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SETTING THE CONDITIONS FOR SELF-RULE: UNIONS, ASSOCIATIONS, OUR FIRST AMENDMENT DISCOURSE AND THE PROBLEM OF *DEBARTOLO*

THOMAS C. KOHLER*

The National Labor Relations Act consists essentially of two contradictory themes: the Wagner Act, concerned with associational rights, protects and maintains unions, while the Taft-Hartley Amendments, concerned with individual rights, serve to constrain union activities. In different ways, both portions of the NLRA are inconsistent with first amendment doctrine.

In this Article, Professor Kohler uses the Supreme Court's recent *DeBartolo* opinion as a vehicle for exposing this inconsistency and questioning our general first amendment discourse. He demonstrates that the Court's delicate reconciliation of the Labor Act with the first amendment is based on a reductionist view of unions as limited purpose organizations, resulting in their virtual dissolution as associations. The author urges an alternative discourse that would recognize the role associations can play as "schools for democracy," and the contributions they make in setting the conditions for genuine self-government.

"Few discoveries are more irritating than those which expose the pedigrees of ideas."¹

INTRODUCTION

Ideas have consequences. That they do and how they do constitute the large themes of this Article. These themes will be developed through the study of a specific issue: the ever problematic relationship between the first amendment² and the law structured by the National Labor Relations Act.³ That a fundamental tension exists between the first amendment and the statute is clear. What have gone unidentified are the causes of that tension. As a result, the Supreme Court's repeated efforts to reconcile the Labor Act to the first amendment have trailed off into unintelligibility. The ensuing opinions are truly *sui generis*.

* Associate Professor of Law, Boston College. An earlier version of this paper was given at a faculty workshop at the University of Texas Law School. I am grateful to the participants for their thoughtful and stimulating questions and comments, as well as for the hospitality they showed me. As always, I owe special thanks to those whom Burke might have called my "little platoon": Jack Getman and Mary Ann Glendon; Joe Flanagan and Fred Lawrence, members, respectively, of the Philosophy and Theology Departments of Boston College; and to Jim Kuhn and John Delancy, both of the Graduate School of Business, Columbia University.

1. Lord Acton, quoted in L. STRAUSS, *NATURAL RIGHT AND HISTORY* 7 (1953).
2. U.S. CONST. amend. I.
3. 29 U.S.C. §§ 151-169 (1982 & Supp. V 1987) [hereinafter the Labor Act].

They not only resist analysis under prevailing first amendment doctrine, but are inconsistent with the central scheme of the statute.⁴

This Article exposes and analyzes the grounds for the statute's incompatibility with the first amendment. In so doing, it develops a comprehensive explanatory framework that rationalizes this badly confused area of law. However, the value of the insights and the explanations that are developed in this Article are not limited to labor law issues. Nor is this Article confined to doctrinal exposition. Many of the reasons for the ambivalence toward unions that first amendment doctrine conveys are identical with our legal and societal ambivalence about associations and intermediate groups of all descriptions. Some grasp of the causes for the reservations and suspicions expressed in first amendment doctrine toward unions goes a long way toward explaining our uncertainties about the importance and place of mediating groups generally. While this Article concentrates on unions, an important part of its inquiry is how to think about the nature of association generally. As its discussion proceeds, this Article criticizes first amendment doctrine, and the thought that informs it, for failing to recognize that community forms the basis for individual self-determination. This Article undoubtedly raises more questions than it answers. To that extent, it commences rather than completes a research agenda. Throughout, one of its basic concerns is whether present first amendment doctrine acts to corrode rather than to enhance the conditions that support self-rule.

The Court's recent and seemingly mundane opinion in *Edward J. DeBartolo Corp. v. NLRB (DeBartolo II)*⁵ furnishes an excellent vehicle for investigating the issues that this Article addresses. *DeBartolo II* hardly seems the stuff of great scholarly moment. A relatively brief opinion, it proceeds at a subconstitutional level and involves the construction of a rather arcane subsection of the Labor Act, which prohibits certain forms of union secondary boycott activities.⁶ Moreover, its

4. Several of these failed efforts will be discussed below. The incongruities between the Act and the Constitution have produced a considerable body of commentary, some of the more thoughtful of which include: Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984); Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HAST. CONST. L.Q. 189 (1984); St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U.L. REV. 883 (1982); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982); Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982).

5. 485 U.S. 568 (1988) [hereinafter *DeBartolo II*]. For citations to the case's tortuous prior history, see *infra* note 23.

6. 29 U.S.C. § 158(b)(4)(ii)(B) (1982) (The text of this provision is set forth *infra* at note 22).

holding stands for a relatively narrow proposition: in framing the language in question, Congress did not intend to outlaw union secondary appeals made to the public by means other than picketing.⁷ *DeBartolo II*, however, is a deceptively simple opinion. Its seeming straightforwardness masks layers of complexities. Analysis of the doctrinal issues raised by the case uncovers these complexities, revealing their intricacy and interrelation. Further analysis shows that the tension between the first amendment and the statute is but one expression of more fundamental problems that pervade the foundations not only of labor law, but first amendment doctrine as well.

The tangle of problems that underlie the discontinuities between the Labor Act and the first amendment can be grouped into two categories. The first set of problems concerns language. The constitutive nature of law recently has been rediscovered, and with it, the insight that law reveals what a society values, aspires to, and thinks of itself.⁸ Like language, art, music or literature, law acts as a "carrier of meanings." As such, it is another way a society has of "telling a story" about itself.⁹ One reason for the confusion that exists between the Labor Act and first amendment doctrine is that we lack a consistent heuristic framework in which to think about them. The Wagner Act portion of the statute¹⁰ is framed in terms that emphasize the value of associations to self-government, and which view them as an important vehicle for defending and enhancing individual status.¹¹ The language of the Wag-

7. *DeBartolo II*, 485 U.S. at 578-88.

8. Perhaps the leading voice in this recovery among American legal academicians has been James Boyd White, although he has not been alone in its restatement. See, e.g., J. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985). See also, e.g., M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 1-9, 112-45 (1987); Getman, *Voices*, 66 TEX. L. REV. 577 (1988); Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). The understanding of the constitutive impact of law, of course, has never been wholly absent from our legal discourse. E.g., Lord Devlin, *Law, Democracy and Morality*, 110 U. PA. L. REV. 635 (1962). But the insights on which it is based have not been well-represented in American legal thought in this century. It seems plausible to see this recovery as part of a general renaissance of the philosophy of practical reason and virtue-based ethical theory, as well as an increased interest in the application of hermeneutic theory to questions law raises.

9. The term "language" is meant to suggest the patterns of thought, values, shared expectations and meanings that a form of discourse implies. On meaning and its functions (including discussions of language and linguistic meaning), see Lonergan, *Dimensions of Meaning*, in *COLLECTION: PAPERS BY BERNARD LONERGAN* 232 (F. Crowe & R. Doran 2d ed. 1988); B. LONERGAN, *METHOD IN THEOLOGY* 57-99 (1972). See also White, *Thinking About Our Language*, 96 YALE L.J. 1960 (1987); On the idea of the law as story, see C. GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983); White, *supra* note 8.

10. Enacted as The National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1982 & Supp. V 1987)).

11. On the centrality of the autonomous employee association to the scheme adopted in the Wagner Act's provisions, and the development of the Labor Act itself, see

ner Act parallels themes about human nature and community found in classical political philosophy.¹² In the latter's perspective, humans cannot be understood in the abstract. Instead, humans are regarded as situated beings, intelligible only in relation to the associational ties that condition the individual's existence. In this view, community is prior to the individual. Accordingly, flourishing communities are a precondition to the achievement of one's full human potential and, thereby, to authentic freedom. The absence of association results in the diminishment of one's potential and, hence, one's humanity. In this view, community grounds the possibility for self-government.

In contrast to the Labor Act's Wagner provisions, the Taft-Hartley portions of the statute¹³—and first amendment doctrine as well—are framed in a highly individualistic language that places a premium on personal autonomy. This language strongly tends to regard claims of community and association as posing a substantial threat to individual self-direction.¹⁴ It reflects a general view of human nature, reason and

Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499, 513-34 (1986) and sources cited therein.

12. This is not to suggest that the framers of the Wagner Act, nor the unionists and employers who shaped the practices of collective bargaining which were adopted in the Wagner Act, looked directly to the classics for their inspiration or for guidance. Rather, the Wagner Act strongly reflects thought about the nature of humans and community that are characteristic of the political philosophy of the pre-modern era (i.e., thought associated with the Platonic-Aristotelian tradition). The Wagner Act, emphasizing as it does the value of associations to self-government, is an example of a discourse conducted in what Robert Bellah and his colleagues have termed America's "second language." Our first language, they state, is framed and carried on in the now more familiar terms of individualism. See R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 20-22, 155-57, 334-35 (1985) [hereinafter *HABITS*]. This Article suggests that our first amendment discourse is conducted in the "first language," and that because the Wagner Act and the first amendment employ different languages, they "speak past" one another.

13. Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, § 1, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1982 & Supp. V 1987)). The 1947 Taft-Hartley Act was further amended in 1959 by the Labor-Management Reporting and Disclosure Act (Landrum-Griffin), Pub. L. No. 86-257, 73 Stat. 525, 542, § 704(a) (1959) (codified in pertinent part at 29 U.S.C. § 158(b)(4) (1982)). As pertinent to this discussion, the Landrum-Griffin Amendments extended and clarified the restrictions against so-called union secondary activity that were first set forth in the Labor Act through the Taft-Hartley amendments.

For ease of reference, both the Taft-Hartley and Landrum-Griffin Amendments to the National Labor Relations Act will be referred to corporately as the Taft-Hartley portion of the Labor Act. (The Landrum-Griffin Act also established a wide-ranging series of protections for individual union members qua their union. See 29 U.S.C. §§ 401-531 (1982 & Supp. V 1987)).

14. The amendment to section 7, referred to as the "heart" of the Labor Act, is representative of the shift the Taft-Hartley amendments worked in the statute. As set forth in the Wagner Act, section 7 provided that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

association that is informed by the thought of Thomas Hobbes, John Locke and other makers of the Enlightenment reaction to classical theory.

The modern viewpoint portrays humans as self-enlightening, self-perfecting beings who are endowed with rights that exist by nature, not social convention. Consequently, humans are perceived as completely sovereign beings who are prior to any form of community. In contrast to the classical perspective, in the modern framework, any form of association is in some way an artifice. Associations have only some sort of derivative existence that results solely from the affiliative acts of the individuals who compose them. Likewise, associations of whatever description represent no particular or irreducible good in themselves. Because any form of affiliation or association can limit individual sovereignty, all are regarded as suspect. Further, no association or community has any legitimate power over its members save that which the members have ceded voluntarily. In the modern view, freedom and self-government tend to be equated with the absence of association and its obligations.

Despite the enormous differences in the languages they employ, the first amendment and both portions of the statute share the same basic goal. Each seeks to enhance the potential for self-determination. In the final analysis, however, one portion of the statute states a distinctly different view of what it means to be a human being than that enunciated by the remainder of the statute or by our first amendment doctrine. In short, the law employs two different modes of discourse that tell two inconsistent stories about the nature both of humans and of the value and importance of association. Consequently, the law states two very different views about the conditions that will tend to promote individual liberty and the practices of self-government.

The second category of problems that underlie the inconsistencies between the first amendment and the Labor Act grow out of the special character of our basic labor relations legislation. The National Labor Relations Act is a statute at war with itself. It essentially consists of two parts: the Wagner Act provisions, enacted in 1935¹⁵ and the 1947 Taft-Hartley Amendments, which subsequently were clarified and extended by the Landrum-Griffin Act.¹⁶ Consistent with the value it

or other mutual aid or protection.

To this the Taft-Hartley amendments added:

and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

15. *See supra* note 10.

16. *See supra* note 13.

places on employee associations (i.e., unions), the Wagner Act portion of the statute is directed toward their defense and maintenance.¹⁷ Its principal thrust is the removal of impediments to employee self-association. Accordingly, the statute's Wagner provisions prohibit employers from taking discriminatory action against employees who engage in union activities.¹⁸ They also forbid employers to dominate or to interfere with employee associations.¹⁹ Central to the Wagner Act, however, is its exclusivity principle.²⁰ This principle makes the majority-designated union representative of all the affected employees, and bars dissidents from forming alternative organizations to represent their interests.

As noted, the statute's Taft-Hartley provisions reflect an entirely different view about the value of associations and their contributions to self-government. Regarding unions as a threat to individual status, the Labor Act's Taft-Hartley provisions attempt to cabin, constrain and restrict their activities.²¹ These restrictions chiefly take the form of limitations on the types of speech activities in which employee associations may engage, and limitations on the audiences to whom those associations may direct their appeals.²²

17. See Kohler, *supra* note 11, and sources cited therein.

18. 29 U.S.C. § 158(a)(3) (1982).

19. 29 U.S.C. § 158(a)(2) (1982).

20. This principle is set forth in section 9(a) of the Labor Act (29 U.S.C. § 159(a) (1982)), which provides that

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

See also *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

21. Two useful and thorough studies describing the development and evaluating the impact of Taft-Hartley are J. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947* 187-99, 251-59 (1981); H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 241-362 (1950).

22. These restrictions are set forth in section 8(b)(4) of the Labor Act, 29 U.S.C. § 158(b)(4) (1982), which provides in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents—

...

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

...

