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Minority Rights and the Union Shop: A Basis for Constitutional Attack

Frank T. Read

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Of the many basically private groups in this nation possessed with sufficient power and influence to substantially affect the American economic and political scene, certainly labor unions loom as some of the most controversial and prominent. Private though such unions may be, both the federal and state governments have injected large scale authorization as well as restriction into the activities of labor organizations. The author of this article contends that the legislative and administrative inroads of control on this area constitute "governmental" or "state" action which justifies the application of the Constitution to the activities of labor unions. Specifically, the author contends that the Taft-Hartley Act's permissive allowance of the union shop is "governmental action." Consequently, he states that the validity of union activities in a Taft-Hartley union shop situation which affect the constitutional rights of individual union members, particularly those activities which use the dues of dissenting union members to support political causes to which they are opposed, should be tested by constitutional standards.

Frank T. Read*

It has been seriously suggested that ". . . all or most 'powerful' private groups should be subject to all or most provisions of the Constitution. . . ."[1] Many writers have singled out the labor union as an example of a private organization that most needs to have constitutional restraints applied to it.[2] More than a few labor unions have grown to immense size and exercise vast

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1. Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 346 (1961). [Hereinafter cited as Wellington, *The Constitution.*]

2. See, *e.g.*, Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 176 (1957); Malick, *Toward a New Constitutional Status for Labor Unions: A Proposal*, 21 ROCKY MT. L. REV.

powers over workers, industries, and indeed the entire economy.

Currently one of the most controversial areas of labor management relations concerns the union security device known as the union shop. Within 30 days after employment or within 30 days after a union shop contract becomes effective, an employee must join the contracting union and tender the required dues or lose his job.[3] Although the constitutionality of the union shop itself under the Railway Labor Act[4] has been attacked twice in the United States Supreme Court,[5] confusion is greater now than ever before about the constitutional status of this union security arrangement. Because of this current cloud of doubt hanging over all union shop contracts, this paper will be concerned with the threshold question that must be answered in the affirmative before there can be any thoughts of applying the Constitution to the union shop situation. Before the Constitution can be applied to any private group — whether it be labor union, corporate enterprise, or the Gideon Society — a major obstacle must be breached: Is there sufficient governmental involvement in the questioned private activity to constitute the requisite "governmental action" necessary to bring the Constitution into play? If the Labor Management Relations Act's (Taft-Hartley Act's) permissive allowance of union shop contracts[6] amounts to sufficient governmental or state action to justify application of the Constitution to labor unions, serious questions arise as to whether certain commonplace union activities infringe upon the individual members' constitutional rights found in the first, fifth, and fourteenth amendments.

For example, if an individual compelled to join a union shop is then compelled to contribute dues which are used to support political activities and ideas to which he is opposed, are the first

260 (1949); Miller, *The Constitutional Law of the Security State*, 10 STAN. L. REV. 620, 655–56 (1958); Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874 (1957). *Contra*, Wellington, *The Constitution* 346–50, who cites the above authorities, examines their arguments, and concludes that the Constitution should not be applied to labor unions.

3. Labor Management Relations Act (Taft-Hartley Act) (LMRA) § 8(a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958); see SMITH & MERRIFIELD, LABOR RELATIONS LAW 588–91 (2d rev. ed. 1960).

4. Section 2, Eleventh (a), 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (a) (1958).

5. International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

6. Sections 8(a)(3), (b)(2), 61 Stat. 140, 141 (1947), as amended, 29 U.S.C. §§ 158(a)(3), (b)(2) (1958).

and fifth amendment rights of that union member thus violated? We will later be focusing on this particular problem in detail, but it is wise to remember that this is only one of many constitutional questions that could be raised over the union shop situation. Another example is that when a man's religion forbids him to join the union and yet he must join or lose his job, are his first amendment guarantees of freedom of religion being violated?[7] An analogous problem exists when the federal government authorizes a union to act as exclusive bargaining agent and then that union discriminates in excluding members on the basis of race. Are these workers' fifth amendment rights being violated?[8]

I. GOVERNMENTAL OR STATE ACTION

It is well settled that the limitations on conduct contained in the first and fifth amendments to the Constitution of the United States are limitations on federal governmental conduct, and not on private conduct.[9] Therefore, if there is to be a violation of the guarantees contained in these amendments, the federal government must in some way be connected with the violation. Likewise, it has been clear since the *Civil Rights Cases* of 1883[10] that Congress cannot legislate under the fourteenth amend-

7. See Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956); Otten v. Baltimore & O.R.R., 205 F.2d 58 (2d Cir. 1953), *aff'd per curiam sub nom.* Otten v. Staten Island Rapid Transit Ry., 229 F.2d 919 (2d Cir.), *cert. denied*, 351 U.S. 983 (1956) (union shop does not violate constitutional rights of worker who refuses to join for religious reasons); Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 475–78 (1959); Wellington, *The Constitution* 354–56.

8. See, *e.g.*, Rauh, *supra* note 2, at 875; Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457 (1962).

"The union's obligation under the . . . [Railway Labor Act] is to represent fairly all employees—members and nonmembers, dissenters and advocates—in the bargaining unit." Wellington, *Machinists v. Street; Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 56 n.37. [Hereinafter cited as Wellington, *Machinists v. Street.*] See Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944), where Mr. Justice Stone made it clear that if the statute in question had permitted discrimination, then governmental action would have been present.

9. See Corrigan v. Buckley, 271 U.S. 323, 330 (1926); Talton v. Mayes, 163 U.S. 376, 382, 384 (1896); Withers v. Buckley, 61 U.S. (20 How.) 84, 89–91 (1857); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). See also Public Util. Comm'n v. Pollak, 343 U.S. 451, 461–62 (1952); Virginia v. Rives, 100 U.S. 313, 318 (1879).

10. 109 U.S. 3 (1883).

ment to prohibit private action.[11] Only "state action"[12] of a particular character is prohibited by the fourteenth amendment.[13] While private actions alone cannot be regulated or controlled by application of the first, fifth, or fourteenth amendments, it has become evident that "ostensibly private actions . . . may occasionally have a sufficient nexus with governmental action to justify use of the Constitution as an instrument of control."[14]

Some modern scholars have adopted very expanded concepts of governmental or state action. They contend that whenever a government gives legal consequences to transactions between private parties, there is governmental action, and that the real

11. The Supreme Court has in many cases applied the corollary rule that the constitutional restrictions on state action apply to the manner in which the state regulates legal relations between "private" parties. See Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); AFL v. Swing, 312 U.S. 321 (1941); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Truax v. Corrigan, 257 U.S. 312 (1921); Truax v. Raich, 239 U.S. 33 (1915); Lochner v. New York, 198 U.S. 45 (1905); Holden v. Hardy, 169 U.S. 366 (1898); Plessy v. Ferguson, 163 U.S. 537 (1896); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956); see Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946).

12. The terms "governmental action" and "state action" are often used interchangeably and will be so used in this Article. Specifically, however, the term "governmental action" refers to sufficient involvement of the *federal* government with the challenged action to invoke the first or fifth amendment; the term "state action," on the other hand, refers to sufficient involvement of a *state* government with the challenged action to invoke the fourteenth amendment.

13.

> As to nation and state alike, the current controversies [concerning "governmental" and "state" action] center on the application of the guaranties respecting freedom, in one form or another. With reference to the federal power, there is the first amendment's prohibition that Congress "make no law . . . abridging the freedom of speech, or of the press. . . ." More significant still, because of wider possibility of application, are the broad prescriptions of the fifth amendment, "nor shall any person . . . be deprived of . . . liberty . . . without due process of law . . . ," and the parallel prohibition against the states contained in the fourteenth amendment. This wider applicability of the fifth and fourteenth amendments arises from the fact that it is liberty of all kinds, not merely of speech or of the press, that they protect, coupled with the doctrinal development whereby due process of law means not merely compliance with established and decorous forms of procedure but, as well, protection of "the very substance of individual rights to life, liberty, and property" as against "arbitrary legislation."

Merrill, *The Three L's—Law, Labor, Liberty*, 37 NOTRE DAME LAW. 589, 590–91 (1962). (Footnotes omitted.)

14. Wellington, *The Constitution* 345.

question to be asked is not whether such action is present, but whether it is constitutional or unconstitutional.[15] Nevertheless, the traditional approach seems to make the decisive question whether sufficient governmental action exists. In many cases it has been assumed that the private action in question would be unconstitutional if the Constitution were to be applied to it, and the only real question is whether or not the Constitution is to be applied.[16]

Before attempting to decide whether the Labor Management Relations Act's permissive allowance of the union shop amounts to governmental action, one needs to review quickly how the concept of governmental action has expanded in the last few years.[17] Two decades ago a federal court of appeals declared that "culpable official State inaction may also constitute a denial of equal protection."[18] This idea that failure to act can still be governmental action in aggravated cases was one of the first of many new ideas that took root and flowered into the present rapidly expanding conception of governmental action. Similarly, implicit in the decision of *Baker v. Carr*,[19] where the Supreme Court held that perpetuation by a state of serious malapportionment of legislative districts which developed because of population shifts violated the "equal protection" clause of the fourteenth amend-

15. See Horowitz, *The Misleading Search for 'State Action' Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

16. See *ibid.*

17. Williams, *supra* note 15, in giving a brief review, contends that the concept of state action has in reality become all-pervasive. He claims that the growth of state action since the *Civil Rights Cases* has taken place in four directions: (a) the individual acting "under color of law" — citing, *e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Virginia, 100 U.S. 339 (1879); (b) the nonofficial individual or group acting so much under government authority as to be viewed as engaging in state action — citing, *e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); (c) the concept of governmental refusal or failure to act as fulfilling the requirement of state action — citing, *e.g.*, Baker v. Carr, 369 U.S. 186 (1962); and (d) state action found in judicial enforcement of private agreements and the supervision of private relationships — citing, *e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

18. Catlette v. United States, 132 F.2d 902, 907 (4th Cir. 1943). Defendant, a deputy sheriff, had participated in infliction of indignities on Jehovah's Witnesses and had failed to exercise the authority and duty of his office to protect those citizens from group violence.

19. 369 U.S. 186 (1962).

ment, was a finding of state action because of the *failure* of a state to act to correct serious abuses.

