INDUSTRIAL SABOTEURS, REPUTED THIEVES, COMMUNISTS, AND THE FREEDOM OF ASSOCIATION

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I. Introduction

In the early and mid-twentieth century, the United States confronted a shadowy enemy. There were fears that the nation had been, or might be, infiltrated by covert agents of a foreign power, that the U.S. was faced with "tightly organized, highly disciplined, international revolutionary . . . organization[s]" capable of working against American interests from within the United States itself.[1] Moreover, the members of these organizations and those associated with them might well work against American interests through actions that were themselves legal, or they might spend long periods covertly preparing for a catastrophic revolutionary act. The U.S. government responded creatively and aggressively to this perceived threat, which, in turn, fostered new thinking about the constitutional limits on government powers.

This essay is concerned with one aspect of that new thinking, the jurisprudential development of the idea of "freedom of association." The difficulty of addressing the perceived threat created the temptation to look for and make use of "guilt by association" and to undertake measures to prevent harmful acts from occurring in the first place by breaking up, harassing, or monitoring dangerous or potentially dangerous associations. Of course, we are familiar with that temptation today from the war on terror, and freedom of association and related concerns have been raised in the context of antiterrorism efforts as well.[2] The idea that freedom of association is constitutionally protected is now well entrenched,

[1] Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998), 6 (characterizing the American Communist Party).

[2] See *United States v. Al-Arian,* 308 F. Supp. 2d 1322 (M.D. Fla. 2004) (applying the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] to individuals accused of supporting fundraising activities of a terrorist organization); *Linde v. Arab Bank, PLC,* 384 F. Supp. 2d 571 (E.D. N.Y. 2005) (applying the Anti-Terrorism Act of 1990 to a bank accused of providing financial assistance to a terrorist organization); *United States v. Goba,* 220 F. Supp. 2d 182 (W.D. N.Y. 2002) (upholding AEDPA against challenge that it was unconstitutionally vague); *United States v. Marzook,* 383 F. Supp. 2d 1056 (N.D. Ill. 2005) (upholding AEDPA against challenge that it violated First Amendment freedom of association); *United States v. Assi,* 414 F. Supp. 2d 707 (E.D. Mich. 2006) (same); *Humanitarian Law Project v. Reno,* 205 F. 3d 1130 (9th Cir. 2000) (upholding AEDPA against challenge that it unconstitutionally infringed on freedom of association, but restricting its application on grounds that it was unconstitutionally vague).

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however, and the legal and political response to the war on terror has necessarily been shaped by that Cold War constitutional inheritance.

The idea of a constitutionally protected freedom of association posed a problem for those who initially advanced it in the early decades of the twentieth century: namely, the U.S. Constitution does not mention a freedom of association. Like a right to contract or a right to privacy, the freedom of association was to be a judicially recognized and protected unenumerated right. Worse, it was an unenumerated right being advocated against government in a post–New Deal context in which many of the justices of the Supreme Court were committed to deferring to the actions of elected officials. Even so, the New Deal justices had inherited some jurisprudential resources that could make sense of the idea of freedom of association but could also limit its scope.

Although the freedom of association is not enumerated in so many words in the Constitution, the Court has nonetheless looked for a textual home for such a right. In the context of the U.S. Constitution, a freedom of association is often located in the First Amendment. A particular freedom of association may be regarded as implicit in the free exercise clause of the First Amendment. As Justice Hugo Black noted, English laws to suppress those "terming themselves Catholicks . . . [who] do secretly wander and shift from Place to Place within this Realm, to corrupt and seduce her Majesty's Subjects" bore a striking resemblance to twentieth-century American laws aimed at other "seditious" (though explicitly antireligious) sects.[3] No doubt due in part to the explicit constitutional securities provided to the free exercise of religion, the specific freedom of religious association has had little jurisprudential significance. Nonetheless, the presence of the free exercise clause and the historical background that led to its inclusion in the Constitution helps provide the conceptual underpinnings for recognizing a broader right to a freedom of association.[4] Prohibiting the organizational activities of dissenters, whether religious or otherwise, makes dissent more difficult, and the First Amendment, broadly conceived, prevents the government from brushing aside inconvenient dissenters.

Of greater significance for the judicial recognition and elaboration of a constitutional freedom of association has been the free speech clause of the First Amendment. The First Amendment, of course, includes within it a distinct clause securing "the right of the people peaceably to assemble," but this provision has rarely stood by itself. In effect, the right peaceably

[3] *Communist Party of the United States v. Subversive Activities Control Board,* 367 U.S. 1, 149 (1961) (quoting English acts of 1593).