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any

The Labor Act's provisions thus pull in different directions. Indeed, it is the conjoining of these conflicting views and stories within one statute that makes the development of any consistent first amendment approach to the Labor Act as a whole so difficult. While both portions of the Labor Act pose constitutional difficulties, the character of these difficulties differs. The Wagner Act's exclusivity principle imposes significant restrictions upon individuals' first amendment freedom to associate. The statute's Taft-Hartley provisions fly in the face of the first amendment speech guarantees. Nevertheless, despite the many inconsistencies between the Labor Act and prevailing first amendment doctrine, the Court consistently has upheld the validity of both portions of the Labor Act. In doing so, the Court has repeatedly referred to the special nature of labor legislation to explain its unusual deference to a statute so incompatible with judicially developed constitutional norms. The Court's opinions are informed by the individualistic language in which first amendment discourse is conducted. Consequently, the cases divide according to the portion of the Labor Act subject to constitutional challenge. All the cases, however, involve the same underlying set of problems.

This Article is divided into six parts. By tracing a particular problem in relation to other issues, the discussion moves into successive and more fully explanatory perspectives. The first two sections examine the first amendment problems raised by the statute's Taft-Hartley provisions. Section I analyzes the *DeBartolo I* opinion. It outlines the development of the legal problems the case presents, and concludes that the holding in *DeBartolo I* cannot be squared with previous interpretations of the first amendment. Section II analyzes the state of the law in the wake of *DeBartolo II* and suggests some implications that flow from its holding. Section III turns to investigate the root causes for the tensions that exist both within the Labor Act, and between it and the first amendment. It examines the way first amendment discourse has taught us to think about groups and associations. It also examines the more nuanced view of the character and function of association that an alternative discourse suggests. Section IV analyzes a series of cases dealing with union-security arrangements. These cases demonstrate how the individualistic language of first amendment discourse has affected the way the Court regards the role of unions. Explanations for the Court's continued deference to the Labor Act are

other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing (emphasis in original).

This section is further qualified by the so-called "publicity proviso" which is set forth *infra* at note 33. Note that subsection (B) pertains to sections 8(b)(4)(i) and 8(b)(4)(ii).

offered in Section V. Section VI examines the two different modes of discourse the Labor Act and first amendment employ. It explores what the first amendment's notion of individualism assumes about the individual and the activity of self-determination. It suggests that first amendment discourse deflects attention from consideration of the conditions that nurture the reflection and choice on which self-government depends.

I. *DEBARTOLO I*: THE TAFT-HARTLEY PROVISIONS AND THE RISE OF A CONSTITUTIONAL PREDICAMENT

A. *Factual Simplicity and Statutory Ambiguity*

The procedural history of the *DeBartolo* case, prolix as it is,²³ reflects well the problematic nature of the Labor Act's Taft-Hartley provisions. It somehow seems wholly appropriate that the case took nearly a decade and two appearances before the Supreme Court to bring to resolution—and that the underlying issues remain as tangled as ever. Despite the years spent in appellate litigation before various tribunals, the facts of the case are quite simple and straightforward, indeed so much so that no hearing on them was ever held. The underlying record consists only of a stipulation of facts with some attached exhibits, which, upon the joint motion of the parties, was transferred from the administrative law judge directly to the Board for its determination.²⁴

The facts of the case can be recited briefly. The H.M. Wilson Company, the operator of a chain of department stores, leased land in a shopping mall located in Tampa, Florida. The mall, of which Wilson's was one of the larger tenants, was owned and managed by the DeBartolo Corporation. To erect its building at the mall, Wilson retained the H.J. High Construction Company. Though the building would become part of the mall's structure, by the terms of its lease, Wilson had sole control over the selection of the contractors who would erect it.²⁵ High allegedly was paying substandard wages and benefits to its unorganized employees who were engaged in the construction of the Wilson's building.

23. Florida Gulf Coast Bldg. Trades Council, 252 N.L.R.B. 702 (1980), *aff'd sub nom.* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264 (4th Cir. 1981), *vacated and remanded*, 463 U.S. 147 (1983) (*DeBartolo I*) (holding that union's speech activities are not protected by the publicity proviso of section 8(b)(4); remanded to consider question of coercion under statute), 273 N.L.R.B. 1431 (1985) (supplemental decision and order; coercion found), *enforcement denied sub nom.* Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328 (11th Cir. 1986), *aff'd sub nom.* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (*DeBartolo II*).

24. *DeBartolo*, 252 N.L.R.B. 702, 702 (1980).

25. Joint Appendix, Stipulation of Facts, at 23(a)-24(a), *DeBartolo I*, 463 U.S. 147 (1983).

In protest, agents of the union entered onto DeBartolo's property and distributed handbills at the four public entrances to the mall. The content of these handbills, which did not refer to High by name, urged consumers to refrain from patronizing stores located in the mall "until the Mall's owner publicly promises that all construction at the Mall" would henceforth be performed only by contractors paying prevailing union wage and benefit rates.²⁶ The distribution of the handbills was peaceful and orderly, and was unaccompanied by picketing or patrolling. The handbilling, which with notable timing was commenced in mid-December, continued until enjoined by a state court decree issued in early January.²⁷ The only question before the Board in *DeBartolo I* was whether the union's conduct in urging consumers to boycott the mall and its tenants in furtherance of the union's primary dispute with the H.J. High Construction Company constituted unlawful secondary activity under the statute. Resolution of this question depended upon the construction to be given section 8(b)(4)(ii)(B) of the Labor Act.²⁸

26. The handbills read:

PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL PLEASE.

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is, requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE. We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts. We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

DeBartolo II, 485 U.S. 568, 670 n.1.

27. *DeBartolo*, 252 N.L.R.B. at 703. Until the case reached the Fourth Circuit for its review, none of the parties raised the interesting issue of whether the stranger handbillers had a protected right to gain access to the mall property. At that point, the court refused to entertain the question. *Edward J. DeBartolo v. NLRB*, 662 F.2d 264, 272 (4th Cir. 1981). The Board's current standards for non-employee access to an employer's property are set forth in *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988), 129 L.R.R.M. (BNA) 1201 (1988).

28. For the text of this section, see *supra* note 22.

The so-called secondary boycott²⁹ prohibitions of the Labor Act, among which the provisions of section 8(b)(4)(B) figure prominently, can hardly be called a triumph of clear drafting. First enacted as a part of the 1947 Taft-Hartley amendments to the National Labor Relations Act, the language of the present section 8(b)(4)(B) was reformulated and extended by the Landrum-Griffin Amendments of 1959.³⁰ Benjamin Aaron has described this section as "surely one of the most labyrinthine provisions ever included" in a federal statute.³¹ Certainly, it constitutes one of the most problematical, a quality enhanced in no small degree by the fact that the language in which it is framed is very different from that employed by the Labor Act's Wagner provisions. The stated objective of the framers of section 8(b)(4) was the protection of "neutral" employers and workers from disputes with which they are "unconcerned."³² Thus, the Board's task in construing and applying the terms of this section has consisted of defining who, for its purposes, constitutes a neutral party.

Specifically, the language of section 8(b)(4) pertinent to *DeBartolo* provides that it is unlawful for a labor organization "to threaten, coerce, or restrain any person engaged in commerce" when an object in so doing is to compel "any person . . . to cease doing business with any other person." The purpose and reach of the language of section 8(b)(4)

29. Although long used judicially, the term "secondary boycott" is not used in the Labor Act itself. As Judge Learned Hand instructed,

[t]he gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give into his employees' demands.

International Bhd. Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950). For what is perhaps the classic exposition of this complex statute, see Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

30. For a concise explanation of these reformulations and extensions, see *NLRB v. Servette, Inc.*, 377 U.S. 46, 50-54 (1964); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 64-70 (1964); A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 642-44 (10th ed. 1986).

31. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pt. 2), 73 HARV. L. REV. 1086, 1113 (1960). In their magisterial study of the amendments, Harry Millis and Emily Brown similarly characterized the Taft-Hartley Act, stating that "[s]ince it was complex, looked in two directions at once, and in addition was poorly drafted and unclear at many points, it meant many things to many men." H. MILLIS & E. BROWN, *supra* note 21, at 655.

32. "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." 93 CONG. REC. 4323 (1947) (statement of Sen. Taft). "[T]here have been numerous jurisdictional disputes in which the employer is absolutely innocent, and yet he and the public have been made to suffer, even though they have had absolutely nothing to do with the controversy or the causes of it." 93 CONG. REC. 4416 (1947) (statement of Sen. Smith). See, e.g., *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 223 n.20 (1982) (purpose of section 8(b)(4)(B) to protect "neutral employers" as well as preventing the "widening of industrial strife").

is clarified and qualified by several provisos. Crucial to the issues raised in *DeBartolo* was the construction to be given the so-called publicity proviso. In it, Congress declared that nothing contained in the language of section 8(b)(4)

shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer

unless that publicity induced the employees of a disinterested employer to refuse to handle goods or perform services at the distributor's place of business.³³

B. Labor Board v. Servette: The Proviso Construed

A part of the Landrum-Griffin amendments to the Labor Act, the publicity proviso received its first (and, until *DeBartolo*, only) construction by the Court in 1964 in *NLRB. v. Servette, Inc.*³⁴ *Servette*, a wholesale distributor to supermarkets, was engaged in a dispute with the union that represented the company's drivers. In furtherance of its position, agents of the union went to various supermarkets which purchased merchandise from *Servette* and distributed handbills to consumers and passersby. The contents of the handbills described briefly the union's reasons for striking and asked its readers to support the drivers by refusing to purchase named items supplied to the stores by *Servette*.³⁵

33. The complete text of the publicity proviso reads:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. . . .

29 U.S.C. § 158(b)(4) (1982).

34. 377 U.S. 46 (1964).

35. The handbill read as follows:

"To the Patrons of This Store

"Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by *Servette, Inc.*:

"Brach's Candy

"*Servette* Candy

"Good Season Salad Dressing

Construing the publicity proviso as language of exception and exclusion, the Court concluded that its terms protected the union's distribution of the handbills.³⁶ The Court thus upheld the NLRB's finding that the union's activity did not contravene the prohibitions of secondary activities contained in section 8(b)(4). Specifically rejecting the conclusion the Ninth Circuit had made upon its review of the case,³⁷ the Court held that even though Servette did not "produce" the items that it distributed, Servette nevertheless constituted a "producer" within the meaning of the proviso.³⁸ The proviso, the Court counseled, "was the outgrowth of a profound Senate concern" that union speech rights "be adequately safeguarded."³⁹ To construe its terms so that the proviso's protections "applied only in situations where the union's labor dispute is with the manufacturer or processor," warned the Court, "would fall far short of achieving this basic purpose."⁴⁰ The Court instructed that "the protection of the proviso" was not intended by Congress "to be any narrower in coverage than the prohibition to which it is an exception."⁴¹ In short, after *Servette*, the legality of an otherwise unlawful appeal turned on the answer to this question: Did the neutral employer, whose customers were the objects of the union's appeals, constitute a distributor of the products of the employer with whom the union had its primary dispute? If so, the appeal was protected. Thus, in applying the terms of the proviso, the NLRB's task lay in determining what for its purposes constituted a producer-distributor relationship.

C. United Steelworkers of America (Pet, Inc.): *The Proviso Transformed*

The complexities—and ambiguities—inherent in this assignment are well-illustrated by the facts and rationale of the *United Steelworkers of America (Pet, Inc.)* case, decided by the Board in 1979.⁴² There, a

"Old London Products

"The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts.

"These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

"The drivers of Servette appreciate your cooperation in this fight."

Id. at 48 n.2.

36. *Id.* at 55.

37. *Servette, Inc. v. NLRB*, 310 F.2d 659 (9th Cir. 1962) (setting aside the NLRB's decision in 133 N.L.R.B. 1501 (1961)).

38. *Servette*, 377 U.S. at 55.

39. *Id.*

40. *Id.*

41. *Id.*

42. *United Steelworkers of Am. (Pet, Inc.)*, 244 N.L.R.B. 96 (1979), *enforcement denied sub nom. Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

union was involved in a strike against a division of the Hussmann Refrigerator Company, which in turn was a wholly owned subsidiary of Pet, Inc., a diversified conglomerate engaged in a broad variety of businesses. As part of its strike against Hussmann, the union, through handbills, newspaper advertisements and statements made by its officers during televised interviews, urged the public to support its members by refusing to purchase products produced by or to trade with stores operated by Pet or any of its subsidiaries.⁴³ Although the Board found that Pet's divisions and subsidiaries operated "essentially as independent business entities," it concluded that the union's conduct fell within the shelter of the proviso and thereby, even if coercive, was not unlawful.⁴⁴ As framed by the Board, determination of the protected status of the union's activities turned on whether Hussmann constituted a "producer" of the products of Pet and its constituent companies because of the "diversified corporate relationship" between them.⁴⁵

In answering this question, the Board noted that in previous cases, both it and the courts had construed broadly the statutory terms "products," "produced" and "distributed." This approach, the Board continued, was consistent with the Court's admonition in *Servette* that Congress intended the shelter of the proviso to be no lesser in scope than the prohibitions to which its language stands as an exception. The Board further observed that, with judicial approval, it had construed the statutory term "producer" to include "anyone who enhances the economic value of the product ultimately sold or consumed,"⁴⁶ thus bringing within the proviso's reach the suppliers of services as well as manufacturers and distributors.⁴⁷ Read together, these cases made "ap-

43. These activities are described in detail in *United Steelworkers of America (Pet, Inc.)*, 244 N.L.R.B. at 99.

44. *Id.* at 97.