In *Marsh v. Alabama*[20] can be seen the first clear articulation of another new theory that when a state merely permits a private body to carry out a traditionally public function, the state itself has acted, and therefore, the actions of that private body will be tested by constitutional standards. Mr. Justice Black stated for the Court that:

> the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.[21]

This idea of "permissive" state action is seen again in *Terry v. Adams*,[22] where it was held that if a private organization performs quasi-governmental functions such as holding primary or pre-primary elections, though without state aid, its discriminations will not be considered private.

Perhaps the best example of the expanding scope of the concept of state action is restrictive covenant cases, starting with *Shelly v. Kraemer*,[23] where it was held that by reason of the fourteenth amendment, no state court could enforce any private, racially restrictive covenant. One of the most interesting recent holdings is a per curiam decision that the Board of Directors of City Trustees in Philadelphia, while exercising its obligation as trustee to deny Negroes admission to the college created under the will of Steven Girard, had engaged in state action proscribed by the fourteenth amendment.[24]

One of the latest major state action cases decided by the

20. 326 U.S. 501 (1946). The managers of a private company-owned town refused to permit a Jehovah's Witness to distribute religious literature in the town. A State statute made it a crime to enter or remain on land after having been warned by the landowner not to do so. A conviction of the Jehovah's Witness under the statute was reversed by the Supreme Court on first and fourteenth amendment grounds.

21. *Id.* at 509. (Emphasis added.) Horowitz, *supra* note 15, at 215, notes a distinction between merely permitting a private party to discriminate and compelling a private party to discriminate.

22. 345 U.S. 461 (1953) (fifteenth amendment).

23. 334 U.S. 1 (1948); *accord*, Barrows v. Jackson, 346 U.S. 249 (1953) (*Shelley* extended, no damages recoverable from home owner who broke racial covenant); Hurd v. Hodge, 334 U.S. 24 (1948) (racial restrictive covenants not judicially enforceable in Washington, D. C.).

24. Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).

Supreme Court is *Burton v. Wilmington Parking Authority*.[25] A private restaurant refused service to a Negro. The restaurant was the lessee of a parking authority set up by the city; it occupied the corner of a large building that was used for parking and owned by the city. The Court held that this discrimination violated the equal protection clause of the fourteenth amendment. Several factors influenced its holding that requisite state action was present: There was public ownership and dedication of the building, the money for construction came from the public in part, and the public paid the cost of maintenance and repair; the areas leased were not surplus property of the State but rather an integral part of an overall State plan; improvements that the restaurant made which became a part of the realty were not taxed to the restaurant, and the authority did not require in its lease that the restaurant give service without discrimination.[26] Mr. Justice Clark, writing for the majority, stated that "the State has so far insinuated itself into a position of interdependence with [the restaurant] . . . that it must be recognized as a joint participant in the challenged activity. . . ."[27] Clark further suggests that by its "inaction," that State has placed its power, property, and prestige behind the admitted discrimination. Some commentators have complained that there is a source of doubt about the precedent value of the decision due to the Court's failure to identify the particular act or omission upon which the State's constitutional violation was predicated.[28] But Justice Clark was careful to make clear that only by a sifting of facts and circumstances can the non-obvious involvement of the State in private conduct be given its true significance. Thus, it may fairly be predicted that when state action questions are decided in the future

25. 365 U.S. 715 (1961).

26.

> [I]n its lease with [the restaurant] . . . the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. . . . [N]o state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them . . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination.

Id. at 725.

27. *Ibid.*

28. See *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 144–47 (1961). Williams, *supra* note 15, contends that the *Wilmington Parking Authority* case lays the foundation for abandoning the whole concept of state action as it now exists.

the Court will first indulge in a careful and detailed factual analysis before rending its decision as to the existence or nonexistence of state action.

An understanding of the growth of the concept of state action in various areas can be more easily obtained when one realizes that there is more than just the possibility that a rough pattern is being followed.

> State action cases involving such basic rights . . . as voting and housing have followed a pattern of development. A discrimination statute is first invalidated, only to be replaced by the same discrimination ostensibly in private form. The Court has resolutely held to substance, prohibiting the discrimination regardless of the agency producing it. As a result, the language in the end decision of each sequence provides a definition of state action sufficiently broad to cover almost any type of human activity.[29]

The most recent significant activity of the Supreme Court in the governmental action area was the series of sit-in cases handed down in the late spring of 1963. *Peterson v. City of Greenville*[30] concerned the conviction of 10 Negro students under a South Carolina trespass statute for refusing to leave an S. H. Kress lunch counter at the request of the manager. The manager testified at the trial that he acted because of race, local custom, and a city ordinance requiring racial segregation of eating facilities. The city defended the convictions on the ground that they were merely in aid of the store manager's private decision to discriminate. The Supreme Court reversed holding that where legislation commands an unconstitutional result — in this case segregation of restaurants — the State "will not be heard" to assert that the result was the product of a private individual's choice. Whether the proprietor was, in fact, influenced by the ordinance was deemed irrelevant since "the convictions [have] the effect . . . of enforcing" the legislative command.[31] In light of *Peterson*, convictions in *Gober v. City of Birmingham*[32] were reversed and *Avent v. North Carolina*[33] was remanded to the North Carolina

29. Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Steven Girard*, 66 YALE L.J. 979, 982 (1957) (Footnotes omitted.); see *id.* at 982 nn.13 & 14 for development of state action by cases. Many of the cases are also collected in EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 993–1172 (1st ed. 1952); *State Action: A Study of Requirements Under the Fourteenth Amendment*, 1 RACE REL. L. REP. 613 (1956).

30. 373 U.S. 244 (1963).

31. *Id.* at 248.

32. 373 U.S. 374 (1963).

33. 373 U.S. 375 (1963).

Supreme Court which had erroneously assumed no segregation ordinance existed in the City of Durham.

The most telling of the sit-in cases, insofar as advancement of the concept of state action is concerned, was *Lombard v. Louisiana*.[34] In that case the petitioners were convicted of "criminal mischief" for refusing to leave a lunch counter on request. The Supreme Court reversed on the basis of *Peterson*, holding that the irrebuttable presumption of coercion by the State, announced in that case, was dispositive even though there was present no local ordinance requiring segregation as there was in *Peterson*. One week before the arrests in *Lombard*, however, the Mayor and Chief of Police of New Orleans issued proclamations deploring sit-in demonstrations and promising to preserve the peace. These executive utterances were interpreted as an "official command . . . to direct continuance of segregated service in restaurants. . . ."[35] The Court applied the *Peterson* presumption that the proprietor had been coerced by officialdom.[36] State action has been readily found in many other contexts where it was obvious to the court that racial discrimination was being condoned.[37]

In 1961, Mr. Justice Douglas, concurring in *Garner v. Louisi-*

34. 373 U.S. 267 (1963).

35. *Id.* at 273.

36. The commentators in *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 129 (1963), query "why an individual's right to invoke state assistance in ejecting a Negro ought to turn on the fortuitous existence of an unconstitutional statute or pronouncement." They state: "Such a touchstone not only attaches significance to what is otherwise a legal nullity, but also places the right to assistance at the mercy of legislative inertia and executive intemperance." In summing up the importance of the sit-in cases on the doctrine of state action, *Harvard* comments that "the pressure exerted by the existence of an estimated 7,500 sit-in convictions may, however, overcome judicial resistance to doctrinal development and produce constitutional ventures as enormous as that embarked upon in the areas of school segregation and reapportionment." *Id.* at 131. (Footnotes omitted.)

37. See, *e.g.*, Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962), in which Negro plaintiffs sought an injunction against private purchasers of city golf courses in restricting their use to white persons. The deed from the city contained a reversionary clause which provided that the land be used only as golf courses. The court held that the reversionary clause was sufficient "complete control and interest" making purchasers state agents, thereby making the discrimination state action so as to deny equal protection of the laws guaranteed by the fourteenth amendment. The qualified sale in *Hampton* was placed in the same category as the lease involved in *Wilmington*. Compare Tonkins v. City of Greensboro, 175 F. Supp. 476 (M.D.N.C.), *aff'd per curiam*, 276 F.2d 890 (4th Cir. 1959), in which the sale of a swimming pool owned by a city was complete and therefore the new purchasers could do as they pleased.

ana,[38] indicated an immediate willingness to expand state action far beyond even the most liberal opinion of the past.[39] He reiterated and expanded on this position in *Lombard*.[40] One article stated that if the Douglas expansion were adopted, the usefulness of the concept of governmental action would be destroyed.[41] Despite the fears of this critic, the Supreme Court has never yet held that state action extends to a state's "hands-off" policy — "a policy which simply tolerates, without affirmatively encouraging, the discriminatory practices of individuals or groups."[42] Consequently, although it is evident that the class of activities included under the rubric of governmental action has rapidly grown in the last few years, the Court has never abandoned the

38. 368 U.S. 157 (1961). The majority released 16 Negroes whose only alleged criminal activity was to sit in at white lunch counters. They did so by failing to reach the constitutional question and merely saying the record of conviction was totally void of any evidence that petitioners' acts caused a breach of the peace.

In his concurring opinion, *id.* at 176, Mr. Justice Douglas states that all of the following have amounted to state action: 1) legislative enactments; 2) executive action; 3) administrative action of state agencies in leasing public facilities; 4) judicial action; and 5) custom, practice and usage.

39. Mr. Justice Douglas states that all of the following are indicative of state action: 1) the customs of Louisiana, reinforced by the State's legal patterns, maintain racial discrimination; 2) the restaurant business (where the sit ins occurred) is "affected with a public interest" and thus is subject to the regulatory power of the State; and 3) the State through its municipalities had licensed these restaurants.

40. Mr. Justice Douglas found the existence of the requisite state action "wholly apart from the activity of the Mayor and police, for Louisiana has interceded with its judiciary to put criminal sanctions behind racial discrimination in public places." 373 U.S. at 278. Douglas further urges that any business that is licensed by a governmental body should be required to serve the public without discrimination.

41. Karst & Van Alstyne, *Comment: Sit-Ins and State Action — Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762, 776 (1962). See also Williams, *supra* note 15, at 389, where it is suggested that the sun is setting on the concept of state action as a test for determining the constitutional protection of individuals. The author suggests that state action so permeates all activity that it can be found in virtually all cases.