[4] See also Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan and Company, 1904), 496–97: "Whether freedom of religion requires freedom of association . . . is a question upon which the courts have not passed. The right of association is enjoyed and exercised to the fullest extent without any attempt at legislative restraint or interference. It may be safely asserted that legislative restraint on the right of association for religious purposes . . . would be unconstitutional."

to assemble has been taken to be a natural extension of the right to free speech, and it is the right to free speech that has been taken to define the purpose, extensions, and proper limitations on a right to assemble and a freedom of association. How the justices have conceptualized the free speech clause itself has been critical to how they have understood and applied the freedom of association over time.

This essay will consider the development of freedom of association in four contexts. Section II considers the U.S. Supreme Court's linkage of the freedom of association with the First Amendment and the freedom of speech in the New Deal era. Section III examines an earlier history of freedom of association in the state courts that relied on general notions of personal liberty rather than the specific context of speech and assembly. Section IV returns to the New Deal and the challenges that the First Amendment framework created for the Court as it extended freedom of association protections to its allies in the labor movement. Section V examines the ultimate unwillingness of the post–New Deal Court to allow the freedom of association to be used to block anticommunist measures at the height of the Cold War.

II. *De Jonge,* Industrial Saboteurs, and the Right to Assembly

The U.S. Supreme Court first seriously addressed the question of the meaning of the right to assembly in the case of *De Jonge v. Oregon.* The case was argued just after Franklin D. Roosevelt's 1936 reelection as president and was decided during the same term as the Court's famous 1937 "switch in time." In attempting to understand what elements of a right to assembly might be applied to the states via the Fourteenth Amendment, Chief Justice Charles Evans Hughes linked the right to speak with the right to assemble as part of a unified whole.

At issue in *De Jonge* was Oregon's criminal syndicalism law, which banned presiding over, conducting, or assisting in conducting "any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage." The law had been used to break up a public meeting sponsored by the Communist Party to protest police tactics during a longshoremen's strike in Portland, and the Oregon Supreme Court had upheld this application of the law against constitutional challenges.[5] In ruling on the appeal of the case, Hughes observed that the

> right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . These rights may be abused by using speech or press or assembly in order to

[5] *De Jonge v. Oregon,* 299 U.S. 353, 357 (1937).

> incite violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.[6]

The government could intervene if a particular assembly was being used to advocate or conspire to commit criminal acts, but the mere involvement of those who might elsewhere advocate such acts did not itself vitiate the right to assemble or legally endanger those who might so associate with syndicalists. In the midst of the Great Depression and the New Deal, the Supreme Court emphasized that the government should not attempt to squelch the voices of radicalism but instead should channel the pressures for change into democratic processes of reform.

By contrast, the Oregon Supreme Court had earlier concluded that the legislature had ample discretion to determine how best to address this threat to public safety. It was the "exclusive province of the legislature to determine what acts are inimical to the public welfare, and to declare that such acts when done shall constitute crimes," and there was little question that curtailing the activities of organizations that advocated criminal acts was a "reasonable condition" that the legislature might impose on the general "possession and enjoyment" of constitutionally protected rights. The members of the state constitutional convention that included a provision for peaceful assembly in Oregon's constitution would never have "supposed that a statute prohibiting assemblages from counseling the commission of a crime would be an unconstitutional interference with the right of assemblage."[7] The Oregon Supreme Court focused on the general question of whether criminal syndicalism statutes that banned organizing certain assemblies could be consistent with the state constitutional right to assembly, and answered that they could by observing, as courts have often done, that liberty is not license and that the constitutional right was not intended to protect criminal conspiracies.

The U.S. Supreme Court, by contrast, reached a different outcome in part because it placed the case firmly in the context of the First Amendment's free speech clause and not simply the right of assembly. Although the Communist Party advocated industrial sabotage (and thus its assemblies

[6] Id. at 364–65.
[7] *State v. Laundy*, 103 Or. 443, 458, 462 (1922).

were banned under the criminal syndicalism statute), the particular public meeting that the defendant Dirk De Jonge helped conduct was in content a lawful discussion of and protest against police strikebreaking activity. Suggesting that the Court's own prior cases from the 1920s upholding the convictions of those charged with directly advocating revolutionary action ought to be read narrowly in light of the "fundamental" importance of the freedom of speech, Hughes emphasized that federal constitutional protections applied to such cases and that a freedom to associate to engage in lawful advocacy and protest had to be secured even for those who might, in other circumstances, associate for unlawful purposes.[8]

