "capable of being used to justify almost any action Government may wish to take to suppress first amendment freedoms."[60] However, it is submitted that this fear is ill-founded. The Court has been careful to point out that if the governmental interest is to take precedence over a constitutionally protected right, such a "subordinating interest of the State must be compelling."[61] The burden of proof is clearly upon the state to establish a controlling justification for the deterrent effect on the free enjoyment of the right of association which disclosure of membership, in any form, is likely to have. The Court has amply demonstrated that it values individual freedoms highly and that legislation which unnecessarily infringes upon such rights will fall. The "weighing of interests" test protects against automatic, unreasoning judgments and assures that that right which most needs protection in the particular case presented will be protected whether it be that of the state or of an individual.

IV. THE CONCEPT AS APPLIED TO CASES INVOLVING SUBVERSIVE ORGANIZATIONS

A. *Analysis of the Case Law*

It is posited that the right of association as developed by the Supreme Court has been sensibly and consistently applied in cases involving subversive organizations.[62] The following section of this comment is devoted primarily to the support of this position.

Prior to 1958, American law had never formally recognized a fundamental right of subversive association.[63] From the Alien and Sedition Laws[64] to the Civil War experience,[65] and through World War I,[66] the rise of criminal anarchism and criminal syndicalism,[67] the Ku Klux Klan agitation in the 1920's[68] and the Nazi activity prior to and during World

60. Scales v. United States, 367 U.S. 203, 262 (1961) (dissent).

61. NAACP v. Alabama, 357 U.S. 449, 463 (1958), quoting Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion).

62. For the purpose of this paper, a "subversive organization" is one which evidences a fundamental hostility to the basic values of the society in which it exists and a disregard for its legal forms and standards. Existing case law restricts this category solely to a treatment of the Communist Party.

63. Mr. Justice Brandeis hinted at a possibly different approach in 1927 when he stated that he was "unable to assent to the suggestion . . . that assembly with a political party, found to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment." Whitney v. California, 274 U.S. 357, 379 (1927) (concurring opinion). Compare Yates v. United States, 354 U.S. 298 (1957).

64. 1 Stat. 566, 570, 577 (1798).

65. See generally RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951).

66. See Goldman v. United States, 245 U.S. 474 (1918); Orear v. United States, 261 Fed. 257 (5th Cir. 1919); Wells v. United States, 257 Fed. 605 (9th Cir. 1919); Bryant v. United States, 257 Fed. 378 (5th Cir. 1919).

67. See generally DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES (The Johns Hopkins University Studies in Historical and Political Science Series LVII No. 1, 1939).

68. See, *e.g.*, New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928).

War II,[69] there was a clear recognition in the law that some associational activities were so inimical to the prevailing requirements of public order and safety that one undertook them only at his peril.[70] Post-1958 case law in this area reflects the most pressing challenge today to the security of our nation — the problem of survival in face of the threat posed by the Communist Party. From an examination of these cases certain conclusions can be drawn with regard to the effect of the freedom of association on the actions of members of subversive organizations.

1. *Smith Act cases.* — With one notable exception, the association cases involving the Communist Party — which concern the general power of the government to restrict or otherwise regulate the affairs of that organization *per se* or of its members *per se* — arise through indictments under the Smith Act.[71] On its face, the Smith Act is directed toward a suppression of the advocacy of certain beliefs and ideas; by its very nature, it also restrains association for the advocacy of such beliefs and ideas. These prohibited activities would seem to fall within the protective reach of the right of association found in the *NAACP* case, and this freedom rising, as it does, to the preferred position of the first amendment freedoms, would accordingly appear to offer a basis for challenging the constitutionality of sections 2 and 3 of the Smith Act. However, the ready reply to any such challenge would be the limitation on the exercise of first amendment freedoms found in the power of Congress to protect the Government from forcible overthrow.[72] It is these considerations which vie for judicial recognition throughout the Communist association cases.

The principal pre–1958 case upholding the constitutionality of the Smith Act is *Dennis v. United States,*[73] wherein Mr. Chief Justice Vinson traced the evolution of the "clear and present danger" test and concluded

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69. See Note, *Recent Legislative Attempts to Curb Subversive Activities in the United States,* 10 GEO. WASH. L. REV. 104 (1941).