42. Wellington, *The Constitution* 351:

> But a state policy of toleration is not, without more, state action within the meaning of the fourteenth amendment. If it were, the amendment would apply to the behavior of social fraternities, tennis clubs, and clubs of all kinds. Indeed, most behavior would in the end be state action for fourteenth amendment purposes. That no serious suggestion of this kind has ever been raised is perhaps sufficient comment on its undesirability. Since the Civil Rights Cases of 1883, the Supreme Court has consistently interpreted the amendment to restrict its scope to an area of affirmative state action and a slight penumbrum beyond.

concept itself, and government action, therefore, must still be shown before the Constitution can be applied.

II. THE DESIRABILITY OF APPLYING THE CONSTITUTION TO LABOR UNION ACTIVITIES

It might be appropriate, before rushing headlong into a discussion of whether or not governmental action exists in relation to the union shop, to contemplate a moment the results of applying the Constitution to the labor movement. While many commentators have indeed proposed that constitutional safeguards should regulate union activities,[43] other leading writers have seriously questioned the desirability of such a move.[44]

When any important governmental policy is nomenclatured "unconstitutional," frictions can and do result. The courts might well be subject to strong complaint from the shocked friends of labor, who have traditionally considered unions to be "private" organizations, when they find union conduct is subject to the vigorous standards of the Bill of Rights. To judge union conduct by the Constitution would insert the federal judiciary into the role of judge of all union activity, policy maker of labor manage-

See Comment, 26 Mo. L. Rev. 510, 514 (1961). *But cf.* Horowitz, *supra* note 15, at 221. Despite this categorical statement by Wellington some writers do not agree that a state's "hands-off" policy does not amount to state action. Professor Henkin suggests for a basis of state responsibility that "the state is responsible for what it could prevent, and should prevent, and fails to prevent." Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 483 (1962); *cf.* Gilbert, *Theories of State Action as Applied to the "Sit-In" Cases*, 17 Ark. L. Rev. 147 (1963).

43. See authorities cited note 2 *supra*.

44. Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 620 (1959):

> It has also been argued that the powers which the NLRA vests in labor unions are so far governmental that all their actions, including the election and rejection of members, are subject to the restrictions which the fifth and fourteenth amendments impose upon the federal and state authorities. . . . In my opinion the reasoning is highly dangerous. The implications of calling labor unions governmental instrumentalities are not easy to perceive, but surely the designation would invite more and more regulation with consequent loss of independence.

See also Wellington, *The Constitution* 348:

> The Bill of Rights and the fourteenth amendment are the great instruments with which courts protect the people from misused governmental power. The view that because unions and corporations are somehow similar to government they too should be restrained by these same constitutional provisions has perhaps an aesthetic and emotional appeal. Its analytical shortcomings, however, are fatal. The need to regulate unions and corporations is undeniable; but it need not be assumed a priori that the Constitution is the proper regulatory instru-

ment relations, and organizer of internal union arrangements. If the Supreme Court pronounced a constitutional decision concerning some labor activity, it would be beyond the power of Congress to change that decision by ordinary legislation. Is the Supreme Court of the United States institutionally capable of assuming this new duty at the very time when it is being buffeted by criticism for "policy making" in areas traditionally avoided by the judiciary? What would happen to congressional power to control labor management relations that affect interstate commerce? Are there not other and better ways to regulate unions, if they need regulating, than by applying the Constitution to them?[45] The questions raised above should be kept in mind as we search for state action in this area.

III. THE QUEST FOR GOVERNMENTAL ACTION IN LABOR UNIONS

Labor unions have been traditionally considered to be private organizations.[46] Therefore, before the Constitution can be brought to bear, a sufficient connection between the union and a government has to be shown. As Professor Wellington states: "The trick is to implicate the government in some way and make it a partner to the union's deed."[47]

Having considered the general trend of cases toward expansion of the concept of governmental action, and having raised some questions concerning the desirability of judging union conduct by the Constitution, it is now time to consider the two cases that directly bear on the problem of whether the allowance of union shops by Congress constitutes the kind of governmental

ment. Other, more appropriate, means may be available to accomplish the same desired ends.

45. Wellington, *The Constitution* 349, strongly urges that there are better methods of regulating union conduct than by applying rigid constitutional standards and suggests that if regulation is needed the obvious place to turn is to Congress and the various state legislatures.

46. In American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950), the Supreme Court stated: "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such." But in *Douds* the Court was also careful to point out that "power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *Id.* at 401.

In National Fed'n of Ry. Workers v. National Mediation Bd., 110 F.2d 529 (D.C. Cir.), *cert. denied*, 310 U.S. 628 (1940), it was urged that a union by utilizing the services of the National Mediation Board thereby became an arm of the federal government, but the Court of Appeals refused to so hold.

47. Wellington, *The Constitution* 350.

action that invokes constitutional standards.

A. *Railway Employes' Dep't, AFL v. Hanson*[48]

Employees of the Union Pacific Railroad brought suit against that company and labor organizations representing various groups of employees of the railroad to enjoin the application and enforcement of a union shop agreement signed by the railroad and the labor organizations. The plaintiffs were not members of the union and desired not to join the union but under the terms of the union shop agreement all employees, as a condition of their continued employment, had to join the union within 60 days. These employees claimed that the union shop violated the "right-to-work" provision of the Nebraska Constitution.[49] The Nebraska trial court issued an injunction and the Supreme Court of Nebraska affirmed.[50] It held that the union shop violated the first and fifth amendments of the United States Constitution and therefore there was no valid federal law which could supersede the "right-to-work" provision of the Nebraska Constitution. The Supreme Court of the United States reversed holding that section 2, Eleventh of the Railway Labor Act (RLA),[51] which provides that notwithstanding the law of "any state" a carrier and a labor union may enter into a union shop agreement, was a valid exercise by Congress of its power to regulate commerce.

Mr. Justice Douglas, speaking for the majority in *Hanson*, stated:

> The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into shop agreements. The Supreme Court of Nebraska nevertheless took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States. . . . [*Cf.* Otten v. Baltimore & O.R.R., 205 F.2d 58 (2d Cir. 1953); Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955).] The Supreme Court of Nebraska said, "Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are

48. 351 U.S. 225 (1956), 42 A.B.A.J. 659 (1956), 19 GA. B.J. 550 (1957), 42 IOWA L. REV. 113 (1956), 6 J. PUB. L. 263 (1957), 11 SW. L.J. 88 (1957), 30 TEMP. L.Q. 212 (1957); see Note, 15 VAND. L. REV. 1293 (1962).

49. NEB. CONST. art. xv, § 13:

> No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.

50. Hanson v. Union Pac. R.R., 160 Neb. 669, 71 N.W.2d 526 (1955).

51. 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

concerned for without it such contracts could not be enforced therein." 160 Neb., at 698, 71 N.W.2d, at 547. We agree with that view. *If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . Cf.* Smith v. Allwright, 321 U.S. 649, 663 (1944).] In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . [*Cf.* Steele v. Louisville & N.R.R., 323 U.S. 192, 198–99, 204 (1944).] *The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.*

As already noted, the 1951 amendment, permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." § 2, Eleventh. A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State. . . .[52]

On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. *But that problem is not presented by this record.* Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, and assessments." *If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.* For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. *We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement.*[53]

Mr. Justice Douglas, therefore, explicitly found that governmental action existed in *Hanson*. But the Court also refused to pass on the first and fifth amendment claims of the plaintiffs. The narrow holding was that Congress could justifiably find that it promoted industrial peace to require all who benefited from a union's collective bargaining efforts to pay for those efforts.[54]

52. 351 U.S. at 231-32. (Emphasis added.)

53. *Id.* at 238. (Emphasis added.)

54. Prior to the decision in *Hanson* it was held that the 1951 amendments to the RLA did not impair the constitutional rights of railroad workers, since they did not authorize union shop contracts, but merely withdrew a prior prohibition. Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir. 1956); Cunningham v. Erie R.R., 30 CCH Lab. Cas. 91687 (S.D.N.Y. 1956); Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955); International

A careful analysis of the reasons given by the Supreme Court for a finding of governmental action in *Hanson* is absolutely necessary to our discussion; it is also important to examine other unmentioned factors that might have influenced the Court in its finding of governmental action.[55] Mr. Justice Douglas makes it very clear that federal law did more than just tolerate the union shop contract between the Union Pacific Railroad and the various railroad unions in *Hanson*. Absent section 2, Eleventh of the Railway Labor Act, the Nebraska Constitution would have prohibited the union shop in Nebraska. Federal law ousted inconsistent state law. Therefore the federal law, while permissive toward union and management in letting them make up their own minds whether they want a union shop, is mandatory on the States once the parties have decided they want this particular union security device.

Professor Wellington suggests that the Court's stated reasons for a finding of governmental action in *Hanson* could lead to incongruous results.

> In any given case the Court would have to look to state law to decide whether there was sufficient federal involvement to hold the private agreement to first and fifth amendment standards. Where state law allowed the union shop, the parties could have achieved their purposes without the federal enactment. Where this is the case the federal statute in fact does no more than declare that the federal government will "tolerate" the union shop on the railroads. And governmental toleration will not sustain a finding of governmental action.[56]

Therefore under a strict reading of *Hanson*, if there is only gov-

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Ass'n of Machinists v. Sandsberry, 277 S.W.2d 776 (Tex. Ct. Civ. App. 1954); Moore v. Chesapeake & O. Ry., 26 CCH Lab. Cas. 87140 (City of Richmond, Va. Hustings Ct. 1954).

After the *Hanson* case, the North Carolina Supreme Court, despite the reservation of the constitutional issue in *Hanson*, found that the union shop did not violate any minority worker's constitutional rights. Allen v. Southern Ry., 249 N.C. 491, 107 S.E.2d 125 (1959). Several other courts have also held that section 2, Eleventh preempts the field. Sams v. Brotherhood of Ry. & S.S. Clerks, 233 F.2d 263 (4th Cir. 1956); Hudson v. Atlantic Coast Line R.R., *supra*; Jarrett v. Southern Ry., 35 CCH Lab. Cas. 97623 (Oconee County, S.C. Ct. Comm. Pleas 1958); Sandsberry v. International Ass'n of Machinists, 156 Tex. 340, 295 S.W.2d 412 (1956); Moore v. Chesapeake & O. Ry., *supra*. The union shop amendments also take precedence over state constitutions. Matter of Florida E. Coast Ry., 24 CCH Lab. Cas. 84373 (S.D. Fla. 1953).