III. Reputed Thieves and Guilt by Association

In upholding De Jonge's conviction, the Oregon Supreme Court took note of an additional feature of such emerging freedom of association cases. When defense attorneys raised a claim that individuals had a freedom to associate with whom they pleased, the judges pointed to such traditional crimes as incitement as providing limits on the personal liberty of individuals. No one was at liberty to cause harm to others by inciting criminal acts or organizing to engage in criminal acts. "[J]oining with" those who would commit a crime or advocate crime had to be distinguished from "the act of merely associating with persons having the reputation" of being criminals.[9] For the *De Jonge* case, however, this might imply that those who merely attended a public meeting sponsored by the Communist Party did not incur the legal risk that the actual members of the Party did, a possibility that seemed to weigh on Chief Justice Hughes in evaluating the application of the act to the Portland meeting.[10] But the distinction is one that other courts had likewise made. In upholding a similar criminal syndicalism statute in 1921, the supreme court of Washington state had argued, "An ordinance or act which makes it unlawful to associate with persons having the reputation of being thieves, and so forth, is different from an act which makes it unlawful for any one to organize or help to organize a group of persons to advocate and teach crime, and so forth, for the purpose which is specified in the syndicalism

[8] *Gitlow v. New York,* 268 U.S. 652 (1925) (upholding conviction for distribution of socialist manifesto advocating unlawful acts); *Whitney v. California,* 274 U.S. 357 (1927) (upholding conviction for organizing the Communist Labor Party); *Fiske v. Kansas,* 274 U.S. 380 (1927) (striking down conviction on grounds that no evidence was presented that unlawful acts were advocated).

[9] *State v. Laundy,* 103 Or. 443, 459 (1922).

[10] "While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member, who 'assisted in the conduct' of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party." *De Jonge v. Oregon,* 299 U.S. at 362.

act. If it were in the legislative province as we have found to make it a penal offense to do the prohibited things in the act including the organization of a group of persons, it would seem to follow that it were likewise within the power of the Legislature to make it a penal offense for any one to become a member of such a group of persons or organization." [11] It was one thing to know a member of the Communist Party, or perhaps even to attend a public meeting on matters of general interest sponsored by the Communist Party, as in *De Jonge*, but it was quite another to be a member of the Communist Party yourself.

The distinction was of some significance in the criminal syndicalism cases of the early twentieth century precisely because the Missouri Supreme Court had three decades earlier (in 1896) invalidated a St. Louis vagrancy ordinance that sought to forbid residents from "knowingly . . . associat-[ing] with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, prostitutes or lewd women or gamblers, or any other person, for the purpose or with the intent to agree, conspire, combine or confederate, first, to commit any offense, or, second, to cheat or defraud any person of any money or property." It was here, in a context far removed from public meetings and speeches, that lawyers and judges first considered a right to freedom of association. Unsurprisingly, their reference point had to do with common-law notions of personal liberty rather than the text of the First Amendment. Simply put, did one have a right to associate with reputed thieves?

In evaluating the St. Louis vagrancy ordinance, the Missouri Supreme Court readily agreed with the habeas petitioner that it would be an invasion of "the right of personal liberty . . . to forbid that any person should knowingly associate with those who have the reputation of being thieves, etc." Indeed, if the legislature could "forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of any one may be," and the court denied "the power of any legislative body in this country to choose for our citizens whom their associates shall be." [12] One might well think that the first portion of the relevant clause in the ordinance had to be read along with the last portion, prohibiting not mere association but association with intent to conspire. The judges chose to read the two portions separately, but they had difficulty with the latter portion as well, "for with

[11] *State v. Hennessy,* 114 Wash. 351, 365 (1921).

[12] *Ex parte Smith,* 135 Mo. 223, 224 (1896). See also *City of Watertown v. Christnacht,* 39 S.D. 290 (1917) (invalidating ordinance declaring that any male "found associating with" prostitutes "shall be deemed a pimp"); *Ex parte Cannon,* 94 Tex. Crim. 257 (1923) (invalidating ordinance "prohibiting male and female persons from associating together for immoral purposes" defined as, among other things, being "found together in a house of prostitution"). But cf. *Brannon v. State,* 16 Ala. App. 259 (1917) ("There is no truer saying than that 'birds of a feather flock together,' and, in this class of cases [vagrancy statutes], the law recognizes it."); and *Williams v. State,* 98 Ala. 52 (1893) (evidence of defendant's associates admissible to support prostitution charge).

mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern."[13] The "guilty intention" at issue here was simply the one to conspire or confederate, so the court was not requiring an overt act of committing "any offense" or fraud but simply an actual agreement or combination to commit such an offense. Merely being in the presence of thieves and lewd women was not action enough to trigger the police powers of the state, even for the low bar of conspiracy.