70. Rice, *The Constitutional Right of Association,* 16 HASTINGS L.J. 491, 503 (1965).

71. 18 U.S.C. § 2385 (1964). Relevant are the following portions:

> Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or. . . .
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
>
> Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.
>
> If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

72. Schenck v. United States, 249 U.S. 47, 52 (1919).

73. 341 U.S. 494 (1951).

that success or probability of success of overthrow is not the criterion.[74] The case was decided on a free speech basis, the court adopting the following rule as stated by Chief Judge Learned Hand: "In each case [the court] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[75] The essence of the *Dennis* holding is that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action by advocacy directed to action for the accomplishment of forcible overthrow, is not constitutionally protected.[76] The Court concluded that the freedoms of speech and assembly would not serve to insulate party members from indictment when they advocated forcible overthrow of the Government:

> We hold that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act.[77]

The *Dennis* decision was limited six years later by *Yates v. United States.*[78] The Court again held the Smith Act constitutional but, in so doing, felt compelled to construe its conspiracy provisions restrictively. Mr. Justice Harlan construed the term "organize" narrowly,[79] limiting it to the time of actual organization.[80] More generally, the Court adopted the view that the Smith Act did not prohibit advocacy and teaching of forcible overthrow as an abstract principle divorced from any effort to instigate action to that end. The Court's finding that Congress intended to punish only the advocacy "directed at promoting unlawful action"[81] rendered inconsequential the issue of whether such advocacy was engaged in with evil intent.

After *Dennis* and *Yates,* a prediction of the impact of the freedom of association upon the Smith Act would have had to have been "negative." The prohibitions of the Act had been tested against the guarantees of

74. *Id.* at 510.
75. *Ibid.*
76. See Yates v. United States, 354 U.S. 298, 316 (1957).
77. Dennis v. United States, 341 U.S. 494, 516–17 (1951).
78. 354 U.S. 298 (1957).
79. 18 U.S.C. § 2385 (1964).
80. Yates v. United States, 354 U.S. 298, 310–11 (1957).
81. *Id.* at 318. Justices Black and Douglas wrote separate opinions in *Dennis* and joined in an opinion in *Yates,* expressing each time the view that "the statutory provisions on which these prosecutions are based abridge freedom of speech, press and assembly in violation of the First Amendment to the United States Constitution." 354 U.S. at 339 (concurring in part, dissenting in part).

free speech, assembly, and petition and had been found to be justified by the government's power to protect itself from overthrow by unconstitutional methods within the zone of the clear and present danger doctrine. Although the freedom of association was coordinate with the enumerated first amendments freedoms, it did not rise above them and was, therefore, subject to similar limiting principles.[82]

In essence, case law subsequent to 1958 confirms this mock prediction. In the *Scales* case,[83] the membership clause[84] of the Smith Act came under constitutional attack and was upheld. However, the Court further limited, the reach of the Act in deference to the scope of the now enunciated freedom of association.[85] It imposed upon the clause the requirement of a "specific intent" on the part of a would-be violator, reasoning that "such a requirement was fairly to be implied."[86] Secondly, it interpreted the membership clause to reach only "active" members, again inferring such to have been the intent of Congress.[87] Once these limitations were imposed, the Court had no difficulty overruling the petitioner's first amendment challenge:

> It was settled in Dennis [sic] that the advocacy with which we are here concerned [that of illegal action] is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.[88]

Mr. Justice Harlan, speaking for the Court, stated 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 the government as speedily as circumstances would permit, "[did] not cut deeper into the freedom of association than [was] necessary to deal with 'the substantive evils that Congress has a right to prevent.' "[89]

Justices Black and Douglas dissented, primarily on the theory that the membership clause abridges rights protected by the first amendment.[90] Mr. Justice Brennan, in a third dissenting opinion,[91] set forth a fundamental attack on the membership clause of the Smith Act in which Mr. Chief Justice Warren and Mr. Justice Douglas concurred. The Justices con-

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82. NAACP v. Alabama, 357 U.S. 449, 462–66 (1958).
83. Scales v. United States, 367 U.S. 203 (1961).
84. See note 68 *supra*, second paragraph.
85. Scales v. United States, 367 U.S. 203, 229–30 (1961).
86. *Id.* at 221.
87. *Id.* at 222.
88. *Id.* at 228–29.
89. *Id.* at 229.
90. *Id.* at 259–62, 263–75.
91. Mr. Justice Black, though not formally joining in the opinion, agreed with its reasoning. Scales v. United States, 367 U.S. 203, 259–60 (1961).