55. Wellington, *The Constitution* 355–60, gives a detailed and painstaking analysis of the finding of governmental action in *Hanson*. He examines not only the Court's stated reasons, but also proposes other theories that would support a finding of governmental action. This textual discussion follows very closely Wellington's arguments with a few excursions of my own.

56. *Id.* at 355. Wellington points out that Judge Learned Hand reached a

ernmental action when an inconsistent state law is displaced, the Constitution would apply in Nebraska; but in New York, in an identical case, the Constitution would not apply because New York law allows the union shop. Such a reading of *Hanson*, entirely justified by the Court's language, reaches obviously unhappy results.

A major policy behind having preemption rules in labor relations matters is to achieve uniform rules throughout the nation; a strict reading of *Hanson* would conflict with this policy.[57] Thus could *Hanson* have meant something else? Maybe state law, as such, "is irrelevant in determining whether there has been governmental action."[58] When Congress passed section 2, Eleventh, state law became a matter of indifference; whether states now have right-to-work laws or enact such laws in the future will make absolutely no difference to railroads and railway unions that want a union shop. One criticism of this interpretation is that when a state law is consistent with the federal act, "the impact of the federal statute is, in fact, zero. Only after a conceptual somersault can the federal enactment be said to give rise to governmental action."[59]

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conclusion very like this in Otten v. Baltimore & O.R.R., 205 F.2d 58 (2d Cir. 1953), *aff'd per curiam sub nom.* Otten v. Staten Island Rapid Transit Ry., 229 F.2d 919 (2d Cir.), *cert. denied*, 351 U.S. 983 (1956); *accord*, Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956). The *Otten* case was an RLA case involving an employee whose religious beliefs would not allow him to join a union. Wellington states: "the case is similar to *Hanson*, but it arose in New York where state law tolerates the union shop. Therefore the Constitution had no application." Wellington, *The Constitution* 356.

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*

There is, moreover, an additional difficulty with the governmental-action-arising-from-pre-emption interpretation of *Hanson* — that governmental action automatically results when a congressional enactment nullifies, or even confirms existing state law. It gives to federal governmental action under the fifth amendment a meaning quite different from the one the Court has given to state action under the fourteenth. It means that unlike the states, the federal government in many situations may not explicitly adopt a "hands-off" policy. It means that all private action taken under the authority of federal legislation that occupies a field by that token alone becomes governmental action. Therefore, the federal government must affirmatively outlaw private behavior that conflicts with the standards applicable to it under the fifth amendment. It is surely not self-evident that such a difference between federal and state governmental action — a difference which may or may not be desirable — is a by-product of the supremacy clause and the doctrine of pre-emption. Those instruments of policy were

It seems to the author, however, that this "pre-emption interpretation" of the finding of governmental action in *Hanson* is essentially sound. It is then immaterial whether state law is consistent or inconsistent with federal law. Section 2, Eleventh requires nationwide permissive allowance of union shop contracts in the railroad industry regardless of the views of any particular state.

Another theory might support the Supreme Court's finding of governmental action in *Hanson*. Immediately after Mr. Justice Douglas's statement that he agreed with the Nebraska Supreme Court's finding of governmental action, he cited *Smith v. Allwright*.[60] This is a "white primary" case and by its citation perhaps the Court meant to infer that there is an analogy between *Hanson* and the rationale that supported a finding of governmental action in the white primary cases. In those cases the Court seemed to hold that once a government has participated in an activity, it is easy to find state action when a State attempts to remove itself from that activity. However, Wellington insists that the reasons the Government removed itself in *Hanson* and the reasons the State removed itself in *Smith v. Allwright* were different. "The difference . . . is 'disengagement' for the purpose of saving a state-instituted scheme of discrimination as contrasted with 'disengagement' for a constitutionally inoffensive purpose."[61]

The issue, however, is whether the Railway Labor Act's allowance of the union shop amounts to "disengagement" such as constitutes governmental action. If the requisite governmental action exists, then the union activities under the union shop should be judged by the Constitution and the government's motive for disengagement is irrelevant.

The fourth and last major theory that would support the finding of governmental action in *Hanson* is the one that would most expand the concept, and it is the one that would most easily support a finding that the Taft-Hartley Act's permissive allowance of the union shop is governmental action. This theory points out that the Railway Labor Act is but one segment of a comprehensive regulatory scheme. The railway unions have been given immense control over the economic well-being of the bulk of the

fashioned to cope with problems unrelated to the question of when constitutional restraints apply to the actions of private groups. One must conclude that if the Court had meant to use the supremacy clause and pre-emption to extend the concept of governmental action in this novel way it should have given explicit consideration to the problems involved.

60. 321 U.S. 649 (1944).

61. Wellington, *The Constitution* 358.

employees in the railroad industry by federal legislation. This suggests a delegation to the union of governmental power that may not be unlike the situation of the company town in *Marsh v. Alabama*.[62]

To recapitulate, four theories have been discussed that could support the finding of governmental action in *Hanson*: 1) the strict reading that there is governmental action only because federal law displaced inconsistent state law; 2) the reading that whether state law is consistent or inconsistent with section 2, Eleventh, is a matter of indifference because federal law has preempted the field; 3) the *Smith v. Allwright* reading that once a government has been actively engaged in any activity, disengagement is state action; and 4) the interpretation that because of the extent of federal legislation in the area, the unions have been delegated the requisite degree of governmental power to bring the Constitution into play. "What emerges then, is that only a slight doctrinal extension from existing case law is needed to bring the Constitution to bear on many kinds of activities now considered private. Clearly, it is all that is needed doctrinally to bring the Constitution to bear on union conduct."[63]

It was natural after *Hanson* for a case to arise that *did* present a record of impairment of first amendment rights. The stage was set for *Street*.

B. *International Ass'n of Machinists v. Street*[64]

A group of labor organizations and the carriers comprising the Southern Railway System entered into a union shop agreement pursuant to the authority of section 2, Eleventh of the Railway Labor Act. The appellees brought this action on behalf of themselves and employees similarly situated alleging that each was compelled to pay money to hold his job which "was in substantial part used to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and

62. 326 U.S. 501 (1946); see Wellington, *The Constitution* 360.

63. *Ibid.* Two courts that interpreted the RLA following *Hanson* were uncertain about the reservation of the constitutional issue in *Hanson*. Hostetler v. Railroad Trainmen, 287 F.2d 457, 459–60 (4th Cir. 1961); Allen v. Southern Ry., 249 N.C. 491, 107 S.E.2d 125 (1959).

64. 367 U.S. 740 (1961). The appellate history of *Street* is as follows: *Rev'd dismissal of petition sub nom.* Looper v. Georgia So. & Fla. Ry., 213 Ga. 279, 99 S.E.2d 101 (1957); International Ass'n of Machinists v. Street, 215 Ga. 27, 108 S.E.2d 796 (1959), *probable jurisdiction noted*, 361 U.S. 807 (1959), *case set down for reargument because Attorney General of the United States not notified that constitutionality of a federal statute was in issue*, 363 U.S. 825, *decided*, 367 U.S. 740 (1961).

ideologies with which he disagreed."[65] The Superior Court of Bibb County, Georgia, entered a judgment and decree enjoining enforcement of the union shop on the ground that section 2, Eleventh violated the first, fifth, ninth, and tenth amendments. The Supreme Court of Georgia affirmed holding that section 2, Eleventh violated the first and fifth amendments of the federal constitution. The United States Supreme Court reversed and remanded.

The Supreme Court in the *Street* case split asunder on the constitutional issues and on the statutory construction of section 2, Eleventh. Five different opinions were written. Each opinion will be examined in detail.

Mr. Justice Brennan wrote the opinion of the Court. He frankly admitted that "the record in this case is adequate squarely to present the constitutional questions reserved in *Hanson*. These are questions of the utmost gravity."[66] Nevertheless, he declined to reach the constitutional issues: "[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[67]

The Court held that section 2, Eleventh could be construed reasonably otherwise than to say that Congress meant to authorize a union to collect dues and use the dues, over an employee's objection, to support causes to which the employee was opposed. After an extensive examination of the history of rail unions and

65. 367 U.S. at 744.

66. *Id.* at 749.

67. *Ibid.* [Quoting from Crowell v. Benson, 285 U.S. 22, 62 (1932).] The best statement of the rule that constitutional issues are to be avoided by statutory construction when possible is found in United Staes *ex rel.* Attorney Gen. of United States v. Delaware & Hudson Co., 213 U.S. 366, 407–08 (1909):

> It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. [Knights Templar's Indem. Co. v. Jarmon, 187 U.S. 197, 205 (1902)]. . . . And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. [Harriman v. Interstate Commerce Comm'n, 211 U.S. 407 (1908)]. . . .

See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 487 (Wolfson & Kurland ed. 1951).

their problems with union security clauses, Mr. Justice Brennan declared that section 2, Eleventh was passed by Congress to force all employees to share equally in the costs of negotiating agreements and settling disputes. He stated that one looked in vain for any suggestions that Congress also meant to allow unions to force employees to support political causes which they oppose.[68] The Court took pains to point out Congress's concern with the safeguarding of the right to dissent of the individual worker; the Act was passed for the limited purpose "of eliminating the problems created by the 'free rider.' "[69] The Court therefore concluded that it should give to section 2, Eleventh a construction which achieved both congressional purposes; unions should still be able to eliminate the "free rider," but they should not be able to use an employee's dues to support political causes which he opposes.[70]

After disposing of the interpretation problem, the Court was faced with the difficult problem of forging a workable remedy that would protect dissenters while not destroying the utility of the union shop. The Court decided that a remedy would be given only to those who had identified themselves as opposed to political use of their funds, and even these dissenters were to get only the amount of their dues that were used for political purposes refunded to them.[71] *U.S. Law Week* reported that while the case was being argued "most of the Justices seemed more concerned about the nature of the decree than about the constitutional issue. . . ."[72] Despite the Court's concern over devising a suitable decree, the remedy finally formulated has invoked a storm of criticism.[73]

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68. 367 U.S. at 763-64.

69. *Id.* at 767.

70. *Id.* at 768-69.