Besides the fact that the petitioner in the 1896 case, Walter Smith, was apparently convicted of vagrancy on just that basis, the Missouri court may have been particularly watchful since, according to the ordinance as originally passed in 1871, "mere association" "with persons having the reputation of thieves and prostitutes" *was* criminal. In the 1873 case *City of St. Louis v. Fitz,* when reviewing the original 1871 vagrancy ordinance, the Missouri Supreme Court had pointed out that this went "beyond the common law crime of conspiracy," and thus probably beyond the constitutional power of the city. The judges were not impressed by how the ordinance was applied in practice either. In the *Fitz* case, the factual basis for the prosecution—that the associates of the defendant had reputations as thieves—was provided entirely by the testimony of the police, while "all the witnesses outside the police force, including some fifteen or twenty of the neighbors and associates of the defendant, contradict[ed] the statements of the police officers concerning the reputation of the persons alleged to be thieves and in whose society the defendant was found." (The police themselves apparently reached their conclusion largely on the basis of the fact that alleged thieves "lived in the neighborhood of the defendant . . . and this neighborhood was infested with thieves and prostitutes.")

This early Reconstruction era case grounded the freedom of association in a broader understanding of the proper role of the state. Whereas Chief Justice Hughes in *De Jonge* was concerned with identifying the specific value of the "fundamental right" of free speech and the utility of the freedom of association to advancing that right, the judges of the Missouri Supreme Court in the 1870s drew a line between the regulation of acts that caused harm to others and those that did not. The police powers of the legislature entitled it to regulate the sale of liquor or houses of prostitution but not "to regulate the morals or habits of individual citizens." The law could interfere "[w]hen a positive breach of law is reached, or when the act of the citizen is such as to justify an implication of an intended breach of law," but "a citizen has the right of selecting his associates," no matter how unsavory they may be. It was "not the business of the Legislature to guard over individual morality" or to "correct the evil consequences which such an association may

[13] *Ex parte Smith,* 135 Mo. 223, 224 (1896). See also *Lanzetta v. New Jersey,* 306 U.S. 451 (1939) (invalidating as excessively vague a statute imposing penalties for being a "gangster").

bring on the individual." It was the state's role "to protect society from actual or anticipated breaches of the law," which meant that a person's association with others could not be criminal unless "such person so associates with a design or intent to aid, abet, promote, or in any way to assist" in the commission of a crime. The Missouri court noted that, although "once a thief always a thief would be the maxim upon which police officers would act," the state could hardly "mark" someone "as a leper in society, to be avoided by his former associates." (The alleged thieves in the *Fitz* case, as it happened, did not even have criminal records.) Henceforth, the lower courts in Missouri were to instruct juries that individuals could only be convicted under the 1871 ordinance when there was evidence of "an identification or community of interest" and "an intent to assist or encourage" a criminal act. Only by this means could the Missouri Supreme Court save the St. Louis ordinance from being invalid, make "clear . . . the intent of the ordinance," and prevent it from criminalizing "mere casual association, or an association for honest purposes."[14]

The city council of St. Louis took the hint and amended the ordinance, but twenty years later police were still conducting themselves in much the same way as they had in the *Fitz* case. In *City of St. Louis v. Roche* (1895), the Missouri Supreme Court took a tough stance: "Our constitution and laws guaranty to every citizen the right to go where and when he pleases, and to associate with whom he pleases, exacting from him only that he conduct himself in a decent and orderly manner, that he disturb no one, and that he interfere with the rights of no other citizen." The ordinance still authorized too much.[15]

Unsurprisingly, the *Fitz* and *Roche* cases did not ground a freedom of association in a right to free speech. The freedom for which they contended was to be found in a general "personal liberty"—in the inherent limits on the police powers of a republican government. The right to associate with others was an extension of the most basic, Blackstonian "right of locomotion, to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens." This right was of a piece with a then-recent Michigan case holding that the city of Kalamazoo could not empower its police officers to arrest a woman merely because she was present on the street at "unseasonable hours" and the subject of gossip in the police department. A justifiable arrest for "street walking" required an overt "act indicating that the party is there for that purpose" and not "mere suspicion" that a woman was on the street to ply her illicit trade.[16]

[14] *City of St. Louis v. Fitz*, 53 Mo. 582 (1873).
[15] *City of St. Louis v. Roche,* 128 Mo. 541, 543 (1895).
[16] *Pinkerton v. Verberg*, 78 Mich. 573, 584, 586 (1889), cited in *City of St. Louis v. Roche,* 128 Mo. 541, 542 (1895).