tended that section 4(f) of the Internal Security Act of 1950[92] legislated immunity from prosecution under the membership clause. The majority opinion on the other hand, had construed section 4(f) to grant immunity to *mere* membership and, indeed, it held the section to be a "clear warrant for construing the membership clause as requiring not only knowing membership, but active and purposive membership, purposive that is as to the organization's criminal ends."[93] The majority seized upon the words "shall not constitute *per se* a violation" to support their conclusion. The dissent countered with the argument that Congress meant that conduct in addition to membership itself, whatever its nature, is necessary to support a conviction and that such additional conduct need not be what the majority term "active."

It is submitted that the majority's reading of section 4(f) of the Internal Security Act better effects the legislative purpose underlying that Act. If section 4(f) is to be read as a partial repealer of the membership clause of the Smith Act or, as the dissent would have it, as a grant of immunity from prosecution under that clause, the conclusion is inevitable that Congress also intended to immunize under that section what it prohibited in subsections 4(a) and 4(c) of the same act.[94] Furthermore, if Congress had the limitation of the Smith Act in mind by the passage of section 4(f), some evidence should appear to this effect in its hearings. However, none does.

One final case must be mentioned before an attempt to evaluate the future vitality of the Smith Act can be made. It is interesting to note that *Noto v. United States*[95] was decided the same day as *Scales* and the issue before the court was identical. Though the petitioner's conviction was reversed for insufficiency of evidence, the Court's analysis remained a constant, even as to the identity and basis of the dissenters.[96] Although *Noto* provided the Justices with a further opportunity to reaffirm their stands regarding the membership clause of the Smith Act, the opinion contains no noteworthy comment on the right of association in that regard.

The right of association has not proved a barrier to or a shield from convictions under the Smith Act. The Court assuredly has restricted the applicability of the Smith Act, but the restrictions imposed are due as much

92. 64 Stat. 987 (1950), 50 U.S.C. §§ 781–826 (1952). The first sentence of subsection 4(f) states that: "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any criminal statute."

93. Scales v. United States, 367 U.S. 203, 209 (1961).

94. Subsection 4(a) makes it a crime:

> for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . the direction and control of which is to be vested in or exercised by or under the domination or control of, any foreign government, foreign organization or foreign individual. . . .

Subsection 4(c) makes it a crime for any officer or member of a "communist organization" to obtain classified information.

95. 367 U.S. 290 (1961).

96. Only Justices Black and Douglas wrote formal concurring opinions; Mr. Chief Justice Warren and Mr. Justice Brennan relied on their view in the *Scales* case.

to fifth as to first amendment requirements. Indeed, one looks in vain for mention of freedom of association in *Noto* and finds no great stress on the concept in *Scales*.[97] In essence, the Smith Act remains as an effective deterrent to Communist activity, with certain superimposed judicial limits. First, it must be demonstrated that the Party as such advocates the unlawful, forcible overthrow of the government. The advocacy must assume the form of present advocacy of violent overthrow of the government, immediate or future; that is, it must be " 'advocacy of action' for the accomplishment of such overthrow either immediately or as soon as circumstances proved propitious, and uttered in terms reasonably calculated to 'incite' to such action."[98] Incitement to action, as contrasted to a doctrinal approach to expression, is the key factor,[99] and such advocacy must be fairly imputable to the Party. *Noto* also requires that advocacy be gathered from the facts of each case and not from judicial notice of the teachings of the Communist Party.[100] Secondly, it must be shown that the defendant is implicated in the conspiracy by having the necessary knowledge and intent and that he is an active, as opposed to a nominal or passive, member of the Party.

To date, the Court has preferred to save the Smith Act through a process of limited construction, rejecting the avenue opened to it by the enunciation of the right of association to find the Act an unnecessary infringement on constitutional freedoms. While the Smith Act, in whole or in part, may be struck down in the future — in view of the precarious 5-4 balance that existed in 1961 and the addition of Justices White and Fortas to replace Justices Whittaker and Frankfurter, both of whom were

97. Most of what the Court has to say about association is found at 367 U.S. 203, 229–30 (1961).

98. Scales v. United States, 367 U.S. 203, 230 (1961).

99. See *Id.* at 234, where the Court states that at least the following patterns of evidence would be sufficient to constitute illegal advocacy:

> (a) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for revolution is reached; and (b) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.