71. On remand, the Georgia Supreme Court directed the trial court to formulate a "fair, practicable, and convenient" method of computing the amount of dues money expended by the unions for political purposes. However, if the trial court should be unable to formulate such a remedy, it was directed to enjoin the unions from all political expenditures. The trial court was also directed to cause notice to be posted that any employee who so desires would be given the opportunity to intervene as a party plaintiff. The unions moved for rehearing on the grounds that they were willing to allow the plaintiffs to leave their union and recover their past dues, and that they would not seek to have plaintiffs dismissed from their jobs. International Ass'n of Machinists v. Street, 217 Ga. 351, 353, 122 S.E.2d 220, 222 (1961).

72. 28 U.S.L. WEEK 3313 (1960).

73. See Note, 61 COLUM. L. REV. 1513, 1518 (1961). "[The remedy in *Hanson*] . . . will probably be of little practical significance, for the financial burden of litigation is thereby imposed on individual dissenters who, even if successful, will secure monetary recoveries so small as to be almost *de minimis*." Further, the lower courts will be faced with the vexing problem of

The second opinion in *Street* was that of Mr. Justice Douglas, concurring. He stated categorically that since neither Congress nor a state legislature could abridge first amendment rights, they cannot grant the power to private groups to abridge them.[74] It will be recalled that Mr. Justice Douglas wrote the majority opinion in *Hanson* which found the existence of governmental action and still upheld the Railway Labor Act. However, he points out that the constitutional issue was expressly reserved in *Hanson* and that the narrow and precise holding of *Hanson* was only "that it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost."[75] Douglas concurred in the statutory interpretation of section 2, Eleventh and in limiting relief to the six petitioners. He stated that he recognized the strength of the arguments against proportioned relief but concurred with the Court for the sake of a majority.

Mr. Justice Whittaker concurred in everything the Court said about the statutory construction of the Railway Labor Act but dissented against the proportional relief granted. He believed the only practical remedy was the one formulated by the Georgia courts.

Mr. Justice Black dissented and strongly criticized the Court's avoidance of the constitutional question.

> I think the Court is once more "carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme." . . . [H]istory

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defining "political" disbursements—a task so complex that the Taft-Hartley ban on political expenditures has never resulted in a conviction. United States v. UAW, 352 U.S. 567 (1957), *jury acquittal on remand*, 41 L.R.R.M. 52 (1957); United States v. CIO, 335 U.S. 106 (1948); United States v. Painters Local 481, 172 F.2d 854 (2d Cir. 1949) (dismissal); United States v. Anchorage Cent. Labor Council, 193 F. Supp. 504 (D. Alaska 1961) (same); United States v. Construction Local 264, 101 F. Supp. 869 (W.D. Mo. 1951) (same). See generally Rauh, *Legality of Union Political Expenditures*, 34 So. CAL. L. REV. 152 (1961); Woll, *Unions in Politics: A Study in Law and the Workers' Needs*, 34 So. CAL. L. REV. 130 (1961).

> Moreover, it is not clear whether the suggested remedy places the burden of proof on the dissenting member or the unions. Even with the accounting requirements of the Landrum-Griffin Act it will be extremely difficult to trace the flow of dues through the local, state, and national union and to prove that the political expenditures were made from dues funds rather than voluntary contributions or income earned by union property.

Note, 61 COLUM. L. REV. 1513, 1518 (1961). In addition "it is clear that the expense of securing restitution will exceed the value of that remedy, so that even if it is not circumvented, the remedy will be unsatisfactory to the protestant." *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 238 (1961).

74. 367 U.S. at 777.

75. *Id.* at 776.

> shows that Congress with its eyes wide open passed that section, knowing that its broad language would permit the use of union dues to advocate causes, doctrines, laws, candidates and parties, whether individual members objected or not. Under such circumstances I think Congress has a right to a determination of the constitutionality of the statute it passed, rather than to have the Court rewrite the statute in the name of avoiding decision of constitutional questions. . . .[76]
> [N]o one has suggested that the Court's statutory construction of § 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality.[77]

After Mr. Justice Black reached the constitutional issue, he found section 2, Eleventh to be unconstitutional.

> There can be no doubt that the federally sanctioned union-shop contract here, *as it actually works*, takes a part of the earnings of some men and turns it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law. This injects federal compulsion into the political and ideological processes, a result which I have supposed everyone would agree the First Amendment was particularly intended to prevent.[78]

Mr. Justice Frankfurter also dissented in an opinion joined by Mr. Justice Harlan. First Justice Frankfurter lashed the majority's avoidance of the constitutional question.[79] It is interesting to note that both the two oldest justices, Black and Frankfurter, would have reached the constitutional issue. However, having reached the constitutional issue, Frankfurter's opinion was diametrically opposed to Black's.

Mr. Justice Frankfurter felt that the constitutional issue raised in *Street* was for all practical purposes decided in favor of the

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76. *Id.* at 784–85.

77. *Id.* at 786.

78. *Id.* at 789. (Emphasis added.)

79.

> And so the question before us is whether § 2, Eleventh of the Railway Labor Act can untorturingly be read to bar activities of railway unions, which have bargained in accordance with federal law for a union shop, whereby they are forbidden to spend union dues for purposes that have uniformly and extensively been so long pursued as to have become commonplace, settled, conventional trade-union practices. No consideration relevant to construction sustains such a restrictive reading.

Id. at 800.

> The aim of the 1951 legislation, clearly stated in the congressional reports, was to eliminate "free riders" in the industry — to make possible "the sharing of the burden of maintenance by all of the beneficiaries of union activity." To suggest that this language covertly meant to encompass any less than the maintenance of those activities normally engaged in by unions is to withdraw life from law and to say that Congress dealt with artificialities and not with railway unions as they were and as they functioned.

Id. at 801.

validity of section 2, Eleventh in the *Hanson* decision.[80] After examining the claims of the petitioners and weighing them against the congressional policy evidenced by section 2, Eleventh, Frankfurter concluded that "this is too fine-spun a claim for constitutional recognition."[81]

Interestingly enough, after Justices Frankfurter and Harlan had already rejected the constitutional claims of the plaintiffs, they then raised the problem of governmental action. These two justices were the only members of the Court even to suggest that there was no governmental action because of the "permissiveness" of section 2, Eleventh. Therefore, it is necessary to quote at some length from their arguments:

> But were we to assume, *arguendo,* that the plaintiffs have alleged a valid constitutional objection if Congress had specifically ordered the result, we must consider the difference between such compulsion and the absence of compulsion when Congress acts as platonically as it did, in a wholly non-coercive way. Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. Congress has only given leave to a bargaining representative, democratically elected by a majority of workers, to enter into a particular contractual provision arrived at under the give-and-take of duly safeguarded bargaining procedures. . . . Congress itself emphasized this vital distinction between authorization and compulsion. S. Rep. No. 2262, 81st Cong., 2d Sess. 2. And this Court in *Hanson* noted that "The union shop provision of the Railway Labor Act is only permissive. Congress has not . . . required carriers and employees to enter union shop agreements." 351 U.S., at 231. When we speak of the Government "acting" in permitting the union shop, the scope and force of what Congress has done must be heeded. There is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions. On the contrary, Congress expanded their freedom of action. Congress lifted limitations upon free actions by parties bargaining at arm's length.[82]

Finally Mr. Justice Frankfurter warns: "This Court would stray beyond its powers were it to erect a far-fetched claim, derived from some ultimate relation between an obviously valid

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> The record before the Court in *Hanson* clearly indicated that dues would be used to further what are normally described as political and legislative ends. And it surely can be said that the Court was not ignorant of a fact that everyone else knew. Union constitutions were in evidence which authorized the use of union funds for political magazines, for support of lobbying groups, and for urging union members to vote for union-approved candidates. . . . One would suppose that *Hanson*'s reasoning disposed of the present suit.

Id. at 804–05.

81. *Id.* at 806.

82. *Id.* at 806–07.

aim of legislation and an abstract conception of freedom, into a constitutional right."[83]

Because of the proliferation of opinions, it would be wise to try to summarize the positions of all nine justices on the major issues involved. Five justices agreed that section 2, Eleventh did not authorize the expenditure of union dues for political purposes (the Brennan four and Mr. Justice Whittaker). Five agreed on the issue of proportional relief (the Brennan four and Mr. Justice Douglas, *dubitante*). Seven justices thought some relief should be granted and said that their opinions cast grave doubt on the constitutionality of a statute which would authorize expenditures of a dissenting employee's dues for political purposes (the Brennan four, and Justices Black, Douglas, and Whittaker). Only two justices expressed the view that the statute would be constitutional (Frankfurter and Harlan). And only two justices verbally cast doubt on whether the permissive character of the statute created the necessary governmental action to bring the Constitution to bear on the union shop situation (Frankfurter and Harlan).[84]

The *Street* case has received wide attention; its importance has been argued[85] and its conclusions have been discussed and attacked from all sides.[86] The restrictive interpretation of the Railway Labor Act to avoid constitutional problems has especially been the source of a torrent of criticism.[87] If the Court had construed section 2, Eleventh of the Railway Labor Act as permitting the union to compel membership and the payment of

83. *Id.* at 812.

84. A similar breakdown is made in Note, 24 GA. B.J. 432 (1962).

85. The N.Y. Times, June 22, 1961, p. 30, col. 4, stated that "few durable conclusions can be drawn from the decision," and the majority opinion was characterized as a "free-wheeling interpretation of the Railway Labor Act." One author went so far as to suggest that "stripped of all its disguises, the *Street* case . . . emerges as simply another attack on the validity of the union shop; and the issues it raises are neither novel nor particularly significant." Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 63 (1961).

86. The *Street* case has been extensively noted by legal periodicals. See, *e.g.*, 48 A.B.A.J. 81 (1962); 28 BROOKLYN L. REV. 170 (1961); 61 COLUM. L. REV. 1513 (1961); 24 GA. B.J. 432 (1962); 75 HARV. L. REV. 233 (1961); 13 MERCER L. REV. 439 (1962); 56 NW. U.L. REV. 777 (1962); 36 ST. JOHN'S L. REV. 164 (1962); 1961 SUP. CT. REV. 49; 1961 U. ILL. L.F. 526; 64 W. VA. L. REV. 220 (1962).