The 1937 *De Jonge* case decisively threw aside this personal-liberty approach in order to fasten the freedom of association to the freedom of speech. The same notion of personal liberty could easily have underwritten the liberty of contract that had obstructed the expansion of economic regulation and redistribution legislation, and at the end of the battles over the New Deal, Chief Justice Hughes was looking forward, not back; free speech as a fundamental right would survive the constitutional revolution of 1937. Free speech was also a seemingly narrow platform on which to erect a right like freedom of association. Nonetheless, the personal-liberty background was not irrelevant to the U.S. Supreme Court's thinking about the freedom of association. From its narrow opening, the range of applications for the freedom of association expanded over time, and, as that range of applications expanded, many of the same considerations that had arisen in the earlier context carried over as well.

IV. Labor, the New Deal, and the Freedom of Association

In 1945, not long after *De Jonge* but with the New Deal no longer a matter of controversy on the Court or in politics, the U.S. Supreme Court again emphasized the connection between the various components of the First Amendment and the freedom of association. As part of a larger regulatory scheme, the government of Texas required that union organizers register with the state. As part of a tour to encourage workers to join the United Auto Workers (UAW), R. J. Thomas, the president of the union, passed through Texas and was scheduled to speak at a meeting in Bay Town on the Gulf Coast. A few hours before the meeting, Thomas was served with a restraining order barring him from participating in organizing activities until he had registered with the Secretary of State's office in Austin. Thomas went ahead with his planned speech and was arrested. He later challenged the registration requirement as a prior restraint on speech, but the state courts upheld the law as routine commercial regulation (comparable to similar requirements for other commercial agents such as real estate brokers and securities salesmen) with only incidental effects on speech. Of course, the central feature of the constitutional revolution of 1937 was that commercial regulations and the balancing of economic interests were to be left in the hands of the elected branches and administrative agencies, and such regulations were routinely upheld by the courts. The union organizer and the securities salesman were presumably in the same boat and could find their proper remedy in the legislature. Moreover, Thomas, unlike De Jonge, was not speaking at a public meeting about government officials and their actions. Thomas was simply organizing an economic association. But Thomas was giving a speech, and labor was not simply an economic organization but a central component of the New Deal coalition, and that left him well positioned to transform both freedom of association and traditional understandings of freedom of speech.

In an opinion written by Justice Wiley Rutledge, a recent appointee of Franklin Roosevelt's, the Supreme Court placed union organizing well within the zone of liberty protected by the First Amendment, and built on the *De Jonge* case to connect the freedom of speech with the right to assembly. In *Thomas v. Collins* (1945), the Court held that Thomas's activities fell within the "preferred place" of the "democratic freedoms secured by the First Amendment." As such, "[t]he rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." Only the narrowest restrictions on speech could be tolerated, "particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom of 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."[17]

Significantly, the *Thomas* Court understood the protections of the First Amendment to extend beyond the realm of politics and religion. Shifting the jurisprudential ground of the freedom of association from personal liberty to the First Amendment potentially limited the purposes for which the freedom could be claimed. If the freedom of association was a mere adjunct of the First Amendment's free exercise clause, then it was of concern only to religious worshipers. If it was an adjunct of the free speech clause—as *De Jonge* held—then perhaps it was only of concern to those associating in order to advance a political message, the constitutional value Hughes emphasized in *De Jonge.* But the New Deal Court was unconcerned that Thomas was assembling with others and giving speeches in order to mobilize workers to join a labor union and pressure their employers for higher wages, rather than speaking about public policy. The First Amendment, Justice Rutledge explained, was concerned with the redress of grievances generally, "not confined to any field of human interest." "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." The First Amendment did not merely protect "intellectual pursuits"; it protected "action," and the organizing activity of unions fell within its ambit.[18] It was not until an organizer undertook "the collection of funds or securing subscriptions" that the state's regulatory interest could make itself felt, and it was not until that point that the regulated action became "free speech *plus* conduct."[19]

[17] *Thomas v. Collins,* 323 U.S. 516, 530 (1945).

[18] Id. at 532.

[19] Even then, however, the regulated conduct must not be too "intertwined" with protected speech. Ibid., 540, 541. Four dissenters, led by Justice Owen Roberts, thought that the Texas statute was merely a reasonable occupational regulation that did not in fact regulate