In Noto v. United States, 367 U.S. 290, 297–98 (1961), the Court stated:

> We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching. . . .

100. The finding of unlawful advocacy may not be made "upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party." Noto v. United States, 367 U.S. 290, 299 (1961). This rule would seem to render valueless as a precedent People *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928), where the technique of judicial notice was employed to support the determination of the New York state legislature that the Ku Klux Klan was engaged in such invidious advocacy and activity that it should be required to disclose its membership. Query whether the requirement of proof in each case which the *Noto* rule entails does not place an unnecessary burden on the government in view of the common knowledge found in this country of the character of the Communist Party? See also United States v. Brown, 381 U.S. 437 (1965).

included among the majority Justices — there has been no substantial indication that such action would be taken on the basis of the freedom of association.

2. *The Internal Security Act.* — The concept of the right of association was given prime consideration in *Communist Party of United States v. Subversive Activities Control Bd.*,[101] in which the registration requirements of the Internal Security Act of 1950[102] were challenged. This act requires that any organization found by the Subversive Activities Control Board (SACB) to be a "Communist-action organization"[103] must register annually with the Attorney General, and that the registration be accompanied by a list of the names and addresses of all individual members of the organization.[104] If the organization fails to register as directed, then within 30 days each member must register individually;[105] noncompliance is made a felony.[106] Any publication circulated by the organization through the mails or in interstate or foreign commerce must be stamped with the words: "Disseminated by ----------, a Communist organization"; radio and television broadcasts must be preceded by the announcement: "The following program is sponsored by ----------, a Communist organization."[107] The SACB is authorized to consider the fact that its members refuse to acknowledge membership in determining whether an organization is a "Communist-action organization."[108] The act states that it shall not be construed to infringe upon the freedoms of speech or press.[109]

Under the 1958 definition of the right of association, this act would seem to be liberally interspersed with unconstitutional provisions. However, the Supreme Court held otherwise.[110] The majority opinion admitted that "compulsory disclosure of the names of an organization's members may in certain instances infringe constitutionally protected rights of association,"[111] but recognized that "against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation

101. 367 U.S. 1 (1961).
102. 64 Stat. 987 (1950), 50 U.S.C. §§ 781–826 (1958).
103. 64 Stat. 989 (1950), 50 U.S.C. § 782(3)(a)(b) (1958), defined as follows:
(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement, . . . and (ii) operates primarily to advance the objectives of such world Communist movement . . . ; and
(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this subchapter.
104. 64 Stat. 994 (1950), 50 U.S.C. § 786(a), (d)(4) (1958).
105. 64 Stat. 995 (1950), 50 U.S.C. § 787(a), (b) (1958).
106. 64 Stat. 1002 (1950), 50 U.S.C. § 794(a)(2) (1958).
107. 64 Stat. 996 (1950), 50 U.S.C. § 789(1), (2) (1958).
108. 64 Stat. 999 (1950), 50 U.S.C. § 792(e)(2), (7) (1958).
109. 64 Stat. 987 (1950), 50 U.S.C. § 798 (1958).
110. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).
111. *Id.* at 90.

may achieve."[112] The Court discussed the *NAACP* and *Bates* cases, along with *Shelton v. Tucker*[113] and *Thomas v. Collins*,[114] concluding that the present case differed from them "in the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests."[115] Thus the Court laid the foundation for its decision, and bulwarked that foundation with the fact that the avowed aim of the Communist Party is to subvert the government of the United States and to do so by secrecy and covert action. The government's interest in disclosure was found too great and the connection between that interest and disclosure of association too compelling to allow the Party and its members to avoid the registration provisions of the Act:

> Where the mask of anonymity which an organization's members wear serves the double purpose of protecting them from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the support of persons who would not, if the truth were revealed, lend their support, . . . it would be a distortion of the First Amendment to hold that it prohibit Congress from removing the mask.[116]

Though the decision in the instant case was 5-4, only Mr. Justice Black based his dissent on the right of association.[117] In light of this fact, the freedom of association would not appear to provide a fruitful ground on which to base an attack on the provisions of the Internal Security Act.