87. The following is but a sampling of the reaction of commentators to the avoidance of the constitutional problem. "[I]t is almost certain that . . . Congress in 1951 was fully conversant with the political activities of the rail unions that were exerting pressure on it to legalize the union shop." *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 235 (1961).

dues with no restriction as to the expenditure of such dues (thus allowing the union to expend funds for political purposes) — the most obvious construction — serious constitutional issues would have had to be met. The threshold question that would have faced the Court was whether or not the execution and enforcement of a union shop agreement involved governmental action.

C. Analysis and Comparison of *Hanson* and *Street*

On the surface the fact situations, with the exception of the more explicit pleading of the constitutional issues in *Street*, were substantially the same in *Hanson* and *Street*. It would seem an easy matter to find governmental action in *Street* in the same manner it was found in Hanson. Both States had right-to-work laws — but the important difference was that the Nebraska right-to-work law in *Hanson* did cover the railroad industry and the Georgia right-to-work law in *Street* did not cover the railroad industry. As far as this writer has been able to ascertain this extremely important factual difference has been overlooked by every commentator but one, and he mentions it in a footnote.[88]

The Georgia "right-to-work" law provides in the definitional section that

> (a) the term "employer" includes any person acting in the interest of an employer, directly or indirectly, but *shall not include* the United States, or any State, or any political subdivision thereof, or *any person subject to the Railway Labor Act, as amended from time to time . . . .*[89]

If this provision means that the railroad industry in Georgia was not subjected to the right-to-work law of Georgia, as this writer believes it does, then there was no State law or State created right that section 2, Eleventh could have displaced.[90] Therefore in *Street*, if the Court had reached the constitutional issues, the first question it would have had to decide would have been

> [I]t seems that anyone with knowledge of prevailing practices of unions at the time the statute was enacted . . . would be compelled to conclude that Congress must have known that unless specifically prohibited from doing so, the unions would spend a substantial part of the collected dues for political purposes.

Note, 24 Ga. B.J. 432, 436-37 (1962). "The question of the use of funds for political purposes received almost no attention when Congress in 1951 reversed itself and permitted the union shop on the railroads." Wellington, *Machinists v. Street* 59. 61 Colum. L. Rev. 1513 (1961), contains an excellent summary of what *Street* held with an analysis of the opinions of the justices; the author states, "the majority of the Court embraced a strained statutory construction to avoid a constitutional question that should have been decided." *Id.* at 1517.

88. *The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40, 236 n.939 (1961).

89. Ga. Code Ann. § 54-901(a) (1961). (Emphasis added.)

90. Resolution of this issue would have been complicated by the fact that

whether governmental action was involved in the execution or enforcement of a union shop contract *in a state with no applicable right-to-work law*. This issue was certainly not resolved by *Hanson*. Despite the fact that the *Hanson* case is certainly distinguishable on the governmental action point, interestingly the majority opinion of the Court in *Street* seemed to have assumed that governmental action was present in *Street*.[91] The Court was straining to avoid the constitutional issues — a tortured construction of section 2, Eleventh was accepted for the very reason that the constitutionality of the statute was seriously in doubt. If it is not to be assumed that the Court felt that the requisite governmental action was present, it is difficult — if not impossible — to explain why the Court did not hold that there was no governmental action present. Such a holding would have solved the majority's problems because no further constitutional issues would need to have been reached. If this writer's above reasoning is correct, then Wellington's contention "that if we had a 'hands-off' state policy and a permissive federal statute combined in one case, no substantive constitutional question would be presented, for no governmental action — state or federal — could be shown"[92] is erroneous. It is this writer's considered opinion that the Georgia right-to-work law's express exemption of industries covered by the Railway Labor Act from its provisions squarely presents the case mooted by Wellington. *There was a state "hands-off" policy and a permissive federal statute and yet it can be safely assumed that seven members of the Supreme Court felt that the requisite governmental action was present to invoke the Constitution.*

If we are correct in assuming that most of the justices on the Supreme Court would have found governmental action if they had reached the constitutional issue, it becomes necessary again to suggest theories that support the existence of governmental action. The strict reading of *Hanson* that governmental action exists only if inconsistent state law is displaced could not be utilized. But the more liberal interpretation of *Hanson* — that once it was clear the federal act preempted the field, then the laws of the various states become a matter of indifference — would certainly explain a finding of governmental action in *Street*.

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the trial court had found union shops to be contrary to the Constitution, law, and public policy of Georgia in spite of the express exemption of the railroad industry from the Georgia right-to-work law. Looper v. Georgia So. & Fla. Ry., 36 CCH Lab. Cas. 65463, 65466–68 (Ga. Super. Ct. 1958).

91. See 367 U.S. at 749–50; *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 236 n.939 (1961), for the same opinion.

92. Wellington, *The Constitution* 354.

The last two theories discussed above in connection with *Hanson* could also be applied to the *Street* situation. The analogy to *Smith v. Allwright*,[93] the white primary case in which the Court seemed to hold that "disengagement" after a state had been actively involved in an area could amount to state action, would also apply just as easily to *Street*. Finally, the last idea — that the unions have been given such a great amount of control over railway employees by federal legislation that in essence there is a delegation of government power — could also be utilized in *Street*. In connection with this last theory, it is interesting to note various reasons urged by counsel for the dissenting union members in *Street* to support a finding of governmental action:[94]

> 1) [governmental action] . . . arises from the unions' statutory authorization, comparable to "legislative" power, to bind unwilling minorities to a collective contract . . . ;[95] 2) it results from an electoral process absolutely and unreviewably controlled by a federal agency . . . ;[96] 3) [the union shop] . . . effectuates a governmental policy . . . ;[97] 4) [governmental action] . . . results from government-imposed duties and powers of the union to bargain with the employer; 5) the government itself intervened, through the National Mediation Board and a presidential Emergency Board, to encourage if not compel the signing of the union shop contract; and 6) the contract depends on federal tribunals for its enforcement. . . .[98]

Consequently, it is evident that many reasons could be urged on the Court to support a finding of governmental action if the Supreme Court is ever forced to face the constitutional issues in a sufficiently analogous case.

D. Sequel to *Street*

The United States Supreme Court has recently taken one more crack at the issue presented by *Hanson* and *Street* under the Railway Labor Act. In the case of *Brotherhood of Ry. & S.S. Clerks v. Allen*,[99] the Court, while not disturbing the substantial holding in *Street*, did attempt to clarify the remedies available to dissent-

93. 321 U.S. 649 (1944).

94. See a summary of Brief for Appellees, International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), in 6 L. Ed. 2d 1554 (1962). (Footnotes added.)

95. Citing American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

96. Citing Smith v. Allwright, 321 U.S. 649 (1944), and Switchman's Union v. National Mediation Bd., 320 U.S. 297 (1943).

97. Citing Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

98. Citing Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957); Barrows v. Jackson, 346 U.S. 249 (1953); Slocum v. Delaware, L. & W.R.R., 339 U.S. 239 (1950); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946).

99. 373 U.S. 113 (1963).

ing union members.[100] The holding in *Street*, that section 2, Eleventh denies a union the power over an employee's objection to use his exacted funds to support political activities to which he is opposed, was expressly reaffirmed. Mr. Justice Brennan, writing for the majority of the Court, agreed with the trial court that it would be impractical to require the plaintiffs to list and prove each distinct union expenditure to which he objects; he stated that it was enough that a plaintiff object to expenditures for any political purposes. The Supreme Court, however, did not follow the trial court on the formulation of the remedy available to the dissenting employees. The remedy of injunction was held to be improper because it was too broad and might interfere with performance by unions of those functions and duties which the Railway Labor Act places upon them to obtain the goal of stability in the industry. The Court then discussed possible remedies. It suggested an injunction against expenditures for the political purposes opposed by each dissenter — such expenditures being an amount equal to so much of the moneys exacted from the employees as is the proportion of the union's total budget spent for political purposes — and restitution of such sums already exacted from the employees and expended by the union over their objection.[101] Mr. Justice Black concurred on the basis of his opinion in *Street*. Mr. Justice Harlan concurred in part and dissented in part; he wanted dismissal of the action in its entirety on the basis of *Lathrop v. Donohue*[102] because of a lack

100. Briefly the *Allen* case involved a suit by

> a group of nonunion railroad employees . . . in . . . North Carolina . . . to enjoin enforcement of a union-shop agreement entered into between a railroad and several unions under § 2, Eleventh, of the Railway Labor Act . . . . The complaint alleged that sums exacted under the agreement "have been and are and will be regularly and continually used" to finance political activities "directly at cross-purposes with the free will and choice of the plaintiffs." A jury made separate findings that moneys . . . were used . . . [to support] purposes not . . . necessary . . . to collective bargaining, including political activities. The trial court enjoined the unions

from compelling the plaintiffs to join a union or pay any dues; nevertheless, the trial court further provided that when the union showed what portion of its dues were used for collective bargaining it could charge the plaintiffs that portion of the dues. The North Carolina Supreme Court affirmed the trial court by reason of an equally divided bench. The United States Supreme Court reversed and remanded. *Ibid.*

101. It is still unclear as to what type of expenditures fall into classes from which members may dissent. 48 MINN. L. REV. 635 (1964). See also 49 A.B.A.J. 1011 (1963).

102. 367 U.S. 820 (1961). (Discussed in text accompanying notes 138–47 *infra*.)

of specificity as to what exactly each employee objected to. The *Allen* case does not affect our previous analysis of the *Street* case nor the many sound theories that can be urged as support for a finding of governmental action in the union shop situation.

IV. DOES THE TAFT-HARTLEY ACT'S PERMISSIVE ALLOWANCE OF THE UNION SHOP CONSTITUTE GOVERNMENTAL ACTION?

The Taft-Hartley Act amended section 8(a)(3) of the National Labor Relations Act to read:

> *Provided*, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . .[103]

This section of Taft-Hartley is remarkably similar in language, and seemingly in purpose, to section 2, Eleventh of the Railway Labor Act.[104] The major difference is that the union shops in the railroad industry are permitted "notwithstanding any . . . law . . . of any State."[105] Whereas section 14(b) of the National Labor Relations Act as amended by Taft-Hartley provides that:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.[106]

Therefore the only major difference in the two acts is that under Taft-Hartley states can have a right-to-work law and under the

103. 61 Stat. 140–41 (1947), as amended, 29 U.S.C. §§ 158(a)(3) (1958).