45. *Id.*

46. *Id.* at 101 (quoting *American Fed'n of Television and Radio Artists, San Francisco Local (Great W. Broadcasting Corp.)*, 150 N.L.R.B. 467, 472 (1964), *enforced*, 356 F.2d 434 (9th Cir. 1966).

47. In addition to *Great Western Broadcasting*, the Board relied upon its decision in *Local No. 662, Radio and Television Eng'rs (Middle-South Broadcasting Co.)*, 133 N.L.R.B. 1698 (1961). These two cases involved parallel variations on the facts of *Servette*. In both, the Board had concluded that broadcasters add their "labor, in the form of capital, enterprise or service" to the products or services of those employers who advertise through the broadcaster's facilities. *Middle-South Broadcasting*, 133 N.L.R.B. at 1705; *Great Western Broadcasting*, 150 N.L.R.B. at 472. Because it found that labor in the form of advertising enhances the marketability of a product or service, the Board concluded that a broadcaster "becomes a very important producer in the intermediate stage leading toward" the sale of that product or service. *Middle South Broadcasting*, 133 N.L.R.B. at 1705. The Board thus ruled that striking employees of a broadcaster do not offend the secondary boycott prohibitions by directing consumer appeals against secondary employers who continue to advertise over the struck station during the labor dispute. The secondary retailer or provider of services, it concluded, constitutes a distributor of a product produced by the broadcaster; the consumer appeal thereby falls within the shelter of the publicity proviso. The Board in *Pet* also noted

parent" the conclusion that the proviso shields union appeals to the customers of a neutral employer, made through means other than picketing, "so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise or service, a product of the neutral employer."⁴⁸ The constituent operations of diversified business organizations, the Board explained, provide support for and make contributions to one another.⁴⁹ While admitting that their respective contributions may differ considerably, the Board reasoned that each subsidiary operation supplies some measure of goodwill and "profits, either actual or potential, which enhance the value of the enterprise" as a whole.⁵⁰ Because Hussmann made just such contributions to Pet's overall enterprise, the Board found that under the proviso, Hussmann constituted a producer of the products of Pet and its subsidiaries. Consequently, the Board dismissed the complaint against the union, concluding that its actions were exempted from the proscriptions of section 8(b)(4).⁵¹

The rule announced in *Pet* may have been "apparent" to the Board. It was not to the Eighth Circuit, which rejected the Board's interpretation of the proviso as unreasonable and remanded the case for further proceedings.⁵² To most readers, the most distinctive aspect of the Board's decision is the strained and ephemeral quality of its reasoning. In *Pet*, the Board analyzed only half of what precedent required in the application of the proviso's terms. Thus, although the decision never speaks to the point, Pet and its subsidiaries presumably constituted "distributors" within the meaning of the proviso. Yet, unlike the previous cases on which the Board relied,⁵³ there were no identifiable products or services which Hussmann had participated in manufacturing or distributing for another division of Pet. Nor had Hussmann performed some specific services like advertising which made more saleable the goods or services provided by the other divisions which comprised Pet. Rather, Pet and its subsidiaries became distributors

that in its decision in *International Bhd. of Teamsters, Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901 (1961), it had found that for the purposes of the proviso, "a product need not be tangible, and that, since labor is the prime requisite of one who produces, an employer who applies his labor in the form of 'capital, enterprise and service' to a product, in the initial or intermediate stages of marketing" constitutes a producer. *Lohman*, 244 N.L.R.B. at 100. (*Lohman* and *Servette* involved identical fact patterns; in its opinion in *Servette*, the Court specifically approved of the Board's conclusion in *Lohman* that, for the purposes of the proviso, a wholesaler distributor constitutes a producer.)

48. *Lohman*, 244 N.L.R.B. at 101.

49. *Id.*

50. *Id.*

51. *Id.* at 102.

52. *Pet*, 641 F.2d 545, *complaint dismissed*, 288 N.L.R.B. No. 133 (May 31, 1988), 128 L.R.R.M. 1161 (1988) (finding case controlled by Court's opinion in *DeBartolo II*).

53. *See supra* note 47.

because Hussmann, through its economic and organizational relationships with them, had enhanced their value as enterprise organizations. In short, after *Pet*, the determination under the proviso of an employer's status as a neutral no longer turned on an examination of its relationship to the primary through the chain of production. Instead, that determination turned on whether the primary had enhanced the economic status of the would-be secondary as an enterprise. The *Pet* decision thus broke the analysis of the proviso from its old moorings established by the Court in *Servette*. The words of the statute remained the same, but the act of interpretation performed in *Pet* markedly transformed their meaning.

Nevertheless, the outcome of *Pet* hardly seems outrageous. Through its economic enhancement theory, the Board simply attempted to recognize the economic and organizational interdependence of affiliated business enterprises. To term the parent of a subsidiary an uninterested party does seem to constitute the very erection of form over substance that was condemned in *Servette*. To this extent, the result in *Pet* is wholly consistent with the *Servette* Court's instruction. Yet, as construed by the Court in *Servette*, the language of the proviso stands as language of exception. The unintelligibly vague test the Board formulated in *Pet*, however, seemingly admits of no stopping point. Consequently, *Pet* threatened to do away with all restrictions on publicity other than picketing. It was just this potential which the Board's first decision in *DeBartolo* manifested, and which alarmed the Court in *DeBartolo I*.

The *Pet* case illustrates one of the fundamental problems underlying the attempts to outlaw "secondary" activities; the prohibitions assume that it is possible in an integrated economy to isolate the impact of any undertaking. Further, even a quick reading of the case also leaves one with the impression that the wrong question has been asked, and that there was something fundamentally amiss with the interpretive framework used by both the Agency and the courts to analyze questions under the proviso. The *DeBartolo* case would eventually confirm that impression.

D. *DeBartolo I: The Attempt to Restore Servette*

The record in the *DeBartolo I* case reached the Board within months of the issuance of the *Pet* decision.⁵⁴ Interestingly, as part of the parties' stipulations on that record, *DeBartolo* had agreed that, for

54. The Board's decision and order in *Pet* is dated August 10, 1979. *Pet*, 244 N.L.R.B. at 96. On May 22, 1980, the Board issued an order granting the parties' motion to transfer the *DeBartolo* proceeding to the Board for its determination. The Board issued its first decision in the matter on September 30, 1980. *DeBartolo*, 252 N.L.R.B. at 702.

the purposes of the proviso, Wilson's Department Store constituted a distributor of the products of the High Construction Company.⁵⁵ Viewed against the analytical pattern established in the Board's pre-*Pet* decisions, DeBartolo's stipulation seems reasonable enough.⁵⁶ In light of its analysis in the *Pet* case, however, the Board's recognition of High's status as a producer apparently turned upon the idea that, by constructing a new store building for Wilson's at DeBartolo's mall, High was enhancing the value of the Wilson chain as a business enterprise. But why stop there? The implications of its analysis in *Pet* were clear to the Board, and it vigorously pursued them.

A shopping mall and its tenants, the Board observed, are mutually dependent for their economic success.⁵⁷ Consequently, like the divi-

55. *Id.* at 704.

56. *See, e.g.*, International Union of Operating Eng'rs, Local No. 139 (Oak Constr. Co.), 226 N.L.R.B. 759 (1976) (handbilling of telephone utility by union asking the public to withhold portions of their monthly bills in furtherance of union's dispute with contractor hired by the utility protected by proviso); Local Union No. 54, Sheet Metal Workers Int'l Ass'n (Sakowitz, Inc.), 174 N.L.R.B. 362 (1969) (union's handbilling directed to customers of two retail clothing stores that had both leased space in an uncompleted shopping center in furtherance of union's dispute with air conditioning subcontractor hired by developer of the center protected by proviso); Plumbers & Pipefitters Local Union No. 142 (Piggly Wiggly) 133 N.L.R.B. 307 (1961) (union's handbilling directed to customers of retail food store chain in furtherance of their dispute with refrigeration subcontractor employed by chain, protected by proviso). Like the *DeBartolo* case, each of the unions in *Oak Construction*, *Sakowitz* and *Piggly Wiggly* were engaged in protesting the respective contractors payment of substandard wages and benefits. Further, none of these cases discusses the nature of the primary employers' (i.e., the contractors') "product" that was being "distributed" by the utility or retailer. Indeed, though far from clear on the point, *Sakowitz* and *Piggly Wiggly* seem to suggest that consumer handbilling simply is not subject to the prohibitions of section 8(b)(4)(ii)(B). In fact, the administrative law judge in the *Piggly Wiggly* case, Fannie M. Boyls, specifically so concluded. *Piggly Wiggly*, 133 N.L.R.B. at 318-19. Her decision, which contained a masterful analysis of the proviso's legislative history, thereby anticipated by over 25 years the subsequent opinion in *DeBartolo II*.

Obviously, contrary rulings in *Oak Construction*, *Sakowitz* and *Piggly Wiggly* may have resulted in construction workers having far more restricted communication freedoms than those enjoyed by employees in other sectors of the economy, contrary to the Court's instruction in *Servette*. Common to each of the above-cited Board decisions is the fact that the employer subject to the handbilling had a direct business relationship with the contractor whose employment policies the union found offensive. Thus, even though the distribution of the work of persons engaged in the building trades becomes in these cases a wholly idealized and formulaic notion, the existence of a producer-distributor relationship as a form of limitation upon the scope of union communicative activities at least implicitly remained an important aspect of the Board's application of the proviso.

57. The Board noted that each tenant in the mall paid a minimum rent which automatically increased when a large department store commenced doing business, and that each tenant was required to pay the proportionate costs of maintaining the mall's common areas. All were also required to join and pay dues to a merchant's association which conducted joint advertising campaigns. "A functioning Wilson's store," the Board stated, "will attract consumers to the mall who will then visit and purchase products from other tenants, and, reciprocally, Wilson's will profit from its proximity to the other tenants." *DeBartolo*, 252 N.L.R.B. at 705. *DeBartolo*, the Board found, also stood to gain "for its leases provide that, in addition to receiving monthly rents," it received a percentage of each tenant's gross sales. *Id.*

sions of a diversified corporation, DeBartolo and its lessees had a "symbiotic" relationship.⁵⁸ Although it admitted that High had no relationship with DeBartolo, or any of its tenants but Wilson's, the Board found that High was applying "its labor to a product, i.e. the Wilson's store, from which DeBartolo and its tenants will derive substantial benefit."⁵⁹ The Board thus concluded that, just as Hussmann could be said to have "produced" the product of *Pet*, High, through its performance of construction services for Wilson's, could be said to have applied "capital, enterprise and service" that would inure to the economic benefit of DeBartolo and its tenants, and that would enhance the value of their common enterprise.⁶⁰ Since High stood as a "producer" both to DeBartolo and to its tenants, the Board concluded that the handbilling gained the protection of the proviso and was lawful. It thus dismissed the complaint against the union in its entirety. Having so ruled, the Board, consistent with its practice in previous cases,⁶¹ made no findings as to whether the union's actions constituted restraint or coercion within the meaning of section 8(b)(4) of the Labor Act. In a footnote, the Board also observed that, given its conclusion, it need not accept the union's invitation to inquire into whether the union's conduct was protected by the first amendment.⁶²

If the length of a decision serves as any indicator, the Board, with its reformulated version of the proviso in hand, had little trouble in disposing of *DeBartolo*. Although the Fourth Circuit analyzed the matter in greater depth, it adopted the Board's reasoning and upheld its conclusions.⁶³ The Supreme Court, however, in an opinion noteworthy for its tentative and almost anxious tone, unanimously vacated the Fourth Circuit's judgment and remanded the case to the Board.⁶⁴ After reciting the facts of the case, the Court observed that it had previously interpreted the producer-distributor requirement of the proviso only in *Servette*, an opinion confined solely to construing the term "producer."⁶⁵ In contrast, the present case turned on the meaning of the term "distributor" and what constituted a producer-distributor relationship. Noting that DeBartolo had been "willing to concede" that Wilson constituted a "distributor" of High's products,⁶⁶ the Court observed that the Board had failed to make any finding "that any product

58. *Id.*

59. *Id.*

60. *Id.*

61. *E.g., Pet*, 244 N.L.R.B. at 100.

62. *DeBartolo*, 252 N.L.R.B. at 705 n.3.

63. *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981) (Britt, J., dissenting).

64. *DeBartolo I*, 463 U.S. 147 (1983).

65. *Id.* at 154-55.

66. *Id.* at 155-56.

produced by High was being distributed by DeBartolo or any of Wilson's co-tenants." The only publicity exempted from the Labor Act's secondary boycott prohibitions, the Court instructed, was that intended to inform the public that the product of the primary employer was being distributed by a third party. The Board's economic enhancement theory, "would almost strip the distribution requirement of its limiting effect."⁶⁷ Such an approach was "so generous" that it would permit a union to urge consumers to refrain from trading with "virtually any secondary employer;" had Congress intended that all peaceful non-picketing publicity be protected, the proviso "would not have contained a distribution requirement."⁶⁸ Despite DeBartolo's stipulation to the status of Wilson as a "distributor," the Board had "no justification for treating the products that the co-tenants distribute to the public as products produced by High"⁶⁹ The Court thus held that the Board had erred in concluding that the union's activities fell within the protection of the proviso.