As the legal scholar Ken Kersch has noted, the Supreme Court's extension of First Amendment protections to such union activities required redrawing the line between protected "speech" and governable "conduct."[20] The confluence of Thomas's roles as a speaker and as an organizer allowed the Court to easily assimilate the latter into the former, while at the same time building on its earlier efforts to extend the realm of constitutionally protected speech and assembly beyond the "free political discussion" that Hughes had highlighted in *De Jonge* to simple labor disputes. It is not entirely surprising that "peaceful assemblies" seeking "redress" for grievances would now be read to include labor organizing. In the decades leading up to the New Deal, the notion of freedom of association had been developing within the economic context. As early as 1893, in the law journal of the New York Law School, S. C. T. Dodd, general counsel for Standard Oil, observed the rise of "peculiar criminal laws" that "undertake to limit freedom of association for business purposes," namely, antitrust legislation punishing conspiracies in restraint of trade.[21] More common, however, was the connection made between freedom of association and labor unions. In recounting the status of trade unions in English law, W. M. Geldart pointed out: "Freedom of association has never been looked upon as a privilege requiring constitutional guarantees." There were no legal restraints on the formation of such "voluntary societies" as trade unions, though they were bound by the same limits as to what "one man may lawfully do."[22] The "principle of freedom of association" was advocated as an international human right that should be integrated into treaties and domestic legislation.[23] And the "full freedom of association"

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or implicate public speeches but only regulated "transaction[s]" between professional labor organizers and potential union members (and thus, in order to insure his arrest, Thomas took pains not only to deliver his planned speech but also to personally register workers into the union at the meeting). Ibid., 551.

[20] Ken I. Kersch, "How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech," *University of Pennsylvania Journal of Constitutional Law* 8 (2006): 255.

[21] S. C. T. Dodd, "Peculiar Legislation," *Counsellor* 2 (1893): 195. See also John W. Burgess, "The Ideal of the American Commonwealth," *Political Science Quarterly* 10 (1895): 404, 413–14. In this guise, freedom of association made a brief comeback in the early New Deal as necessary to the management of production. Malcolm P. Sharpe, "Monopolies and Monopolistic Practices," *University of Chicago Law Review* 2 (1934): 301, 310. More critically, see John P. Davis, *Modern Corporations* (New York: G. P. Putnam's Sons, 1905), 267: "Distrust of the state as organized caused the accumulation of political powers in the hands of minor states, corporations, which excited no apprehensions because they were democratically organized. . . . [W]ere they not based substantially on individual contract and was not 'freedom of association' one element of liberty? . . . But there is much evidence that the true nature of corporations is gradually becoming plainer, though least in the system of law."

[22] W. M. Geldart, "Status of Trade Unions in England," *Harvard Law Review* 25 (1912): 579, 580.

[23] "Report of the Commission on International Labor Legislation," *American Labor Legislation Review* 9 (1919): 364, 374; "Report of the Special Committee of the American Bar Association on a League of Nations," *American Bar Association Journal* 6 (1920): 136, 177; "Treaty of Peace between the Allied and Associated Powers and Hungary," *American Journal of International Law* 15 (1921): 1, 134.

had been integrated into the rhetoric of the anti–labor injunction movement and incorporated into the Norris-LaGuardia Act.[24] The International Labor Organization titled its multivolume comparative review of labor legislation *Freedom of Association.*[25] Before the Court appended it to the First Amendment, the idea of freedom of association had already gained considerable resonance in the context of labor organizing. The Colorado Supreme Court recognized this in 1944, after *De Jonge* and similar cases: "[W]e think the decisions indicate that the constitutional guarantee of the people is not restricted to the literal right of meeting together 'to petition the Government for a redress of grievances.' " The "right of workmen to organize and operate as a voluntary labor association" was effectively "within the area of the guarantees of assembly and free speech."[26] The New Jersey Supreme Court had concluded even before *De Jonge* that the text of the constitutional right of assembly "must be given the most liberal and comprehensive construction" so as to encompass the "right of the people to meet in public places to discuss in an open and public manner all questions affecting their substantial welfare, and to vent their grievances, to protest against oppression, economic or otherwise, and to petition for the amelioration of their condition, and to discuss the ways and means of attaining that end." So long as such an assembly did not display by "overt acts" a "common understanding" among the participants of the assembly that was "of such a nature as to inspire well-grounded fear in persons of reasonable firmness and courage," it was constitutionally protected.[27] The innovative New Jersey Supreme Court was charting the course that the U.S. Supreme Court would later follow, somewhat more tentatively. The freedom of association may have been tied textually to the freedom of speech, and initially justified by the U.S. Supreme Court as a fundamental freedom because of the importance of protecting political dissent in a democracy, but, with the New Deal coalition politically and intellectually ascendant, freedom of association was also understood to be the right to organize against economic "oppression."

V. Communists and the Post–New Deal Court

Such developments set the background for the Court's encounter with anticommunism measures in the early Cold War period. The postwar Communist threat gave new salience and meaning to the possibility of "guilt by association." Former secretary of state Henry Stimson declared

[24] Felix Frankfurter and Nathan Greene, "Labor Injunctions and Labor Legislation," *Harvard Law Review* 42 (1929): 766, 795; Norris-LaGuardia Act, 47 Stat. 70 (1932).