104. Union and carrier may negotiate an agreement:

> requiring as a condition of continued employment, that within sixty days following the beginning of [their] employment . . . all employees shall become members of the labor organization . . . provided, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms . . . as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reasons other than failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Railway Labor Act, § 2, Eleventh, added by 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

105. *Ibid.*

106. Labor Management Relations Act § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

Railway Labor Act they cannot. Despite this difference, it is fair to surmise that Congress in section 2, Eleventh was attempting to do no more than roughly conform the law of union security in the railroad industry to that in industries regulated by Taft-Hartley.[107]

Because of the great similarity in the union security provisions of the Taft-Hartley Act and the Railway Labor Act, it is confidently predicted that it will not be long before a dissenting employee asserts that Taft-Hartley's allowance of the union shop is unconstitutional for the same reasons that the unconstitutionality of the Railway Labor Act was asserted in *Hanson* and *Street*.[108] However, it will be much more difficult for the Court to avoid the constitutional issue in a Taft-Hartley Act case. As it was, the Supreme Court was accused of engaging in a strained interpretation[109] when it decided that Congress did not mean to authorize a union to spend the dues of a dissenting employee for political purposes in *Street*. It will be almost impossible for the Court to similarly interpret the Taft-Hartley Act to avoid constitutional issues. The history of Taft-Hartley indicates little congressional interest in protecting the rights of employees who object to use of their funds for political purposes to which they are opposed.[110] However, history of congressional interest in the rights of dissenting employees was strongly relied on by the Court in *Street* to avoid deciding the constitutionality of railroad union shops.[111] Other crutches used by the Court in *Street* to support its restrictive interpretation of section 2, Eleventh will not be as persuasive when the Taft-Hartley Act case arises.[112]

107. Wellington, *Machinists v. Street* 59–60.

108. See Wellington, *Machinists v. Street* 70; 64 W. VA. L. REV. 220, 223 (1962).

109. International Ass'n of Machinists v. Street, 367 U.S. 740, 784–86 (1961) (Black, J., dissenting), 61 COLUM. L. REV. 1513, 1517.

110. What little discussion there is about the use of employee dues under a union shop arrangement for political purposes is sparse and disorganized. See, *e.g.*, *Hearing on S. 55 Before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. 796–808, 1004, 1425, 1687, 2145 (1947); *Hearings on H.R. 8 Before the House Committee on Education and Labor*, 80th Cong., 1st Sess. 350 (1947).

111. 367 U.S. at 765.

112. See Wellington, *Machinists v. Street* 70:

> It will not be long before a dissenting employee asserts that the Taft-Hartley's union shop is unconstitutional. When that happens it will be difficult indeed for the Court to read Taft-Hartley in the way in which it has read the Railway Labor Act. As we have seen, it cannot be said that in 1947 Congress was cutting back on a freedom it had earlier granted dissenting employees. Nor can it be asserted that unions regulated by Taft-Hartley had traditionally been uninterested in union se-

Consequently, when a dissenting employee raises the constitutionality of the union shop under the Taft-Hartley Act, the Court will in all likelihood be faced inescapably with deciding the constitutional questions involved. And, of course, the first question that will present itself is whether the union shop allowed by Taft-Hartley is infected with governmental action which will support the application of the first and fifth amendments of the Constitution.

The union shop allowed by the Taft-Hartley Act is permissive only, and it expressly does not preempt state right-to-work laws. Therefore, can it be contended that section 8(a)(3) of Taft-Hartley infects the union shop with governmental action? Woll contends that whenever the Supreme Court has held or suggested that certain actions of private groups are subject to constitutional limitations, there has been present one of three crucial elements:[113] 1) the private body was exercising a basic state function — usually with affirmative cooperation of the state;[114] 2) the private body was invoking affirmative state action by seeking judicial enforcement or recognition of a private contract;[115] 3) "the private body had derived its power to act in a particular capacity or engage in a specific activity, usually monopolistic or exclusive, by virtue of a statute, and was regulated in the exercise of this power by governmental authority."[116] Woll places the *Hanson* finding of governmental action under number three, above, because the union shop was allowed despite state law to the contrary. This writer believes it is possible to find all

curity. These propositions were made by the *Street* majority about congressional performance in 1951, and about unions regulated by the Railway Labor Act. They were advanced by that majority as weighty reasons for its reading of section 2, Eleventh. They are not available as bases for reaching a like conclusion in a Taft-Hartley case. The constitutional questions left unresolved by *Street* will yet have to be resolved by the Court.

113. Woll, *supra* note 73, at 138. This article contains an excellent discussion of whether the union's expenditure of funds for political purposes is private or governmental action.

114. Citing two primary election cases, Terry v. Adams, 345 U.S. 461 (1953), and Smith v. Allwright, 321 U.S. 649 (1944), and the company-town case, Marsh v. Alabama, 326 U.S. 501 (1946).

115. Citing Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). Both of these cases also had elements of number one, discussed in the text immediately above, because private groups were trying to regulate zoning.

116. Woll, *supra* note 73, at 139, cites, as well as *Hanson*, Steele v. Louisville & N. Ry., 323 U.S. 192 (1944), in which the bargaining representative had to represent all members of the unit without discrimination — constitutional problems would have arisen if discriminatory representation were pos-

three of Woll's elements in a Taft-Hartley Act case. It could be contended that because of the power unions derive from federal labor legislation they have in a sense been delegated a basic state function. If a union defended the legality of section 8(a)(3), which most certainly it would do if its activities under a union shop contract were challenged, then federal judicial enforcement might raise *Shelley v. Kraemer* type governmental action. And lastly it could be contended that most certainly a union received its power to act as exclusive bargaining agent by means of federal legislation and that federal legislation regulated this power. An extremely strong argument could be built up for a finding of governmental action just by the vast amount of federal legislation concerning organized labor.[117]

The strongest argument of all, of course, for a finding of governmental action in a Taft-Hartley case is simply because the Supreme Court expressly found that governmental action existed in *Hanson*, and seven members of the Court probably assumed it existed in *Street*. To the dissenting employee who is compelled to join a union, the situation is exactly the same under the Railway Labor Act or under Taft-Hartley. It is a matter of indifference whether the compulsion arises from a permissive federal act that displaces a few right-to-work laws or a permissive federal act that tolerates a few right-to-work laws.[118] It is this writer's opinion that the general trend toward expansion of the concept of governmental action, plus the express finding of governmental action in *Hanson* and the implication of governmental action in *Street*, will result also in a finding of governmental action in a Taft-Hartley Act case.

V. SHOULD THE CONSTITUTION BE APPLIED TO THE UNION SHOP SITUATION?

"Responsibility and power over federal labor policy shifts from Congress to the Court when union conduct is judged by the Constitution."[119] As previously indicated many commentators are deeply concerned over the institutional capabilities of the Supreme Court to handle the problems it would face if the

sible under the statute. He also cites Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), saying "in a non-labor case, governmental action existed because a public transport utility had been specifically permitted by a government commission to operate radio programs on its buses."

117. See statutes listed in Railway Employes' Dep't, AFL v. Hanson, 351 U.S. 225, 238–39 (1956).

118. See Wellington, *The Constitution* 369.

119. *Id.* at 361.

constitutional questions concerning the union shop are solved the way Mr. Justice Black would have solved them in *Street*.[120]

> Reconciling the public interest in the union shop as an instrument of industrial stability and the union's right as a collective bargaining agent to further legislation in which it has a legitimate interest with the union members right not to be compelled to support political views that he opposes is a complex and highly political problem. It necessarily requires investigation and regulation more appropriately conducted by the legislature than by the courts. A holding that political expenditures of union dues is constitutional, which is certainly supportable, would have withdrawn the Court from much of its involvement in this area and might have encouraged Congress to determine whether remedial legislation is warranted.[121]

Wellington contends that the union shop should not be regulated by the Constitution for several reasons.[122] The two reasons that he urges most strongly are: 1) The Court would do a bad job because it is institutionally unfit; and 2) no existing doctrine would compel the Court to test union action by constitutional standards. Needless to say, this writer disagrees with Wellington's second reason — present legal doctrine would point to a decision that the union shop was touched with sufficient governmental action. The core of Wellington's objections are found in his first reason, above.[123] He feels the Court is structurally unqualified to make policy decisions concerning the need for a union shop:

> If the Court, within the analytical framework of union activity as governmental action, is to decide whether this use of funds by the union contravenes the first amendment, it would seem that the Justices must consider several factors: on the one hand are to be weighed the uses and purposes to which the money is to be put, the importance of the objectives in question to the labor organization, and the extent to which they are supported by the majority within the organization, and on the other hand there is to be assessed the impact of the union's action on the dissenting employee. As noted, this means the Court's immersion in the history, structure, and aspirations of the union movement, and of the particular union. In short, it means immersion in collective bargaining, and an understanding of the relationship between economic power and political action.[124]

One frequent objection to the Court's judging the union shop by constitutional standards is that it would force the Court to decide which expenditures are for political purposes and which are not. Of course, the Court's avoidance of the constitutional issue in *Street* by statutory interpretation still requires the Court

120. See, *e.g.*, Wellington, *The Constitution; The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 233 (1961).

121. 61 COLUM. L. REV. 1513, 1518 (1961).

122. Wellington, *Machinists v. Street* 71–72.

123. Wellington, *The Constitution* 363–64.

124. *Id.* at 364.

to decide what portion of the dues were used for "political purposes."[125] Only avoidance of the constitutional issue by failure to find the requisite governmental action, or a square holding in favor of unlimited expenditures of dissenting employee's dues for political purposes will keep the Court from the labyrinth of deciding what purpose is political and what purpose is not.

Wellington calls all those who would have the Court regulate union conduct by the Constitution "bold thinkers,"[126] and predicts that such a holding would be opening a Pandora's box.[127] In spite of Wellington's warning, this writer still feels that it would not be an unwarranted extension of existing doctrine to apply the Constitution to the union shop.[128] Wellington has real fear not only that the Court is institutionally unfit to apply the

125. See 36 ST. JOHN'S L. REV. 164, 168 (1961).

126.