E. Taft-Hartley, the First Amendment, and the Court's Quandry in DeBartolo I

As it was plainly aware, the holding in *DeBartolo I* placed the Court in a predicament, the nature and the extent of which can only be appreciated in light of the Court's previous treatment of conflicts between the statute and the first amendment. A consistent theme of the previous cases was the Court's recognition that labor legislation represents an especially sensitive subject of congressional activity.⁷⁰ Accordingly, the Court resolutely had upheld both the Labor Act's Wagner and Taft-Hartley provisions against all first amendment challenges. The manner in which it had done so, and the distinct pattern of departure from prevailing first amendment doctrine in cases involving the Taft-Hartley provisions, is well exemplified by the Court's opinion in *International Longshoremen's Assn. v. Allied Int'l, Inc.*⁷¹ In this case, members of the Longshoremen's union refused to unload cargo from Russian ships or to handle Russian goods at ports on the

67. *Id.* at 156.

68. *Id.*

69. *Id.* at 157.

70. On the distinctive quality of labor law generally, see Lord Wedderburn, *Labour Law: Autonomy from the Common Law?*, 9 COMP. LAB. LAW J. 219 (1988) and sources cited therein. Other useful sources discussing this topic include, M.A. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 143-70 (1981); P. SELZNICK, *LAW SOCIETY AND INDUSTRIAL JUSTICE* 121-54 (1969); H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 103-06, 112-17, 120-21 (1968); Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971).

71. 456 U.S. 212 (1982).

East and Gulf coasts to protest the Russian invasion of Afghanistan and the Carter Administration's "business as usual" trade policy with the Soviet government.⁷² The business of Allied, an importer of Russian wood products, was interrupted by this protest. Allied alleged that the union's protest had forced it to "cease doing business" with the carrier of Allied's imported goods from Soviet ports and with the stevedoring company the carrier employed. Allied charged, and the Board agreed, that the Longshoremen's protest constituted an illegal secondary boycott under the terms of section 8(b)(4).⁷³

On review, the Court acknowledged that the union's protest was purely political, had no labor relations objectives, and had not been intended to halt dealings between Allied and any other business.⁷⁴ Nonetheless, the Court upheld the conclusion that the activity was unlawful. However "commendable" the union's objectives might have been, the Court opined, the union's action would have the "certain effect" of imposing "a heavy burden on neutral employers."⁷⁵ The congressional purpose behind the enactment of the boycott prohibitions was to shield neutrals from such burdens and to prevent the spread of industrial strife.⁷⁶ Thus, whenever such union activity "reasonably can be expected to threaten" a neutral party with substantial economic loss, it necessarily has the unlawful object of coercing them.⁷⁷

Through reasoning that amounted to no more than a mere ipse dixit, the Court also rejected the union's claim that its activity was protected by the first amendment. Writing for a unanimous Court,

72. The Longshoremen's statement announcing the boycott read:

In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

The reason for this action should be apparent in light of international events that have affected relations between the U.S. and the Soviet Union.

However, the decision by the Union leadership was made necessary by the demands of the workers.

It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

Id. at 212 n.1.

73. *International Longshoremen's Ass'n, Local 799 (Allied Int'l, Inc.)*, 257 N.L.R.B. 1075 (1981).

74. *International Longshoremen's Ass'n*, 456 U.S. at 222-23.

75. *Id.* at 223.

76. *Id.*

77. *Id.* at 224 (quoting *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 614 (1980)).

Justice Powell simply stated that “[a]pplication of § 8(b)(4) to the ILA’s activity in this case will not infringe upon the First Amendment rights of the ILA and its members.”⁷⁸ Although there was no picketing activity involved in *Allied*, the Court further noted that it had consistently rejected the claim that “secondary picketing by labor unions in violation of section 8(b)(4) is protected” under the first amendment.⁷⁹ The Court closed its brief consideration of the constitutional issues by observing that the union and its members had “many ways” to express their opposition to foreign policy “without infringing upon the rights of others.”⁸⁰

The extent to which the Court has been willing to protect the Labor Act’s Taft-Hartley provisions from even the hint of unconstitutionality becomes even more clear when the *Allied* opinion is compared to the Court’s opinion in *NAACP v. Claiborne Hardware Co.*⁸¹ In *Claiborne*, the Court held that a boycott of white-owned businesses to effect changes in local governmental policies constituted protected expression under the terms of the first amendment.⁸² It thus reversed a state court’s holding that the NAACP and the individual organizers of the boycott could be liable to the boycotted businesses on the basis of the common law tort of malicious interference with the respondent’s businesses.⁸³

The Court acknowledged that “the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of” the boycott.⁸⁴ Even though the boycott might have had “a disruptive effect on local economic conditions,”⁸⁵ the Court

78. *Id.* at 226.

79. *Id.* The Court followed this statement with the remarkable and revealing suggestion that the Longshoremen’s conduct was “designed not to communicate, but to coerce.” *Id.*

80. *Id.* at 227.

81. 458 U.S. 886 (1982). Tellingly enough, *Claiborne* was handed down within weeks of *Allied*.

82. Among the boycotters’ specific demands were “the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers.” *Id.* at 899.

83. 393 So. 2d 1290 (Miss. 1980). Because it found that the boycott had been enforced in part by violence and threats, the Mississippi Supreme Court concluded that the boycott was not protected by the first amendment. The Mississippi Supreme Court stated:

If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other. All of these factors are here present, and the boycott was illegally operated and we do not need to examine into its type, whether primary or other.

Id. at 1301 (quoted in part at *Claiborne*, 458 U.S. at 895). The Mississippi Supreme Court declined to find that the boycott violated the state’s secondary boycott statute only because the statute was enacted two years after the boycott commenced. *Id.* at 1300-01.

Upon its review of *Claiborne*, the U.S. Supreme Court held that all nonviolent aspects of the boycotters’ activities were protected by the first amendment. *Claiborne*, 458 U.S. at 915.

84. *Id.* at 914.

85. *Id.* at 912.

held that it was not subject to state regulation because the boycotters' goal was "to bring about political, social and economic change" for themselves.⁸⁶ The Court observed that

[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values."⁸⁷

Only two facts distinguish *Allied* from *Claiborne*. The first is the existence of the terms of the Labor Act. In *Claiborne*, the Court stated that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'"⁸⁸ The Court explained that restrictions on such communicative activity was justified by "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."⁸⁹ The second difference is the identity of the speaker in *Allied*, and the Court's views about the proper range of activities in which a union legally may be involved. As the *Allied* Court saw it, the "random political objective" of the Longshoremen's boycott was objectionable and hence beyond the coverage of the first amendment because it was "far removed from what has traditionally been thought to be the realm of legitimate union activity."⁹⁰ In other words, wages and hours, not political protests, are the proper concern of unions.⁹¹

Precedents like *Allied* and *Claiborne* seemed strongly to suggest that the union in the *DeBartolo* case bore little chance of convincing the Court that the application of section 8(b)(4) to its handbilling activities raised constitutional difficulties. The Court, however, seemed eager to avoid yet another exercise in attempting to accommodate the Labor Act's terms to first amendment doctrine. Noting that the Board had yet to decide whether the handbilling itself constituted unlawful

86. *Id.* at 911.

87. *Id.* at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

88. *Id.* at 912 (quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring in part and concurring in result)). The Court also cited the *Allied* case for this proposition.

89. *Claiborne*, at 912.

90. *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. at 226 (quoting *Longshoremen v. Allied Int'l*, 640 F.2d 1368, 1378 (1st Cir. 1981)).

91. For further discussion of this point, see *infra* notes 194-212 and accompanying text.

coercion or restraint within the Labor Act's terms, the Court declined to consider the constitutional issue and remanded the case to the Board to consider the statutory question.⁹²

A prudential doctrine of long-standing is that courts should not pass upon the constitutionality of a statute if the case may be disposed of on another ground.⁹³ The doctrine is rooted in the concern that the judiciary demonstrate a proper deference to the legislature. The Court's invocation of the doctrine in *DeBartolo*, however, smacks more of expedience than of concern over the separation of powers. To hold against the union on the first amendment issue would have highlighted once again that labor is somehow less deserving of protections for its speech than other organizations and associations, though for reasons that never have been stated clearly. To hold for the union would have had the explosive potential of questioning the constitutional legitimacy of much of the structure of the 1947 and 1959 amendments to the Wagner Act. One can hardly blame the Court for looking elsewhere for resolution of the issues *DeBartolo* raised.

F. The Case on Remand: The Board and the Eleventh Circuit in DeBartolo II

Although the Court purported not to have decided the statutory issue, given the Court's reasoning in the matter, the Board had little choice on remand but to conclude that the union's distribution of handbills at DeBartolo's mall constituted coercive conduct in violation of the Labor Act.⁹⁴ Specifically, the Board found that the union's distribution of the handbills had the unlawful object of seeking to force the mall's tenants to cease doing business with DeBartolo, thereby compelling either or both DeBartolo and Wilson to suspend their dealings with High. This conduct, the Board concluded, constituted coercion of the mall's tenants within the meaning of section 8(b)(4) and was thereby unlawful.⁹⁵ The Board once again declined to consider the union's contention that the first amendment protects handbilling. The Board modestly explained that "as a congressionally created administrative agency" it would "presume the constitutionality of the Act" it administered.⁹⁶ The Court's hope to avoid the constitutional issue appeared to have been thwarted. Either *Servette* would have to be reformulated, which would require overruling the just-issued *DeBartolo I* opinion, or the apparent clash of the Board's application of the statute with the first amendment would have to be reconciled.

92. *DeBartolo I*, 463 U.S. 147, 157-58 (1983).

93. See, e.g., *DeBartolo II*, 485 U.S. 568, 575 (1988).

94. The decision on remand is reported at 273 N.L.R.B. 1431 (1985).

95. *Id.* at 1432.

96. *Id.* For a concise review of the Board's fluctuating willingness to entertain constitutional claims, see *Communication Workers of America v. Beck*, 108 S. Ct. 2641, 2647 (1988).

The Eleventh Circuit's masterful opinion in *DeBartolo II*⁹⁷ spared its reluctant superior from having to resolve this dilemma. The opinion is a textbook example of the proper use of legislative history in statutory interpretation. It demonstrates that the tortuous language of the proviso had not been intended by Congress to be language of exception at all. Rather, the proviso had been intended as language of clarification.⁹⁸ Its placement in subsections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) was to show that the restrictions of secondary consumer appeals were directed solely at picketing; other forms of union publicity were not prohibited.⁹⁹ The

97. Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328 (11th Cir. 1986) (*DeBartolo II*).

98. *Id.* at 1343.

99. *Id.* How this point became forgotten provides a revealing view of the way in which statutes come to gain their meanings. Prior to the Court's *Servette* decision, the meaning of the publicity proviso's language seemed to be understood clearly enough. As Benjamin Aaron observed in his extensive analysis of the Labor Act's Landrum-Griffin amendments (which he published in 1960), the language of section 8(b)(4)(ii)(B)

in the unqualified form in which it first appeared in the Landrum-Griffin bill could have been interpreted as overruling previous decisions upholding a union's right to organize a consumer boycott of a store selling the products of a manufacturer with whom the union has a labor dispute. The House conferees insisted, however, that the new provision was intended to do no more than outlaw picketing which caused a secondary consumer boycott. Accordingly, they agreed to insert another of the innumerable provisos that disfigure the new law, the effect of which was to permit a union to employ every other form of publicity except picketing for the purpose of inducing consumers to boycott either the product of the primary employer or the distributor who does business with him.

Aaron, *supra* note 31, at 1114 (footnotes omitted). As noted at *supra* note 56, in an early decision that preceded the Board's construction of its language, Administrative Law Judge Fannie Boyls also construed the proviso as language of clarification and concluded that the restrictions of section 8(b)(4)(ii)(B) were directed solely to consumer appeals made by picketing.

The notion that the proviso should be construed as language of exception, and that it contained a distribution requirement seems largely to have sprung from NLRB Member Rodgers' partial dissent in the Board's *Lohman* decision (*supra* note 47). The administrative law judge in *Lohman* construed section 8(b)(4)(ii)(B) to apply only to picketing. He thus concluded that the union's handbilling of the customers of Lohman, a wholesale distributor of candy and tobacco products, in furtherance of the union's dispute with Lohman constituted no violation of the Act. In his partial dissent, Member Rodgers disagreed with this reading of the Labor Act, stating

I think it is clear that Congress unmistakably limited the application of the 8(b)(4) proviso to the presence of certain requirements or expressed conditions; and unless all of the enumerated conditions are met in every respect, the proviso cannot be relied upon to save what would otherwise be unlawful. One of the conditions specified in the proviso is the publicity must involve "a product or products . . . produced" by an employer with whom there is a primary dispute, and which "are distributed by another employer." Here Lohman, the primary employer, concededly produces nothing; on the contrary, it distributes the products which are produced by others. Accordingly, by its explicit language the proviso cannot stand as a defense, and consequently Respondent's handbilling should be declared unlawful.

Lohman, 132 N.L.R.B. at 910-11 (footnote omitted). The Board's majority responded at length to Member Rodgers' contentions. They first noted that by its terms, the "proviso to Section 8(b)(4) protects 'publicity, other than picketing'" (*Id.* at 904) (emphasis in original), and "that mere handbilling is not picketing but is embraced by the term 'publicity' which is

court explained that the producer-distributor language of the proviso reflected the fact that the only type of non-picketing consumer appeal that had been discussed during the congressional deliberations was "secondary union action taken against a retail store selling a struck manufacturer's product."¹⁰⁰ As the legislative history reveals, the supporters of the language presently contained in section 8(b)(4) included the publicity proviso "both to clarify their position that nonpicketing publicity was not prohibited and, most importantly, to allay the fears of the opponents of the amendments that such speech would be restricted."¹⁰¹ Because it was unable to find that Congress in framing the boycott prohibitions had intended to proscribe the peaceful distribution of handbills, the court concluded that no violation of the Labor Act had occurred.