3. *Conclusions Drawn From the Case Law.* — The case law dispels the notion that members of subversive groups will be accorded the same fundamental freedom of association extended to other organizations.[118] The situation could not logically be otherwise. There cannot be a constitutionally protected right to join or support a subversive association which levels a fundamental attack at the State itself and its government. The Constitution cannot consistently contain within itself detailed provisions for its permanent endurance unto future generations and at the same

112. *Id.* at 91.
113. 364 U.S. 479 (1960).
114. 323 U.S. 516 (1945).
115. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 93 (1961).
116. *Id.* at 102-03.
117. See *Id.* at 137. Mr. Chief Justice Warren and Justices Brennan and Douglas agreed with the majority's analysis of the first amendment problem but dissented on fifth amendment grounds of the privilege against self-incrimination.
118. An analysis of the association cases discloses that those involving subversive organizations have been decided in favor of the government, while in other areas the right has been applied to protect individual liberties, unless a substantial compelling governmental interest was clearly demonstrated. See, *e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Louisiana v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960). The statutes considered in the Communist Party cases have been presumed to be or construed to be constitutional in the face of their possible infringement on the freedom of association; in other areas, statutes are literally construed and often held to be too far-reaching with little or no effort made to save them.

time legitimize the efforts of those who would disregard those provisions and overturn its very foundations. At the same time, however, it must be recognized that measures taken against even subversive organizations must conform to the basic standards governing governmental action in general, such as due process and the first amendment freedoms of speech and press.

The right of association, though homogenously applied, has produced varying results for a number of reasons, the foremost of which involves the nature of governmental objectives. As all legislation is directed toward the achievement of self-preservation and the welfare of society's constituents, the Communist Party must be limited in its operation since it endangers both aims. Organizations such as the NAACP, labor unions and teacher associations work within the framework of the existing government with aims not incompatible with those of government and, therefore, can be extended greater latitude of operation. A closely allied factor is the nature of the harm involved. Vividly portrayed in the *Subversive Activities Control Bd.* case was the fact that the Communist Party actively pursues the ultimate harm — the establishment of a totalitarian dictatorship. The harm inherent in non-disclosure of associational relationships in other organizations is limited to the ill effect that such privacy may have upon but a segment of society; ever-present in the Court's mind is the ultimate lawful purpose of these organizations. A third factor is existing social pressures. Public opinion in the United States has been consistently anti-Communist, while the aims of social organizations such as those mentioned above are sympathetically viewed by the nation as a whole and, for the most part, tolerated as "legally" legitimate by those who oppose their aims. These factors are real ones and are weighed together with the innate "prejudices"[119] of each Justice in deciding every case. That they should be so considered and balanced was both contemplated and approved in the *NAACP* opinion, and the results consequently arrived at in the subversive organization cases are compatible with the right of association as originally conceived.

B. *Questions Peculiar to Subversive Association Cases*

The Court has touched on problem areas peculiar to the application of the right of association to subversive organizations in the subversive association cases. While a look at some of these areas will not provide the viewer with full answers in every situation, it might provide some indication as to the position the Court will assume in the future.

One reason underlying the Court's reluctance, noted above, to grant associational immunity to members of the Communist Party is rendered explicit by Justice Jackson in his concurring opinion in the *Dennis* case.[120]

119. The word is not used with its usual pejorative connotation. It is used to convey the idea that in the weighing of the factors which each case necessarily involves, each Justice brings to this evaluation his own peculiar thoughts and experiences.

120. Dennis v. United States, 341 U.S. 494, 561 (1951).

The issue on which he focused may be stated: Is the Communist Party, or any subversive organization, an association in the sense contemplated by the *NAACP* decision or may it more properly be termed *a* state within *the* State and subject, therefore, to legislative and judicial consideration as such? Mr. Justice Jackson adopted the latter position,[121] characterizing the Party as "an authoritarian dictatorship within a republic."[122] As such, it was not entitled to the unmitigated application of the first amendment freedoms. Therefore, as applied to the Party, the Smith Act was constitutional.

Mr. Justice Harlan's opinion for the majority in the *Scales* case[123] expresses the same position implicitly:

> [A] combination to promote such advocacy [of the overthrow of the United States government], albeit under the aegis of what purports to be a political party, is not such an association [as is protected by the Constitution].[124]

The Court has been correct in its characterization of the Communist Party and has rightly denied to the Party the right to assert for its members, in its fullest sense, the freedom of association. Though no explicit sentiment can be found in the *NAACP* case in support of this conclusion, the freedom of association was there enunciated with constitutional trappings, and certainly the Constitution is not to be construed to contain the seeds of its own destruction, an inevitable result of a conquest by a subversive organization.