> The easy conclusion, shared by too many "bold thinkers," that "whenever any organization or group performs a function of a sufficiently important public nature, it can be said to be performing a governmental function and thus should have its actions considered against the broad provisions of the Constitution" is wrong. Like most easy conclusions about most hard governmental problems it lacks the institutional feel. Perhaps there are private groups in society to which the constitution should be applied. But one thing is clear: that conclusion should depend on more than an awareness that the group commands great power or performs a function of an important public nature.
>
> With respect to labor unions one should ask: (1) What is the present state of the law? (2) Where will an extension of doctrine lead? (3) Can nonconstitutional law be used to solve the problem? and (4) Can and will Congress solve these problems—and solve them better than the Supreme Court? The answer to these four questions yields one conclusion: union conduct should not now be regulated by the Constitution of the United States.

Wellington, *The Constitution* 374.

127. He contends that the kind of confusion which followed the Court's construction of section 301(a) of the Taft-Hartley Act would follow. Labor Management Relations Act (Taft-Hartley Act) § 301, 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185 (1958). *Compare* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), *with* Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955). See Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957) for an interesting discussion of the problems imposed on the federal judiciary by the *Lincoln Mills* holding that the federal courts were to create a body of substantive federal law to apply to the enforcement of labor management contracts.

128. *Contra*, Wellington, *Machinists v. Street* 72–73:

> [I]t would require an extension of existing doctrine, doctrine contained in the landmark cases of *Shelley v. Kraemer*, *Smith v. Allwright*, and *Terry v. Adams*, to permit such a result. While an extension of this doctrine to cover union action would not be an illogical development of constitutional law, it would . . . be a plainly unwise development.

Constitution to unions, but also that policy making powers reserved by the Constitution for Congress are being usurped.[129] Notwithstanding these impressive arguments from Wellington and others, the Constitution prohibits congressional legislation that infringes on first and fifth amendment rights, and it is logical to say that section 8(a)(3) of Taft-Hartley represents such governmental action — therefore the Supreme Court is faced with the duty of testing union activities under the union shop by constitutional limitations.

VI. WHEN THE CONSTITUTION IS APPLIED TO THE UNION SHOP — WHAT RESULT?

"Who does not see that 'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.' "[130] This statement of James Madison is quoted along with a similar one by Thomas Jefferson[131] in Mr. Justice Black's dissent in *Street*.[132] The first and fifth amendment rights of citizenship are indeed precious. The right of free speech and association contained in the first amendment are as dear to a dissenting worker in a union shop as to any other citizen. And certainly it cannot be claimed that the Supreme Court, both in *Hanson* and in *Street*, has not been painfully aware of the dangers of making political freedom "overly subservient to general group welfare under the guise of sharing the cost burden."[133]

Nevertheless, despite the strong constitutional arguments that can be raised on behalf of the dissenting employee, it must be kept in mind that the majority workers in a union shop have constitutional rights also. Unions have, since their inception, been as interested in politics as they have been in the closed shop or the union shop.[134] Opposition or support of proposed legislation — such as a wages and hours bill or a statute to outlaw the union shop — which directly affects a union's strength "is clearly

129. Wellington, *The Constitution* 366; Wellington, *Machinists v. Street* 61–62.

130. WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901).

131. Thomas Jefferson, in his 1779 Bill for Religious Liberty, declared "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tryannical." 2 BRANT, JAMES MADISON, THE NATIONALIST 354 (1948).

132. 367 U.S. at 790.

133. Note, 36 ST. JOHN'S L. REV. 164, 171 (1961).

134. See Brief for the AFL-CIO as Amicus Curiae, pp. 14–28, International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

'germane' to collective bargaining."[135] Attempts to curb the political activity of unions have generally been noted for their lack of success.[136] Organized labor feels that it too has the right to claim "freedom of speech." In a complex society a single voice is often drowned out in the din of the crowd; only when single voices unite and speak as one have they a chance of being heard. Labor feels that it must speak as an entity or its views will not be respected — and to speak as an entity requires money. The union treasuries of necessity must be looked to for support of important causes in which labor has a vital stake. Therefore, when the Supreme Court faces the constitutional challenge that will be made on the union shop in Taft-Hartley Act industries, it will be faced with weighing and balancing the competing claims of the union as an entity against those of the individual dissenting worker. Perhaps the dues of the minority worker which are spent on causes to which he objects will be held to cause only a "negligible decrease in the net effectiveness of the dissenters' political strength."[137] Then again perhaps the right of the dissenter will be held to outweigh those of the union in the union shop context. Therefore, even when the Supreme Court has concluded that the requisite government action exists to test the union shop by the Constitution, its decision on the merits will, by no means, be an easy one.

The difficulty of deciding the constitutional issue on the merits and the divergency of views that can be expected in the Court itself is illustrated by the decision in *Lathrop v. Donohue*,[138]

135. Brief for the United States, p. 32, International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). Mr. Justice Frankfurter stated:

> When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, it seems rather naive for a court to conclude — as did the trial court — that the union expenditures were "not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents." The notion that economic and political concerns are separable is pre-Victorian.

367 U.S. at 814.

136. See Rauh, *Legality of Union Political Expenditures*, 34 So. CAL. L. REV. 152 (1961). The author contends that LMRA § 304, 61 Stat. 136, 159 (1947), and which is now 18 U.S.C. § 610 (1958) of the Criminal Code, is a dismal failure because labor unions have an historical role to play in all political activity.

137. *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 83, 236 n.939 (1961). Merrill, *The Three L's — Law, Labor, Liberty*, 37 NOTRE DAME LAW. 589, 600 (1962) states that the freedom of expression issue is completely irrelevant to the constitutional validity of compulsory organizational membership.

138. 367 U.S. 820 (1961).

handed down the same day as *Street*.[139] Although the purpose of this Article does not include a determination of the constitutionality of various activities under the union shop or a prediction as to the outcome of such a case in the Supreme Court, the *Lathrop* case is interesting and instructive in relation to the present discussion.

The plaintiff in *Lathrop* sued to recover dues paid to the Wisconsin State Bar. The plaintiff contended that an order of the Wisconsin Supreme Court integrating the state bar was unconstitutional on the ground, among other things, that it violated the fourteenth amendment. The United States Supreme Court could not agree on an opinion, although six members of the Court (Brennan, joined by Warren, Clark and Stewart — and Harlan joined by Frankfurter) did agree that a state may constitutionally condition the right to practice law upon membership in an integrated bar association. There was no state action problem because the order of the Supreme Court of Wisconsin was held to be a statute. In the Court's opinion, if you can call it that, Mr. Justice Brennan held that the membership requirement was limited to compulsory payment of reasonable annual dues and therefore the order did not impinge on protected rights of association. He held the issue of free speech was not ripe because the record did not show what the petitioner was opposed to, nor what percentage of his money was used for that purpose.[140] Mr. Justice Harlan contended that all constitutional issues were ripe for decision and that the integration order was valid. Mr. Justice Whittaker held the Constitution was not violated when a lawyer had to pay a reasonable fee for the privilege of practicing law. Mr. Justice Black, joined by Mr. Justice Douglas, held that the constitutional question should have been decided and that to take the compulsory dues of a lawyer and use them for things to which he was opposed violated the first amendment. Mr. Justice Douglas further contended that the State has no power to compel all lawyers to join a guild.[141] In viewing this indecisive decision,

139. June 19, 1961.

140. A comment in 48 MINN. L. REV. 635 (1964), expresses the opinion that the holding in Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113 (1963), discussed in text *supra*, that it was impractical to require each plaintiff there to prove each distinct minor expenditure to which he objected, overrules Lathrop v. Donohue, 367 U.S. 820 (1961), on this point.

141. Interestingly enough Mr. Justice Douglas wrote the majority opinion in *Hanson* and used the analogy of the integrated bar to uphold the union shop. Now in *Lathrop* he states, "in the *Hanson* case we said, to be sure, that if a lawyer could be required to join an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails." 367 U.S. at 879.

Mr. Justice Black stated, "I do not believe that either the bench, the bar or the litigants will know what has been decided in the case — certainly I do not."[142]

The important thing about *Lathrop v. Donohue*, for our purposes, is the extremely close analogy between it and the *Street* and *Hanson* opinions. In *Street* itself, Mr. Justice Frankfurter comments: "The present case is, as the Court in *Hanson* asserted, indistinguishable from the issues raised by those who find constitutional difficulties with the integrated bar."[143] Mr. Justice Black agreed with Mr. Justice Frankfurter that the constitutional issues in *Lathrop* and *Street* were the same.[144] In both *Street* and *Lathrop* "the complaint is against being compelled to contribute money that will be used to support causes opposed by the contributor; and it is this element of compulsion that is the real common denominator."[145] It is said that the constitutional question in all three cases — *Hanson*, *Street*, and *Lathrop* — is simply whether, in order to practice his livelihood, an individual may be compelled to join and pay money to an organization which financially supports political causes to which he is opposed.[146] *Street* and *Lathrop*, coupled with the earlier decision in *Hanson*, occupy the whole arena of the Court's consideration of the "freedom *from* association."[147]

CONCLUSION

The Supreme Court of the United States in the near future is going to be squarely faced with the question of whether or not the Taft-Hartley Act's permissive allowance of the union shop contract amounts to sufficient governmental action to support a claim alleging that compulsory payment of union dues that are used to support political purposes to which an individual is opposed violates the first and fifth amendments. It is predicted that the Supreme Court *will* find that the necessary governmental nexus exists to apply the Constitution to the union shop in Taft-Hartley industries. Once it is clear that the Constitution can be

142. 367 U.S. at 865.

143. 367 U.S. at 809.

144. *Id.* at 785. 28 U.S.L. WEEK 3313 (1960) asserts that in the oral arguments before the Court in *Street* the justices argued much about the analogy between the union shop and the integrated bar.

145. Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 58–59 (1961).

146. 64 W. VA. L. REV. 220–21 (1962).

147. Comment, *Freedom from Political Association: The Street and Lathrop Decisions*, 56 NW. U.L. REV. 777 (1962). See also 64 W. VA. L. REV. 220 (1962).

used to test section 8(a)(3) of the Taft-Hartley Act, then the continued validity of that statute in operation is greatly in doubt. Cogent arguments can be made by dissenting employees that section 8(a)(3) violates their constitutional rights. Likewise, strong arguments can be raised by the unions as to the rights of the majority to speak as an entity. What the decision will be when made on the constitutional merits is beyond the scope of this article and probably impossible to predict. If the Supreme Court should hold section 8(a)(3) unconstitutional, and this is not such a remote possibility, the reverberations of such a decision would rival those following the school integration cases of 1954 and the apportionment decision of 1962.