At least one unstated consequence of the holding immediately was obvious. Since the misconstruction of the proviso in *Servette*, both the Board and the courts had struggled mightily to answer the wrong question. Whether a union's appeal to customers might constitute secondary activity turns on the manner in which the union makes that appeal. It does not turn on determining whether the employer, whose customers are the objects of the union's appeal, is a "producer" or "distributor." Little wonder the language of the proviso had seemed so prolix, or that the reasoning of the cases attempting to apply its terms were so often byzantine. Because the Supreme Court, for substantially the same reasons, adopted the Eleventh Circuit's view as to the meaning of the proviso, it is necessary to consider the implications of this holding and what, in its wake, are the questions yet to be resolved.

protected by the proviso" (*Id.* at 905). The Board's majority then turned to Member Rodgers' contention that because Lohman was a wholesaler, it was not a producer for the Labor Act's purposes, and concluded that "there is not the slightest reason to conclude that Congress was concerned with permitting truthful publicity with respect to products derived from manufacturers," but not with publicity regarding products from wholesalers like Lohman (*Id.* at 908). In so responding to his argument, as Member Rodgers himself noted in his partial dissent, the Board had agreed that the proviso constitutes language of exception. Member Rodgers might have added that the majority had also agreed that the proviso contained a distribution requirement. Subsequent events seem almost inexorable: In its *Servette* decision, the Board majority simply relied on its recently issued *Lohman* decision. In turn, on its review of *Servette*, the Supreme Court, without reference to the legislative history and without much analysis, approved the Board's majority's inclusion of wholesalers within the proviso's term "producer." Thus was created the problem that took a quarter-century and the Court's *DeBartolo II* decision to resolve.

Unfortunately, this is not an isolated incident: the distinction between "decision" and "effects" bargaining, which is central to the Court's opinion in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), arose out of a similar sort of circumstances. See Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402, 405-13 (1983).

100. *Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d at 1341 (emphasis deleted) (*DeBartolo II*).

101. *Id.*

II. THE TAFT-HARTLEY SPEECH RESTRICTIONS AFTER *DEBARTOLO II*: STATUTORY SOLUTION WITHOUT CONSTITUTIONAL RESOLUTION

The Court's *DeBartolo II* opinion is of undoubted importance both to the administration of the Labor Act and to first amendment jurisprudence generally. Its holding undoes a generation's worth of misunderstandings. It jettisons the tortured logic and the express, as well as implied, limitations on certain types of union communicative activity fashioned by a body of case law that employed a faulty premise to interpret and apply an important provision of the nation's basic labor relations statute. Though relatively brief, the *DeBartolo II* opinion does much to clarify the speech rights of a labor organization under the terms of the National Labor Relations Act. Given the case's precedents, it establishes these rights in a comparatively expansive perspective. Indeed, the opinion even contains the tantalizing suggestion that communication about labor relations matters may be extended the full protection of the first amendment.¹⁰² While the Court specifically left open the possibility that some union messages may be "of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection," it nevertheless strongly hinted that the handbilling involved in *DeBartolo*, though calling "attention to a specific situation," was of the highest constitutional dignity.¹⁰³

DeBartolo II thus raises the possibility that the long eroded doctrine of *Thornhill v. Alabama*¹⁰⁴ might in part be reinvigorated. The 1940 *Thornhill* opinion represents the point of apogee in the first amendment protection extended to the speech activities of employee associations. There, the Court struck down as unconstitutional on its face a state statute that made it a crime to engage in picketing to further a boycott. "In the circumstances of our times," the Court declared, "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."¹⁰⁵ The Court continued its discussion, stating that

The health of the present generation and of those as yet unborn may depend upon these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing . . . Free discussion concerning the conditions in industry and the

102. *DeBartolo II*, 485 U.S. at 575-76. Presumably, however, only communication about labor relations matters made by means other than picketing and not directed to a neutral employer's employees will be entitled to first amendment protection.

103. *Id.* at 576.

104. 310 U.S. 88 (1940). For a description of *Thornhill's* steady decline, see Getman, *supra* note 4, at 12-16.

105. *Thornhill*, 310 U.S. at 102 (citing *Hague v. C.I.O.*, 307 U.S. 496 (1939), and *Schneider v. State*, 308 U.S. 147, 155, 162-63 (1939)).

causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.¹⁰⁶

The *Thornhill* opinion, with its statements about the importance of labor speech to the maintenance of a healthy democracy, is especially striking when compared to more recent opinions like *Allied*.¹⁰⁷ Of course, any full-scale resurrection of *Thornhill* in the near future is remote. The case's flat-footed extension of first amendment protection to the peaceful dissemination by any means of information concerning a labor dispute would call into question many of the strictures of section 8(b)(4). *DeBartolo II* may signal some renewed appreciation by the Court of the importance of speech concerning the employment relationship, and more generally the contributions to the public discourse made by labor organizations. Given the contrary view of the long line of cases between *Thornhill* and *DeBartolo II*, however, it seems unwise to read too much into the silvery but slim dicta of one case.

Whatever changes in the law *DeBartolo II* may work, the opinion cannot dispel the effects that result from twenty-five years of construing and applying the statute as if it constituted a flat ban on all so-called union secondary communicative activity, save that sheltered by the proviso. Neither can the opinion erase the implicit and frequently repeated message that the speech of labor organizations is of lesser dignity and subject to greater state regulation than the speech of other associations.¹⁰⁸ Though the influence of the law may be neither as strong nor as pervasive as the influence of language, law also plays a constitutive role in a society. It acts as a sort of flexible social template. The law announces duties and defines their limits. It serves as an important device for ordering our relations with one another. It creates—and can limit—one's expectations. Thus, law performs communicative and pedagogical functions as well.¹⁰⁹ Of course, law is hardly the only institution in society that exerts such effects. As de Tocqueville observed,

106. *Thornhill*, 310 U.S. at 103.

107. It is also interesting to compare the *Thornhill* Court's language with Edmund Burke's characterization of community (see *infra* text accompanying notes 149-53) and with Gunther Teubner's conception of collective bargaining as a "reflexive" system of private ordering (see *infra* text accompanying notes 127-29).

108. For some further comparisons of the Court's treatment of unions vis-à-vis other organizations, see Cox, *The Supreme Court—Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 33-39 (1980); Getman, *supra* note 4; Pope, *supra* note 4; Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, *supra* note 4; Note, *Peaceful Labor Picketing and the First Amendment*, *supra* note 4.

109. On these and other functions meaning performs, see B. LONERGAN, *METHOD IN THEOLOGY* 76-81 (1972); Lonergan, *Existenz and Aggiornamento*, in *COLLECTION: PAPERS BY BERNARD LONERGAN* 222 (F. Crowe & R. Doran 2d ed. 1988); B. Lonergan, *Dimensions of Meaning*, in *id.* at 232.

however, law has an especially strong constitutive influence for Americans.¹¹⁰ Law and especially constitutional law has become the central repository of our values and, as such, acts as a prime carrier and transmitter of meaning. In our pluralistic society, it has become the one source of those ideas and principles upon which (at least at an unreflective, emotional level) we generally agree, and through which we see our society as distinctly American.¹¹¹ The actual impact of the long treatment of "labor" speech as different, without a comprehensive, or comprehensible, explanation other than the identity of the speaker, is as incalculable as the lesson of *Roe v. Wade*¹¹² that abortion is a fundamental right guaranteed to all women. In both instances, the message has been influential in molding the views of the populace who live under the law's instruction and guidance. Of course, fewer members of the general public have read a case like *Allied*, for instance, than even that small number who have read *Roe*. The influence of statute or case law rarely is direct. The message is inculcated through numerous informal channels. Clients receive instruction from their lawyers. Newsletters alert managers, unionists and others as to the latest rulings and what they "mean" for the readers' interests. The news media report stories about unions being enjoined from or paying damages for picketing or boycotting activity found to violate federal law. These means of instruction may be petty, but because of their pervasiveness and constancy, they are effective.

To the extent possible, *DeBartolo II* does restate the law, and the law's message, as Congress apparently originally intended it. Thus, the opinion makes clear that section 8(b)(4) does not proscribe peaceful appeals by unions made to the public by means other than picketing. In effect, *DeBartolo I* and that portion of *Servette* which interpreted the publicity proviso as language of exception have been overruled sub

110. De Tocqueville's account and analysis of American democracy is a complex and interwoven one. The role of law is a constant theme of his account, particularly in his first volume. As he there states, "[t]he main object of this book has been to make American laws known." A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 286 (J.P. Mayer ed. 1969). Despite the emphasis he places on law, however, de Tocqueville ultimately does not regard its influence as primary:

A great part of the success of democratic government must be attributed to these good American laws, but I do not think that they are the main cause. While I think that they have more influence on American social happiness even than the nature of the country, I still have reasons for thinking that mores are even more important. *Id.* at 307. De Tocqueville defines mores as "the habits of the heart," and the "different notions possessed by men, the various opinions current among them, and the sum of ideas that shape mental habits." The term covers "the whole moral and intellectual state of a people." *Id.* at 287.

111. For two recent, nuanced accounts of this influence, see S. LEVINSON, *CONSTITUTIONAL FAITH* (1988) and M. KAMMEN, *SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE* (1988).

112. 410 U.S. 113 (1973).

silentio. To encapsulate its holding, *DeBartolo II* essentially restates the proviso to read that nothing contained in paragraph 8(b)(4) “shall be construed to prohibit publicity directed to members of the public other than picketing” or to state it just slightly differently, “forms of publicity directed to the public other than picketing are not prohibited” by the terms of the section. It is appropriate here to consider more specifically what in light of the holding of *DeBartolo II* remains restricted by section 8(b)(4), and what exceeds its prohibitions.

Perhaps the best way into this task is through a brief statutory excursion. Section 8(b)(4), it should be remembered, contains two subsections.¹¹³ The provisions of section 8(b)(4)(i)(B)—which were not at issue in *DeBartolo*—forbid a labor organization “to induce or encourage” individuals employed by a neutral employer “to withhold their services in order to force their employer to cease dealing with” the party with whom the union has its primary dispute. As has been seen, the provisions of section 8(b)(4)(ii)(B) prohibit a labor organization from engaging in conduct designed “to coerce or constrain” an individual where the union’s object is secondary. Its terms also make unlawful the threat to engage in conduct prohibited by either subsection. Though a bit of a caricature, taken together, these provisions essentially restrict union appeals to different audiences. Thus, subsection (i) basically prohibits appeals to the employees of “uninterested” employers, while subsection (ii) is directed at restraining certain appeals made to members of the public.

From the standpoint of the Labor Act’s administration, all that *DeBartolo II* does is to make clear that non-picketing appeals directed to members of the public are outside the scope of the Labor Act and therefore cannot constitute restraint or coercion for the purposes of section 8(b)(4)(ii)(B). Accordingly, the “threat” to undertake such excluded appeals is similarly beyond the reach of the statute. As noted, *DeBartolo II* also seems to indicate that the legality of such appeals henceforth shall be measured under the first amendment, though the degree of protection to be afforded has yet to be determined. The opinion goes no further. Hence, the remainder of section 8(b)(4)’s restrictions are unimpaired, as are the holdings of the cases authoritatively construing and applying their terms. Can it be that the case that seems to do so much has the potential to do so little?¹¹⁴

113. The provisions of section 8(b)(4) are set forth *supra* at note 22.

114. Not to be overlooked in the evaluation of the impact of *DeBartolo II* is the question of union access to an employer’s property. While a union may not violate the Labor Act’s secondary boycott restrictions by activity such as handbilling, a union’s ability to gain access to an employer’s property to make its dispute known is hardly absolute. See Jean Country, 291 N.L.R.B. No. 4 (Sept. 27, 1988), 129 L.R.R.M. (BNA) 1201 (1988).

Freeing labor organizations and their members to pursue at least most forms of public appeals is hardly insignificant. Nevertheless, *DeBartolo II* leaves in its wake a great deal of unfinished business. The case, after all, involved a question of statutory interpretation and proceeded at a sub-constitutional level. Although pregnant with suggestion, it based none of its holdings on the first amendment. Thus, while it may foreshadow much, from the standpoint of constitutional doctrine, the case settles nothing definitely. The intersection of the Labor Act's terms with the first amendment remains as uncertain as ever; the grand synthesis has yet to be performed.

Divination is a notoriously risky business. Yet, it would be wholly in keeping with the Court's consistently maintained policy of deference to the Labor Act's terms if it were to confine the impact of *DeBartolo II* to its facts. This is not to suggest that such an outcome is to be desired. It is not. The restrictions upon union communicative activities imposed by section 8(b)(4) have resulted in unions enjoying far fewer speech protections than other forms of associations. Thus, as Archibald Cox has written, of the various types of speech upon which the Court has found restrictions permissible, "peaceful labor picketing is the most important, and also the most difficult to fit into a coherent body of first amendment law."¹¹⁵ In light of the *DeBartolo II* Court's view that "picketing is qualitatively 'different from other modes of communication,'" ¹¹⁶ the demise of the "speech plus" approach¹¹⁷ to labor picketing seems unlikely, at least in the near term. Typically, the Court in *DeBartolo II* does not explain the qualitative difference that separates picketing from other sorts of communicative activity. Instead, it cites to earlier opinions in which it has made the same statement.¹¹⁸

115. Cox, *supra* note 108, at 36.

116. *DeBartolo II*, 485 U.S. 568, 580 (1988) (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 311 n.17, (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950))).