Two related questions with which the Court has dealt in the realm of the individual's relation to the subversive association are: (a) Under the developed rationale, when does expression become regulable conduct?, and (b) when can the tenets of the organizations be attributed to the individual members? The answers to these questions were touched upon in the earlier discussion of the *Scales* case. In that case, the Court stated that the membership clause of the Smith Act does not make criminal *"all* associations"[125] with an organization engaged in illegal advocacy, but only activity by an individual who "specifically intend[s] to accomplish the aims of the organization by resort to violence."[126]

The answer to question (a) is clear. In view of the specific intent required for conviction of the individual member, the answer to (b) can only be "Never."

What will happen to the members who are fully conscious of the unlawful advocacy of their organization and who believe strongly in such advocacy, but who intend to devote their personal services to the securing of the organization's lawful goals only? Do not the activities of these persons

121. *Id.* at 577: "The Communist Party realistically is a state within a state. . . ."
122. *Ibid.*
123. Scales v. United States, 367 U.S. 203 (1961).
124. *Id.* at 228–29.
125. *Id.* at 229.
126. *Id.* at 229, quoting Noto v. United States, 367 U.S. 290, 299 (1961).

play an indispensable part in the unified scheme of the organization? The opinion in *Scales* would indicate that if the organization is a technical conspiracy, "which is defined by its criminal purpose, . . . *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as first amendment liberties are concerned."[127] Thus, if the objective of the organization were entirely illegal — for example, to burglarize a store — the government could, under conspiracy principles, 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 in any way. The Court differentiates such organizations from those having both legal and illegal aims.[128] However, could not the Communist Party be branded as a "technical conspiracy" on the basis of its avowed principal purpose? But the Court does not go that far since it requires membership *plus* specific individual intent to accomplish the Party's *illegal* aims before it will level the sanctions of the applicable acts.

Little change from the treatment accorded the Communist Party to date should be expected in the future. Increasing world tension and the tendency of nations today to polarize into two camps make the presence in America of any subversive organization a greater danger than ever before. Consequently, the government's interest in self-preservation assumes greater importance. Though the freedom of association remains truly an individual right, it is impractical to expect the Court to consider the individual apart from the organization of which he is a member. The Court should continue to apply the developed rationales to subversive organizations in the future, thereby protecting those who seek only to advance a belief or concept but sanctioning those who would combine such a belief or concept with advocacy to action in order to subvert the very Constitution whose protection they would invoke.

V. CONCLUSIONS AND PREDICTIONS

The freedom of association remains in an embryonic stage; its shape has yet to be fully formed. However, some comments as to its future can be made on the basis of past experience. In general, the Court will continue to accord this right as much deference as it has given to the other first amendment freedoms. The Court has emphasized that the right of association is necessary to guarantee full expression of the rights of speech, assembly, religion and petition. Having established such an intimate connection between these rights, it cannot restrict the one without concomitantly restricting the others. Though the right is court-declared and

127. *Id.* at 229.

128. *Ibid.* Seemingly, therefore, the test the Court lays down would exculpate one who, though aware of the invidious purpose and activities of the Party, believed that it worked also to alleviate harmful social imbalances, believed that its activity in this regard was good and separable from its harmful work, and intended to promote only those lawful ends by his membership.

court-defined and one may argue, therefore, that its extension and application may likewise be judicially limited at will, there appears no reason for the Court to impose any restriction on the right. This is because of the inherent limiting principle — the balancing test — which can be used as the Court's discretion dictates.