[25] International Labour Office, *Freedom of Association,* 5 vols. (Geneva: International Labour Office, 1927–1930).

[26] *American Federation of Labor v. Reilly,* 113 Colo. 90, 98 (1944).

[27] *State v. Butterworth,* 104 N.J.L. 579, 580, 585 (1928).

soon after World War II that "those who now choose to travel in company with American Communists are very clearly either knaves or fools."[28] In 1920, Charles Evans Hughes had written a memorial for the New York City bar association calling on the state legislature to accept the election of five Socialists to its chambers and to respect the fact that "it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts."[29] The petition did little good then, in the midst of the first "Red Scare," and the Socialists were expelled from the legislature. In the Red Scare of the late 1940s through the early 1960s, legislators were similarly unconvinced by calls to assume the innocence of Communist Party members and associates in the absence of individual overt acts of criminality.

Besides the most direct attacks on Communist speakers and activists (with sedition charges leveled against those who either advocated or engaged in criminal activity), the state and federal governments adopted a variety of tactics for penalizing those who associated with such Communists.[30] Notably, over the course of nearly two decades the U.S. Supreme Court heard cases in which the government sought to deport Communist resident aliens,[31] denaturalize and deport Communist immigrant citizens,[32] force disclosure of Communist Party membership or affiliation,[33] question in public hearings those suspected of association with the Party,[34] require registration of the Communist Party and affiliated groups as subversive organizations,[35] and criminalize active membership in the Communist Party.[36]

Although the Court provided some resistance to these anticommunist measures, on the whole it adopted a posture of judicial restraint and deferred to the government. In the range of cases addressing these issues, the Court recognized that a freedom of association that linked with considerations of free speech was at stake. The jurisprudential

[28] Henry Lewis Stimson, "The Challenge of Americans," *Foreign Affairs* 26 (1947): 8.

[29] Quoted in John Lord O'Brian, "Loyalty Tests and Guilt by Association," *Harvard Law Review* 61 (1948): 592, 594.

[30] The federal government also refused to issue passports to known Communists, but this did not raise particular issues of freedom of association. See *Kent v. Dulles,* 357 U.S. 116 (1958); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964). The government also pursued espionage charges against suspected spies, of course.

[31] *Bridges v. Wixon,* 326 U.S. 135 (1945); *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952).

[32] *Schneiderman v. United States,* 320 U.S. 118 (1943); *Knauer v. United States,* 328 U.S. 654 (1946). *Knauer* involved a Nazi rather than a Communist, but the principles are consistent with the other cases considered here.

[33] *American Communications Association, et al. v. Douds,* 339 U.S. 382 (1950).

[34] *Sweezy v. New Hampshire,* 354 U.S. 234 (1957); *Watkins v. United States,* 354 U.S. 178 (1957); *Barenblatt v. United States,* 360 U.S. 109 (1959); *Braden v. United States,* 365 U.S. 431 (1961).

[35] *Communist Party of the United States v. Subversive Activities Control Board,* 367 U.S. 1 (1961).

[36] *Scales v. United States,* 367 U.S. 203 (1961).

groundwork for such freedom of association claims had been laid, and the justices were prepared to recognize that there was such a freedom and that it was implicated in such cases. But the Court rarely held that the liberty interests protected by freedom of association were sufficient to override the government's interest in protecting national security and its assessment of how best to realize that goal. In general, the Court was sharply divided in these cases. All the cases were decided with dissents, and in nearly all the majorities were further fragmented by concurring opinions.

Politically speaking, it is little surprise that the Supreme Court proved fairly deferential in these years. A total of eighteen justices sat in one or more of these cases (from the late 1940s through the early 1960s). Nearly all of them adopted a fairly consistent posture in deciding the cases. Seven of the justices overwhelmingly voted to reject the government's efforts in the cases; nine voted with similar consistency to uphold the government's actions against the objections of the individuals or organizations involved. Only two justices (Robert Jackson and Stanley Reed) split their votes to a significant degree; one of those (Jackson) voted in only two cases, and the other (Reed) leaned toward the government. With this tendency toward the appointment of deferential justices, it is not surprising that the Court tended to see things the government's way in these cases. The dissent on the Court might have been even less if not for the fact that two of the most forceful advocates for the freedom of association in these cases (William O. Douglas and Hugo Black) also happened to be particularly long-serving justices. Those two justices, countered only by the similarly long-serving Felix Frankfurter, voted in cases throughout the period, which meant that presidents had more opportunities to replace justices who were deferential to the government than to replace justices who took a more aggressive stance.