117. For some time, the Court has distinguished between "pure speech" and communicative conduct. Because picketing includes elements in addition to speech, and "is a mixture of conduct and communication," the Court has held that restrictions may be placed on picketing that would not be permitted on pure speech. See, e.g., *NLRB v. Retail Store Employees*, 447 U.S. 607, 618-19 (Stevens, J., concurring in part and concurring in result); *Florida Gulf Coast Bld'g & Constr. Trades Council v. NLRB*, 796 F.2d 1328, 1332-34 (11th Cir. 1986) (*DeBartolo II*). For a well-known critique of the speech-conduct distinction, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

118. See cases cited *supra* note 116. The Hughes Court in turn relied upon a characterization made of picketing by Justice Douglas in his concurrence in *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942), in which he stated, "[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." For two critiques of this vague but influential statement, see Getman, *supra* note 4, at 13-15; Cox, *supra* note 108, at 36-39.

Also unlikely to fall by virtue of the Court's ruling are any of the restrictions contained in section 8(b)(4)(i)(B) that forbid speech by which a union may seek "to induce or encourage" the employees of a secondary employer to withhold their services where the communication has a secondary object. As the *Allied* case demonstrates, it takes very little to establish such an unlawful object. Contrary to prevailing first amendment doctrine in other settings, even the potential economic impact of union communication on a third party seems to be sufficient to make out a violation and to remove the communication, whether made symbolically or otherwise, from constitutional protection.¹¹⁹ This result raises constitutional questions every bit as troubling as those produced by the Board's prohibition of handbilling in *DeBartolo II*.

A comparison of the reach of subsections (i) and (ii) of section 8(b)(4) gives some further illustration of the tensions between the first amendment and the Taft-Hartley provisions that *DeBartolo II* left unresolved. As the law now stands, union members may make non-picketing appeals urging the employees of an "uninterested" business to support the union by withholding their patronage from their employer. However, section 8(b)(4)(i)(B) prohibits the unionists from urging those employees to support the union by withholding their services from their employer. In brief, urging listeners not to shop is permissible, but urging them not to work is forbidden. From a first amendment perspective, little distinguishes these two appeals. Assume that in both instances the appeals were made through peacefully distributed handbills, and that no picketing or patrolling was involved. Further assume that, as in *DeBartolo*, the handbills contained no threats, and "pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace."¹²⁰

In both instances, the employees are the audience to whom the union's message is directed; the "secondary employer vis-à-vis the handbill is a non-listener."¹²¹ Moreover, the claim that speech is in-

119. *Compare* *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212, 226 (1982) ("It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" than secondary picketing) with *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.").

120. *DeBartolo II*, 485 U.S. at 576. The Court indicated that these characteristics of the Union's message contained in the handbills made it more than "typical commercial speech." It further observed that "however these handbills are to be classified," restrictions upon their distribution would raise serious constitutional issues." *Id.*

121. *DeBartolo II*, 796 F.2d at 1335. Hence, the Eleventh Circuit concluded in *DeBartolo II* that "a finding of statutory coercion would not control the First Amendment analysis," because "[w]hile the focus of § 8(b)(4)(ii)(B) is coercion of the secondary employer, the secondary employer vis-à-vis the hand bill is a non-listener." *Id.* For the purposes of

tended ultimately to exercise a coercive impact upon someone does not remove that speech from the reach of the first amendment.¹²² Further, assuming that they are not public employees, the audience to whom the handbills are directed commit no illegality by withholding their work.¹²³ Nevertheless, in the second instance described above, the union's communication is prohibited by section 8(b)(4)(i)(B). A showing of restraint or coercion is not a necessary element to making out a claim of section 8(b)(4)(i)(B). Nor is it necessary to make out a claim that the communication constitutes a "threat of reprisal or force or promise of benefit" to the audience of employees to whom it is directed.

The prohibitions of section 8(b)(4)(i)(B) constitute a content-based restriction on speech. In non-labor first amendment cases, the Court has held that, to survive constitutional muster, content-based restrictions must be shown both to advance a compelling state interest and not be more extensive than is necessary to serve that interest.¹²⁴ The compelling interest in restricting union speech, while referred to in cases like *Claiborne*, has never been identified clearly. Moreover, the restrictions on labor speech are certainly broader than those the Court has countenanced in other settings.

Cox is correct: The restrictions on union communicative activity that the Labor Act imposes are incompatible with prevailing first amendment doctrine. Nothing in the *DeBartolo II* opinion resolves the fundamental tension that exists between these statutory prohibitions and the first amendment. But, these restrictions hardly represent the full extent of the Labor Act's inconsistencies with first amendment notions and values. The statute is shot through with them. The Wagner Act provisions are as problematic from a first amendment perspective as the statute's Taft-Hartley provisions. While *DeBartolo II* well represents the way the Court has handled first amendment challenges to the statute's Taft-Hartley provisions, the Court's approach becomes intelligible only through an examination of the factors that ground the tension between the Labor Act's Wagner provisions and the first amendment. Such an examination explains both the way the Court treats labor cases with first amendment implications, and the reasons it has deferred to a statute so patently inconsistent with first amendment doctrines. More significantly, this examination reveals the way our first

assessing the first amendment protections to which the handbills would be entitled, the focus must be on the consumers, the audience to whom the message is directed. *Id.* (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

122. *Id.* at 1335 (citing *Claiborne*, 458 U.S. at 911; *Keefe*, 402 U.S. at 419 (1971)).

123. However, if they are bound by a no-strike pledge, they may lose their protections under section 7 of the Labor Act and be liable to discipline or discharge, and their union, depending on the circumstances, may be liable for contractual damages.

124. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

amendment discourse has taught us to think about the nature of association.

III. THE WAGNER PROVISIONS AND THE FIRST AMENDMENT: MODES OF DISCOURSE AND THEIR IMPLICATIONS

A. The Wagner Act's Scheme and the Role of the Employee Association

One reason that the Court has encountered such difficulty in coming to grips with first amendment challenges to the National Labor Relations Act is that the entire scheme of the statute is constitutionally problematic. The Wagner Act portion of the statute, however, presents first amendment difficulties of a different character than the statute's Taft-Hartley provisions. In the Wagner Act, Congress adopted a flexible scheme for the private ordering of the employment relationship.¹²⁵ Founded upon the formation of self-organized and autonomous employee associations, collective bargaining leaves it to the parties to discuss, determine and administer the law that will govern the employment relationship.¹²⁶ Collective bargaining represents an example of what Gunther Teubner has characterized as a "reflexive" legal scheme. The goal of reflexive law, Teubner suggests, is "regulated autonomy" or controlled self-regulation.¹²⁷ Reflexive schemes of ordering regularize and give state sanction to institutions which allow ordering to occur from the "bottom-up" by the parties directly involved.¹²⁸ In a reflexive legal scheme, government does not dictate or directly influence the outcomes of decisions made within the state sanctioned institutions. Instead, it relies on market mechanisms to shape them. Consequently, reflexive legal schemes entail a minimal degree of state intervention in the ordering of such basic social relationships as the relation of employment.¹²⁹

125. Congress did not "invent" collective bargaining. Instead, through the Wagner Act, Congress adopted a scheme whose characteristics and practices had been shaped jointly over time by workers and employers. Like the law merchant, labor law developed from the "bottom-up," not the "top-down."

126. In our scheme of "free" collective bargaining, the relative economic strength of the parties, and not the government, is to determine the outcomes of the parties' negotiations. On the collective bargaining model and the Wagner Acts scheme, see Kohler, *supra* note 11, at 513-34.

127. See Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW & SOC. REV.* 239 (1983).

128. In more Weberian terminology, reflexive law institutes formally rational procedural and organizational norms that give regularized structure to and integrate participation within social decision-making institutions.

129. The recognition of employment as a relationship is long-standing. See, e.g., A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 169-70

The freely formed, autonomous employee association is the heart of the collective bargaining scheme. Consequently, it is not surprising that the principal thrust of the Wagner Act is the removal of impediments to employee self-association. The employee association—the union—performs several roles. It acts to mediate the relationship between the individual and the entity that employs her. In a setting in which one's job typically is both one's primary form of wealth and determinant of social status, the union also serves to reduce the individual's vulnerability. Likewise, it affords individuals an immediate means to take part in framing and adjusting the law that most directly affects their daily circumstances and conditions.¹³⁰ The social institution of collective bargaining thus constitutes a method for self-determination. In J. Willard Hurst's words, it represents a means through self-association "to mobilize group power in behalf of individual status."¹³¹

As will be discussed more fully below,¹³² the significance of the employee association and the practice of collective bargaining far transcends the local workplace or a narrow concern with its benefits and compensation policies (though these are themselves hardly insubstantial matters). For the moment, however, it is important to keep in mind the value the Wagner Act places on association, since this represents the point at which first amendment doctrine and the Wagner Act diverge.

As first amendment doctrine has developed over the course of this century, it increasingly has emphasized individual autonomy. A large part of the operation (and hence the meaning) of first amendment law consists in insulating individuals from various norms and restrictions settled upon by the community. As a result, first amendment doctrine often acts to shelter individuals from claims of associational obligation or responsibility. In contrast, the Labor Act's Wagner provisions seek to protect the individual and his status by defending associations and their claims. In the Wagner Act's scheme, the association exists for the individual, and supplies the means to enhance individual status and the potential for self-determination. The ends intended by the first

(A. Skinner ed. 1974) (observing the mutual dependence of employer and employed). Similarly, in his Commentaries, Blackstone states that master and servant, parent and child, and husband and wife constitute "the three great relations in private life." 1 W. BLACKSTONE, COMMENTARIES *422. In this observation, Blackstone seems to be echoing Aristotle in *The Politics*, who finds in these relations the basis for political life. ARISTOTLE, *THE POLITICS* 38 (C. Lord trans. 1985) (Bk. I, ch. 3, 1253b 1-6).

130. For a fuller explication of this point, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 720-36 (1973).

131. J.W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 86 (1956).

132. See *infra* text accompanying notes 222-49.

amendment and the Wagner Act are not inconsistent. Both intend to intensify and nurture the potential of the individual for self-determination. The courses of these two bodies of law, however, essentially are incongruous. Ultimately, they rest on two very different views of what it means to be a human being. These views, and the nature of association they portray, are reflected in the different languages the first amendment and the Wagner Act employ.

B. The Roots and Lessons of Our First Amendment Discourse

Language has been described as expressed meaning and, like law, it acts as a carrier of shared or common meanings. Consequently, like law, our language performs a constitutive function. We live in and through it. Language, including our legal language, mediates the world to us. Language gives us structure and orients us within the natural and social realms we inhabit. It provides a didactic vehicle by which we define our roles, communicate our duties and expectations, and announce and inculcate our judgments of value. Consequently, language serves as a primary means by which we fix and specify our common understandings and shared meanings. It forms the foundation for community.

Every language has its makers—poets, philosophers, politicians, journalists or advertisement writers—who give terms new meanings, or transform or invent new categories in which we think and speak. Whatever else their differences, those thinkers who have most influenced and shaped the language in which we conduct our first amendment discourse typically have regarded associations with deep suspicion. As they view them, associations threaten both the individual and the state. Thomas Hobbes, for example, described associations as “wormes in the entrayles of a natural man.”¹³³ Rousseau, Hobbes’ greatest critic, agreed with him, at least on this point. Rousseau warned that “for the general will to be well expressed,” it is “important that there be no partial society in the State, and that each citizen give only his opinion” (i.e., allow it to be formed by the representative of the general will—the state).¹³⁴ Where the extirpation of “partial societies” proves impossible, Rousseau counseled that “their number must be multiplied and their inequality prevented.”¹³⁵ In *The Federalist Papers*, Madison carefully followed Rousseau’s advice in propounding his prescriptions

133. T. HOBBS, *THE LEVIATHAN* 375 (C.B. Macpherson ed. 1981).

134. J.-J. ROUSSEAU, *THE SOCIAL CONTRACT* 61 (R. Masters trans. 1978) (Bk. II, ch. III).

135. *Id.*

for what he termed the “dangerous vice” of “factions.”¹³⁶ Similarly, in the highly influential thought of John Locke, there is precious little room for associations save in the form of the state itself, which in its limited scope and arrangements becomes the only form of association for which the human has a perdurable need.¹³⁷

True to the thought of its makers, the language that informs our first amendment discourse has taught us to regard freedom as a form of monadic or ontologic individualism. This view strips the individual out of society and, at its limit, equates liberty with the absence of society altogether. It suggests ultimately that self-isolation is the solution to political questions and the proper means by which to preserve true human freedom. Its starting point is that the human being and the rights which are naturally hers exist outside any social context, are grounded in the individual as an abstract, universalized monad, and that the human is a self-enlightening, self-perfecting and morally complete being who can find truth—if there is any to be found—unaided and without the mediation of any community. In all respects then, the individual is viewed as sovereign. Consequently, only that authority to which the individual has given her uncoerced express or tacit consent legitimately has power over her.¹³⁸

Notions about groups, organizations, community and the characteristics of human association generally are tied directly to our ideas of the meaning of personhood. Since our language conveys the view that persons are selves apart from and prior to any sort of relation with others, it has invited us to regard human association in terms of alliances that come into existence solely to satisfy the self-directed wants of their otherwise unrelated members.¹³⁹ These wants tend to be reduced to two categories: a desire for companionship (to enable self-fulfillment and expression) and the desire for economic or political power. Affiliations in turn are characterized respectively by the ends that brought them about as expressive or purposive association. Be-

136. THE FEDERALIST No. 10 (J. Madison).

137. See J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (1689-90). On the enormous influence of Locke's thought, including its continuing influence on American law, see Pangle's magisterial study: T. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988).