Application of the right in particular instances to particular associations proves more difficult to predict. Prior case law provides an indication of how the Communist Party, the NAACP and other labor and social organizations will be treated in the future. But how will the Court deal with problems that might well arise in connection with such associations as the Minutemen or the John Birch Society? Neither organization is "subversive" in the sense in which the word has hereinabove been employed.[129] Indeed, they are more properly termed "ultra-nationalistic," even though their aims are commonly viewed with distrust and suspicion. The consideration which the Court will accord these associations will be determined primarily by the manner in which the Court views them at the time the litigation arises, that is, would their conduct in pursuit of their ultimate goals be such that the country would not be endangered if such conduct were allowed to be openly engaged in? However, assuming a negative reply to this inquiry, the right of association may nevertheless be applied protectively to the members of these organizations if their activity is confined to the realm of promoting beliefs or ideas or their size and appeal is such that the organization would be unlikely to become a major force on the American scene.[130] These associations differ markedly from the Communist Party in their aims and their lack of foreign attachments or domination, but they are similar in that the ideas they promulgate are "political." For this reason, it is submitted that they will be subjected to close governmental scrutiny and that the governmental interest involved in disclosure of membership will be given greater priority in cases involving them than in corresponding "social" association cases.

Of more immediate concern is the application of the freedom of association to members of the Ku Klux Klan. On March 3 of this year, a Federal grand jury indicted Robert M. Shelton, Imperial Wizard of the KKK, and six other Klan officials for contempt of Congress. The seven were accused of refusing to produce lawfully subpoenaed documents for the House Un-American Activities Committee's investigation of the Klan last October. The subpoenas requested all books, records, documents, correspondence, and memoranda, tax returns and blank membership and charter forms pertaining to various Klan organizations with which the indicted officials were allegedly connected. The Klan officials refused to deliver their organizational documents, books and records, basing their noncompliance on grounds of possible self-incrimination and an asserted

129. See note 62 *supra*.

130. This factor has not found expression in any case to date, but query if the Court would not recognize freedom of association if asserted by a subversive group of five or ten people, whose actions would in other regards violate the Smith Act or similar legislation?

violation of their rights under the first, fourth, fifth, and fourteenth amendments. In this context, the first amendment claim involved the right of association.

To sustain its case under judicial scrutiny, the government must show that its inquiries were related to a valid, announced legislative purpose and were within the scope of the committee's authority. But, "the legislative power to investigate, broad as it may be, is not without limit." *Gibson v. Florida Legislative Investigation Comm.*[131] is factually similar with the present KKK investigation. However, the organization involved in that case was the NAACP. In *Gibson,* the Court held that the record was insufficient to show a substantial connection between the Miami branch of the NAACP and Communist activities. Mr. Justice Goldberg distinguished earlier cases reaching a contrary result in which the membership of the Communist Party was itself the subject of legislative inquiry and the situation in *Gibson* where the NAACP was the subject of the investigation. No evidence was presented to show that the organization was subversive or Communist-dominated or influenced.

It is postulated that the legislative inquiries regarding the Klan, with the attendant requests for the documentary evidence, fall within the announced power of the Committee to investigate subversive or un-American organizations. The KKK is listed by the United States Attorney General as an organization advocating the commission of acts of force and violence in order to deny others their rights under the Constitution. Thus, the Court will not be dealing with an admittedly lawful organization. It is submitted that the Court will find, as it did in the Communist Party cases, that because of its very nature, membership in the KKK is *itself* a permissive subject of regulation and legislative scrutiny. Also, in view of the present hostile climate which surrounds the Klan and its activities (a climate that has been aroused by the Klan's opposition to the full enjoyment of the protected rights of others in our society), the legislative inquiries will likely be deemed of sufficient importance to override any asserted right of association.[132]

From the Court's inconsistent utilization of the right of association — sometimes to protect association and sometimes to control it — one might conclude that the Court created a "monster" that it has been powerless to control, that it originally intended that the right be applicable in but a limited area of social legislation cases only to discover that it was to be asserted by members of associations of every variety. However, the *NAACP* opinion renders this conclusion improbable.[133] Rather, it is submitted that the Court has so defined and shaped the right of association as to permit it to act as the "nation's conscience" in applying the right in the varying situation in which it may be asserted. The diverse applications of

131. 372 U.S. 539, 545 (1963).

132. This paper makes, however, no predictions as to the disposition of the other defenses interposed by the indicted Klan members.

133. See the language of the Court in the text accompanying note 7 *supra.*

the freedom found in the cases are not a product of judicial nearsightedness in failing to perceive the multiple possibilities of the right forged; rather, they evidence the fact that the Court has used the right to achieve results deemed socially desirable. So used, the freedom of association has become a powerful weapon in the Court's arsenal. Concomitantly, judicious care must be taken to assure that it is used in a manner consistent with its constitutional basis.

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