Beyond the question of opportunity, presidents clearly had different outlooks in selecting their justices, which translated into different patterns of behavior on the bench. Perhaps surprisingly, a majority of Franklin Roosevelt's appointees fell into the activist camp. From the perspective of Felix Frankfurter, the self-appointed voice of the Progressive legacy of judicial deference, this pattern might be unexpected, given Roosevelt's own problems with an activist Court and the Progressives' history of opposition to the active exercise of judicial review. Roosevelt clearly was committed to selecting justices who would support the New Deal and the expansion of government authority over the economic arena, and the justices he appointed were reliable on that front. It is not at all clear that Roosevelt was more broadly committed to judicial restraint or sought it in his justices. Supporters of Roosevelt and his Court-packing plan, for example, were explicit that what was needed was not judicial restraint but a "liberal-minded judiciary." The

administration wanted to shape the direction of constitutional law, not put an end to it.[37] As the direction the state and federal courts were moving in in the late 1930s suggested, the new judges were finely attuned to the fact that the activities of Democratic constituencies (i.e., unions) were to be protected and not swept within a general disposition to unleash government power to make reasonable regulations. Harry Truman's appointees, by contrast, uniformly lined up on the side of government on this issue. The Truman administration was on board with the general anticommunist agenda, if not with all its particulars, and Truman's justices were closely aligned with his administration. They did not exhibit the diversity or the civil libertarian streak in regard to Communists that the New Deal justices did. Likewise, Dwight D. Eisenhower's justices were generally deferential to the government on this issue. The two exceptions were, of course, big ones, in the form of Earl Warren and William Brennan. The nominations of those two justices were also the most politically driven of the Eisenhower presidency. Warren, Eisenhower's first nomination to the Court, was political payback for the former California governor's critical assistance in securing the Republican presidential nomination for Eisenhower. Brennan's nomination was made on the eve of the 1956 elections, and it was hoped that nominating the New Jersey state judge would help shore up support among northeastern Catholic Democrats for the president's reelection. There are good reasons to believe that John Marshall Harlan more closely fit Eisenhower's preferences for a justice than did Earl Warren or William Brennan. Eisenhower famously groused that the appointments of the latter two justices were mistakes, and it is likely that their votes in the anticommunism cases were precisely what he had in mind in making those complaints.[38]

VI. Conclusion

Freedom of association grew out of various roots, but finally found a home under the rubric of the First Amendment. The Supreme Court proved most sympathetic to such claims when they were made within the core context of free speech situations—in the case of speakers at public rallies—and in the context closest to the New Deal's concern with economic justice—the activity of labor unions. As the assertion of freedom of

[37] See Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton, NJ: Princeton University Press, 2007); and Kevin McMahon, *Reconsidering Roosevelt on Race* (Chicago: University of Chicago Press, 2003). Roosevelt's Court-packing plan would have allowed the president to appoint a new justice to the U.S. Supreme Court for every justice over the age of seventy. It would have had the effect of giving Roosevelt an immediate and solid majority on the Court, but the plan was defeated amid concern that it would dangerously empower the president and as the Court retreated from its opposition to the New Deal.

[38] David Yalof, *Pursuit of Justices* (Chicago: University of Chicago Press, 1999), 65, 229 nn. 108–9.

association moved to a different context, one in which the justices had substantially less sympathy for the defendants, the claim proved harder to sustain before the Court. The choice to affiliate with the Communist Party seemed rather unlike the possibility of innocent citizens stumbling into public rallies sponsored by dubious organizations, and much more like the action of one who is forming an intent to promote illegal activities. As a result, in this context the Court tended to take a different view of how far the freedom of association could legitimately extend before it was outweighed by the government's responsibility to preserve the general welfare. From the very earliest cases, when state courts worked with notions of personal liberty rather than fundamental rights of free speech, courts had emphasized that individuals should be able to freely associate to engage in lawful activities. But courts had also emphasized that joining an organization such as the Communist Party was quite different from hanging out on the street corner with reputed thieves or attending a public meeting to air general grievances. Over the course of prior decades, the state and federal courts had laid the jurisprudential foundations for recognizing a constitutional freedom of association that had implications for the government's domestic anticommunism efforts during the mid-twentieth century, but the courts hoped to reserve that freedom for those they regarded as exercising traditional and fundamental freedoms and as being in danger of becoming swept up by an overly aggressive state. Although some of Franklin Roosevelt's appointees to the Supreme Court looked with such sympathy upon those individuals being targeted by anticommunism measures, most of the post–New Deal justices instead emphasized the necessary limits of the freedom of association. Guilt by "mere association" was unacceptable, but sometimes "guilt by association" made sense.

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