138. Thus, the right to emigrate, and in part, the right to travel: by remaining in the state, one tacitly consents to its arrangements. But, with the individual seen as being ontologically prior to all institutions, to be restricted from leaving any group is regarded as immoral.

139. On the manner in which Americans have conceived of the nature of groups, association and like notions, see Wilson Carey McWilliams' monumental work, W. MCWILLIAMS, THE IDEA OF FRATERNITY IN AMERICA (1973) (especially useful in terms of the present paper is McWilliams' discussion at 1-94 and 537-69). Also see Aviam Soifer's insightful articles, Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350 (1989); Soifer, *Toward A Generalized Notion of the Right to Form or Join an Association: An Essay for Tom Emerson*, 38 CASE W. RES. L. REV. 641 (1988).

cause any form of affiliation or association can impinge or restrict individual sovereignty, all are seen as having but limited authority over their members, which is no more than that which the individual, implicitly or explicitly, has ceded voluntarily. Consistent with the way we speak about personhood, associations typically are understood as some kind of limited liability organizations,¹⁴⁰ formed by otherwise unrelated individuals whose limited affiliation has been brought about by, and restricted to, some shared self-interest. In short, human association is essentially artificial, instrumental and temporary in character.

The expression and consequences of these notions are displayed in the Court's opinions dealing with union affiliation and membership, but they are hardly confined there. The Court's recent opinion in *Roberts v. United States Jaycees*¹⁴¹ presents a compelling instance of their manifestation. In *Roberts*, the Court rejected the Jaycees first amendment challenge to the application of a state civil rights law that forbade the organization from excluding women from membership. In the course of its opinion, the Court discussed the nature of association. It observed that certain forms of "personal affiliations," such as marriage and other "family relationships," have been extended a high degree of first amendment protection against state interference.¹⁴² This protection "reflects the realization" that it is through such "personal affiliations" that one gains "the ability independently to define one's identity."¹⁴³ This protection also recognizes that "individuals draw much of their emotional enrichment" from such "affiliations."¹⁴⁴ The Court further described "family relationships" as typified "by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."¹⁴⁵ In other words, even marriage and kinship are conceived of as potentially transient alliances between self-interested, independent contractors, which have little connection with, or impact upon, surrounding institutions. Given the extent of his influence on our first amendment discourse, it is not surprising that the Court's description of the family closely parallels those of John Locke.¹⁴⁶

Of course, there are associations and then there are associations. Although our first amendment discourse works hard to distinguish among them, it tends to blur the distinctions, and ends up by treating all associations as if they simply constitute variations on a theme. In *Roberts*, for example, two factors primarily served to distinguish the

140. The term is from McWilliams; see W. McWILLIAMS, *supra* note 139, at 89.

141. 468 U.S. 609 (1984).

142. *Id.* at 618-20.

143. *Id.* at 619.

144. *Id.* Thus, the family constitutes a form of expressive association.

145. *Id.* at 619-20.

146. See J. LOCKE, *supra* note 137, at ¶¶ 78-83.

family from the “large business enterprise” or a civic group like the Jaycees. One was the difference in their respective sizes.¹⁴⁷ The other was the greater degree of “selectivity” that individuals exercise in deciding with whom to begin and remain in a familial relation.¹⁴⁸

A different and more nuanced view of the character and function of association—which in turn expresses a notion of personhood distinct from that conveyed by present first amendment discourse—is set forth by Edmund Burke. Writing in the latter part of the 18th century, Burke stands as a preeminent critic of Hobbes, Locke, Rousseau and similar “modern” thinkers whose work has shaped and informed first amendment discourse. Evoking the views of the writers of classical political philosophy, Burke insisted that the human being could not be understood properly except as situated in society and its history. To attempt to understand personhood otherwise would lead to a distorted image of the human being. Likewise, to employ the “moderns’” understanding of the nature of the person and association as a guide for establishing ordering arrangements would put the conditions for a flourishing human existence at grave risk. “To be attached to the subdivision, to love the little platoon we belong to in society,” Burke asserts in his familiar claim “is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed toward a love to our country and to mankind.”¹⁴⁹ In criticizing the views that have come to inform current first amendment discourse, Burke warns that it is a mistake to speak of all associations as if they constitute “nothing better than a partnership agreement in a trade of pepper and coffee, calico, tobacco, or some other low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties.”¹⁵⁰ Certainly there exist “subordinate contracts for objects of mere occasional interest.”¹⁵¹ But society, and the various associations in which it actually exists, only can be comprehended when understood as constituting more than “a partnership in things subservient only to the gross animal existence of a temporary and perishable nature.”¹⁵² Taken as a whole, these “little platoons,” these intermediate associations, are society, which itself is

a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. As the ends of

147. The Court’s model of family apparently is the nuclear family, and more specifically, the spousal relation, as opposed to the extended family and its relationships.

148. *Roberts*, 468 U.S. at 620-22.

149. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 53 (T. Mahoney ed. 1983).

150. *Id.* at 110.

151. *Id.*

152. *Id.*

such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.¹⁵³

For Burke, humans are not capable of being understood as isolated monads, to be studied as if they existed in some idealized sphere. Instead, we as humans are intelligible only as we are situated associationally, in relation to a community. Communities and associations, in turn, are more than the sum of their parts. Indeed, in a very real way, we live not only as a community in time, but in a community that transcends time. For Burke, association does not threaten our humanity, but grounds it and sets the conditions for self-rule. The language in which Burke speaks of the character of association (and thereby, of the meaning of personhood) is evocative of a discourse now little employed in law, especially at the constitutional level. This discourse is closely related to what Robert Bellah and his colleagues have described as America's "second language," in contrast to our first which they characterize as being framed and conducted in the now more familiar terms of individualism.¹⁵⁴ The practices and habits of thought that Congress adopted through the Wagner Act are reflective of this second language. Significantly, it is not the language of our first amendment discourse. Little wonder that the task of accommodating the Act's Wagner provisions to the first amendment has proved such a troubling exercise.

C. The Grounds of the Tension within the National Labor Relations Act

The differences their discourses reflect explain why the efforts to reconcile the Wagner Act to first amendment doctrine have failed. Differences in language and the meanings those languages express also explains the discord that exists within the National Labor Relations Act and reveals why the statute stands as a house divided. Like first amendment doctrine, the Labor Act's Taft-Hartley provisions are framed in an individualistic language that views association suspectly.

153. *Id.*

154. HABITS, *supra* note 12, at 20-22, 155-57, 334-35. The term "association" is especially problematic and the varying notions to which the term has been applied are the subjects of a vast literature. Bellah and his colleagues use the term community to refer to "a group of people who are socially interdependent, who participate together in discussion and decision making, and who share certain *practices* . . . that both define the community and are nurtured by it." *Id.* at 333 (emphasis in original). Practices "are shared activities that are not undertaken as a means to an end but are ethically good in themselves (thus close to *praxis* in Aristotle's sense)." *Id.* at 335 (emphasis in original). As with any definition, this one is heuristic and represents a sort of "ideal type" or notion. Bellah's definition of community suggests the characteristics that distinguish an association, as the term will be used in this Article, from other sorts of social organizations.

The amendments embody a set of policies and understandings that are essentially inconsistent with the ideas that inform the Labor Act's Wagner provisions.

The provisions of the Taft-Hartley amendments are couched in terms of individual rights and simple economic regulation. The rationale for the amendments, their backers explained, was to protect neutral employees and employers from disputes not their own. In appraising the meanings and intentions of the Taft-Hartley amendments, however, one point should be kept in mind. The Taft-Hartley amendments represent the culmination of over a decade's worth of efforts in Congress to modify, cabin, undercut or rescind the Wagner Act.¹⁵⁵ The bill eventually enacted was the direct descendent of these earlier efforts and consequently, many of its terms bear their stamp. Unable to achieve the Wagner Act's outright repeal, the authors of the Taft-Hartley amendments engrafted onto the statute provisions that embodied a "new and substantially different labor policy."¹⁵⁶ This policy emphasized individual autonomy and distrusted the view that "concerted activity" through autonomous employee associations was "the means to effective protection of the rights of individuals."¹⁵⁷ Commentators Harry Millis and Emily Brown noted that "rather than accepting collective bargaining as in the main to be desired as essential in a healthy society," many of the provisions of Taft-Hartley "inevitably had the effect of weakening unions" and the processes of private ordering that collective bargaining affords.¹⁵⁸ While observing that some of the provisions remedied abuses and filled gaps in the existing legislation, Millis and Brown concluded that "too much of the Act shows that it was the product of men who did not know how things work in industry or in the administration of the NLRA, and of some who wished to weaken the position of all labor organizations in the economic and political scene."¹⁵⁹ A comparison of *Allied* with *Claiborne* or numerous other cases involving the speech rights of corporations, civic groups or other non-labor associations demonstrates the accuracy of this early but prescient assessment of Taft-Hartley's tendencies.¹⁶⁰

155. From 1937 (the year in which the Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), found the Wagner Act constitutional) to the passage of the Taft-Hartley Act in 1947, Millis and Brown found that there were over 230 bills introduced in the Congress whose contents attempted to change the labor policy adopted in the Wagner Act. See H. MILLIS & E. BROWN, *supra* note 21, at 333.

156. *Id.* at 482.

157. *Id.* at 665.

158. *Id.*

159. *Id.*

160. Such an exercise also brings to mind Justice Frankfurter's dissent in *International Ass'n of Machinists v. Street*, 367 U.S. 740, 814 (1961), in which he termed "pre-Victorian" the notion that economic and speech rights are separable.

A comparison of the statute's Wagner and Taft-Hartley provisions reveals why, taken as a whole, the National Labor Relations Act is so ungainly. It also explains why so many of the doctrines developed from the statute appear to work at cross-purposes. Such a comparison also elucidates the reason that the Labor Act's Taft-Hartley and Wagner provisions present different first amendment problems. The Labor Act's Taft-Hartley provisions are rooted in the same individualistic perspectives expressed in first amendment doctrine. Both bodies of law distrust association. The tension between them arises over the restrictions on the speech of employee associations that the Taft-Hartley amendments impose. The tension between the first amendment and the Labor Act's Wagner provisions lies at a more profound level of meaning that reflects different understandings about human nature, reason and the function of association.

Since this Article has examined the expression of the constitutional problems raised by the statute's Taft-Hartley provisions, it is appropriate here to undertake a complementary investigation of these matters as they are posed by the Labor Act's Wagner section. The tensions between the Wagner Act and the first amendment are most clearly presented in a series of cases dealing with so-called union-security arrangements.

IV. THE COURT, THE FIRST AMENDMENT AND THE WAGNER ACT: THE LANGUAGE OF INDIVIDUALISM AND ITS EFFECTS ON THE STATUTORY SCHEME

A. The Emblems of the Tension: The Exclusivity Principle and Union Security Agreements

The employee association represents the primary tension between the Wagner Act and the first amendment. Consistent with the value the Wagner Act places on association, a central feature of its provisions is the exclusivity principle.¹⁶¹ The exclusivity principle rests on the notion of majority rule. Accordingly, the exclusivity principle establishes the association formed by a majority of the employees as the

161. This principle is set forth in section 9(a) of the Labor Act (29 U.S.C. § 159(a) (1982)), which provides that

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Section 8(a)(5) of the Labor Act (29 U.S.C. § 158(a)(5) (1982)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

representative of all. It bars dissidents from forming alternative organizations to represent their interests separately.¹⁶²

Although the exclusivity doctrine might be regarded as posing substantial restrictions on individuals' freedom to associate, it never has been subjected directly to constitutional challenge. A closely-related matter, however, the agency-shop, has come under the Court's examination several times.¹⁶³ Under agency-shop or union-security arrangements, every employee in the workplace who is represented by the union must pay, as a condition of continued employment, a service fee equal in amount to the dues paid by the members of the union. The purpose of these arrangements is to protect and financially maintain the majority-designated association. Agency-shop schemes, the Court has observed, constitute "a significant impingement on First Amendment rights."¹⁶⁴ Their provisions require dissenting employees "to support financially an organization with whose principles and demands [they] may disagree."¹⁶⁵ "To be required to help finance the union might well be thought," the Court has observed, "to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."¹⁶⁶ Nevertheless, the Court consistently has upheld such schemes in the face of the constitutional challenges made to them.

In the Wagner Act, Congress made specific provision for so-called "union-shop" agreements by which membership in the majority-designated employee association could be required as a condition of employment.¹⁶⁷ The Taft-Hartley amendments modified the Labor Act's language to make it clear that the "membership" that could be required under such union-security arrangements was limited to a requirement that employees "tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership."¹⁶⁸ In construing this amended language, the Court held that

162. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

163. *Communications Workers v. Beck*, 487 U.S. 108 S. Ct. 2641 (1988); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956).

164. *Ellis*, 466 U.S. at 455.

165. *Id.*

166. *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)).

167. National Labor Relations Act, ch. 372, 49 Stat. 452 (1935) (codified at 29 U.S.C. § 158(a)(3) (1982)). Union shop arrangements were a typical feature of the practices of collective bargaining that Congress subsequently adopted in the Wagner Act. For a concise history and explanation of security agreements, see R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 639-43 (1976).

168. Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 140 (codified at 29 U.S.C. § 158(a)(3) (1982)). Section 14(b) of the Taft-Hartley Act (29 U.S.C. § 163(b) (1982)) permits states, through so-called "right-to-work" legislation, to outlaw the use of union

Congress had intended to permit an employer and a union to eliminate the problem of the "free rider," that is, a person who enjoys the benefits of the association's work, but makes no contribution toward them.¹⁶⁹ The Court further ruled, however, that no one could be compelled to assume actual membership in a labor organization. "Membership, as a condition of employment," it stated, "is whittled down to its financial core."¹⁷⁰

B. Union Security Agreements and the First Amendment: Resolving the Tension, Dissolving the Association

The Court first dealt with the constitutionality of union (or agency) shop provisions in the 1956 case of *Railway Employees Department v. Hanson*.¹⁷¹ The case arose under the terms of section 2 Eleventh,¹⁷² of the Railway Labor Act.¹⁷³ This section, which authorized the maintenance of union shop clauses, has been held to be substantially analogous to the terms of the National Labor Relations Act.¹⁷⁴ In a brief opinion, the *Hanson* Court rejected the first amendment claim that shop schemes force dissidents "into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought . . ."¹⁷⁵ The adoption of an arrangement that requires the "financial support of the collective-bargaining agency by all who receive the benefits of its work," the Court held, was within the power of Congress under the commerce clause.¹⁷⁶ The choice of the union-shop "as a stabilizing force" was an "allowable one."¹⁷⁷ The *Hanson* Court specifically left open the breadth of activities to which nonmembers or dissenters could be compelled to contribute consistent with the first amendment.

The constitutionality of the use of agency-shop fees for union political activities is an issue of particular sensitivity. The Court deliberately sidestepped the resolution of this issue in its 1961 opinion in *Machinists v. Street*.¹⁷⁸ There, a state court had found that some of the

security agreements. On the impact and policies of Taft-Hartley on union security arrangements, see R. GORMAN, *supra* note 167, at 639-43; H. MILLIS & E. BROWN, *supra* note 21, at 430-40, 635-37.

169. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

170. *Id.* at 742.

171. 351 U.S. 225 (1956).

172. 45 U.S.C. § 152 (1982).

173. 45 U.S.C. §§ 151-88 (1982 & Supp. V 1987).

174. *Communications Workers v. Beck*, 108 S. Ct. 2641, 2648-49 (1988) (citing *Ellis v. Railway Clerks*, 466 U.S. 435, 452 n.13 (1984)).

175. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236 (1988).

176. *Id.* at 238.

177. *Id.* at 233.

178. 367 U.S. 740 (1961).

monies collected under union-shop provisions sanctioned by the Railway Labor Act were being applied to political uses to which a group of employees objected. The state court concluded that, to the extent the Railway Labor Act permitted the use of agency-shop fees for such purposes, its terms violated the first amendment rights of the objecting employees.¹⁷⁹ The Supreme Court reversed, relying on the familiar canon of statutory interpretation that acts of Congress are to be construed so as to avoid doubt of their constitutionality.¹⁸⁰ The Railway Labor Act's union-shop provisions, the Court stated, were intended by Congress to eliminate the "free-rider" problem.¹⁸¹ The use of funds collected pursuant to such agreements for political purposes does not help to defray costs associated with contract negotiation or administration; hence, it "falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified."¹⁸² The Court thus held that the Railway Labor Act must be construed to deny to unions the authority to use union-shop fees to support political causes to which an employee objects.

The distinction in *Hanson* between a union's political and collective bargaining (ordering) activities¹⁸³ set the stage for the Court's opinion in *Abood v. Detroit Board of Education*,¹⁸⁴ in which it faced squarely the issue it had avoided in *Hanson* and *Street*. The result was a predictable application of the principles the Court had fashioned in the latter opinions, and a good reflection of the influence of the ontologic individualism expressed in first amendment discourse.

At issue in *Abood* was the validity of an agency-shop fee clause in the collective bargaining agreement between a teacher's union and a city's board of education. The clause, specifically permitted by the state's public employee labor relations act,¹⁸⁵ was challenged on first

179. The state courts' findings and holdings are recounted at *Street*, 367 U.S. at 744-46.

180. *Id.* at 749.

181. *Id.* at 761.

182. *Id.* at 768. In his dissent in *Street*, Justice Frankfurter sternly criticized the majority's holding. "The hearings and the debates lend not the slightest support" to the construction the majority placed on the language at issue. As the majority construed it, the amendment "would restrict the uses to which union funds had, at the time of the union-shop amendment, been conventionally put." The absence in the legislative history "of any showing of concern about unions' expenditures in 'political' areas only buttresses the conclusion that Congress intended to leave unions free to do that which unions had been and were doing." *Id.* at 802 (Frankfurter, J., dissenting). Justice Frankfurter also noted that the Labor Act contained specific safeguards for minority rights.

183. In his dissent in *Street*, Justice Frankfurter denounced this distinction as illusory and warned that the Court "would stray beyond its powers were it to erect" such a distinction. *Id.* at 812.

184. 431 U.S. 209 (1977).

185. The statute is set forth *id.* at 212 n.1.

and fourteenth amendment grounds by a number of teachers who alleged that it impermissibly deprived them of their freedom of association. The teachers, nonunion members, objected to collective bargaining in the public sector and to the union's expenditure of agency-shop fees for political purposes.

In *Abood*, the Court discussed and reaffirmed its holding in *Hanson*, as elaborated in *Street*: "such interference as exists" with one's first amendment rights because of an agency-fee arrangement, "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."¹⁸⁶ The Court then observed that the state statute in question was modeled broadly after the labor relations scheme adopted by the National Labor Relations and Railway Labor acts. It concluded that the governmental interests in labor peace and stability of bargaining relationships in the public and private sectors were equal.¹⁸⁷ Declining to distinguish between the two sectors for the purposes of determining the first amendment rights of employees, the Court concluded that *Hanson* and *Street* were controlling insofar as the agency fees were applied toward costs associated with the union's bargaining and contract administration activities.¹⁸⁸

The Court then raised its construction of the Railway Labor Act in *Street* to the level of a constitutional principle. It held that the use of service fees (collected under an agency-shop arrangement between a governmental employer and the union) for political or ideological purposes unrelated to bargaining and if objected to by an employee, constituted a violation of that employee's first and fourteenth amendment rights.¹⁸⁹ The Court frankly admitted that its holding would lead to "difficult problems in drawing lines between" ordering and political activities, but stated that it had no occasion on the record before it to attempt to define this distinction.¹⁹⁰ The Court since has taken up the problems of delineation in its recent opinions in *Ellis v. Railway Clerks*,¹⁹¹ which arose under the terms of the Railway Labor Act, and in *Communications Workers v. Beck*,¹⁹² which in essence extends *Ellis* to situations arising under the National Labor Relations Act. In *Ellis*,

186. *Id.* at 222.

187. *Id.* at 223-24.

188. *Id.* at 224-26.

189. *Id.* at 232-37.

190. *Id.* at 236.

191. 466 U.S. 435 (1984).

192. 108 S. Ct. 2641 (1988). The *Beck* Court compared the proviso to section 8(a)(3) of the National Labor Relations Act (which permits union security agreements) to section 2, Eleventh, of the Railway Labor Act. It concluded that the language of section 8(a)(3) and of section 2, Eleventh, were parallel in their purpose and structure. Consequently, the Court held that the principles of *Street* and *Ellis* controlled the interpretation of the proviso to section 8(a)(3).

the Court ruled that expenses for the union's convention, social activities, and publications were sufficiently related to bargaining activities to permit them to be underwritten by agency fee proceeds. However, expenses for litigation were insufficiently related unless the litigation involved matters arising out of organizing efforts,¹⁹³ grievance and arbitration handling, or negotiations.¹⁹⁴

The agency-shop cases represent well the approach the Court has employed toward cases involving conflicts between the Labor Act's Wagner provisions and first amendment doctrine. In them, the Court has rebuffed all invitations to find the agency-shop provisions unconstitutional, but in so doing it has ever increasingly treated the employee association as a sort of limited liability organization. The Court treats the association—the union—as a threat to individual sovereignty. Since certain individuals themselves have not recognized the authority or the legitimacy of the association formed by their fellows, the opinions have confined the validly sanctionable purposes of the association strictly to activities concerned with enhancing the economic security of employees at the workplace itself. The union, thus, is spoken about and presented simply as an affiliation of otherwise unrelated individuals whose conjoining results from the accident of their employment with the same entity and for whom improvement of their individual economic position is the binding and delimited “interest.”

C. The Language of Individualism and the Court's Foreshortened Views of Unions and the Institution of Collective Bargaining

In the agency-shop cases, the Court has attempted to distinguish between a union's ordering and political activities. By this means, the Court has attempted to resolve the tension between a statute whose goal is to protect individuals through defending and fostering their association, and a first amendment discourse that can comprehend only the individual. The influence of the language of individualism, however, is pervasive and manifests itself in cases well beyond those involving union-shop issues. For example, the vision of the union as a limited liability organization was an important factor in the Court's holding in the *Allied* case. At issue in *Allied*, it should be remembered, was not a challenge posed by dissidents to the association itself, but the legality of a concededly political protest to which the members of the association had agreed. Ignoring the history of the American union movement,¹⁹⁵ the Court found the union's conduct objectionable be-

193. *Ellis*, 466 U.S. at 448-51.

194. *Id.* at 453.

195. For a quick overview of the nature and extent of the involvement of unions in “political” questions, see Justice Frankfurter's dissent in *Machinists v. Street*, 367 U.S. 740, 812-16 (1961).

cause, in its view, such protests were "far removed from what has traditionally been thought to be the realm of legitimate union activity."¹⁹⁶ The Court apparently confined this realm to matters of compensation and the hours of work necessary to obtain it.

A similarly foreshortened view of unions and of collective bargaining is expressed in the Court's opinion in *NLRB v. Gissel Packing Co.*¹⁹⁷ There the Court upheld against first amendment challenge the Board's long-standing interpretation of the Labor Act to permit regulation of employer speech during the course of an employee organizing campaign. Such governmentally imposed restrictions are permissible, the Court explained, because "what is basically at stake [in these situations] is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined."¹⁹⁸ As the *Gissel* Court portrays it, unions represent a typical example of purposive association—just as in *Roberts*, the family represented a paradigmatic example of expressive association.¹⁹⁹ Otherwise unrelated individuals affiliate themselves into a union for one, limited end: to increase their incomes. This economic self-interest bounds the purpose of the union as an institution and represents the limits of its social significance. Like any association, a union constitutes nothing more than a transient alliance.²⁰⁰ However, *Gissel* can be seen as a "pro-bargaining" opinion. After all, it upheld a Labor Board practice that was perceived widely as protecting employee rights to organize.²⁰¹ Nevertheless, the Court's

196. *Longshoremen v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982). It is interesting to compare this statement with one made by the Court in its opinion in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court struck down on first amendment grounds a state statute that prohibited certain types of corporations from expending funds to influence votes on referendum proposals that did not affect materially the business, property or assets of those corporations. In so ruling, the Court stated that "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective business when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment." *Id.* at 785 (emphasis added, footnote omitted). The *Bellotti* Court based its holding largely on the need of the public to hear.

197. 395 U.S. 575 (1969).

198. *Id.* at 617-18.

199. On the *Roberts* case (discussing the nature of the family and association in general), and on the notions of expressive and purposive association, see *supra* text accompanying notes 130-38.

200. On the idea of unions as "communities of memory," see *infra* text accompanying notes 245-47. See also Burke's characterization of association, *supra* text accompanying notes 149-53.

201. For a major empirical study that questions the assumptions on which *Gissel* and the regulation of election speech rests, see J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976). For a further critique of *Gissel* and its policies, see Getman, *supra* note 4.

characterization of bargaining is both revealing and unsettling. Only a decade before, in its landmark *Steelworkers Trilogy*,²⁰² the Court had described the collective bargaining agreement as “more than a contract; it is a generalized code.”²⁰³ The Court also depicted collective bargaining as “an effort to erect a system of industrial self-government” through which the parties’ relationship may be “governed by an agreed-upon rule of law” which the parties would mutually promulgate and administer.²⁰⁴ In less than ten years, collective bargaining had gone from being spoken of as a system for self-governance to being an institution of limited social significance that had nothing whatever to do with lawmaking.

Two things seem to explain the differences in the way that *Gissel* and the *Steelworkers Trilogy* characterize bargaining. *Gissel* entailed a first amendment challenge to a practice that had become a long-established feature of the Labor Act’s administration.²⁰⁵ The *Trilogy*, in contrast, involved a question of statutory interpretation. The Court consistently has gone to great lengths to protect the Labor Act from even the hint of unconstitutionality. Downplaying the significance of bargaining helps the Court to avoid clashes with the first amendment.

The *Gissel* opinion may be tinged with disingenuousness. More to the point, however, the differences between the cases reflect the fact that language has a constitutive influence on its users. During the period that separates *Gissel* from the *Trilogy*—the decade of the 1960s—the use of the language of individualism had become increasingly prominent in first amendment discourse. Language is more than instrumental; no user of a particular language wholly can insulate herself from the habits of thought and understandings of reality that language suggests and ingrains. This is the reason that “all language . . . has its dangers: All languages threaten to take over the mind and to control its operation, with all this implies for one’s feelings, for one’s sense of self, and for the possibilities of meaning in one’s actions and relations.”²⁰⁶ The Court, and the readers of its decisions, are hardly exempted from language’s influence.

202. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

203. *Warrior & Gulf*, 363 U.S. at 578. Likewise, in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), the Court likened the union to a legislature and held that in exercising its lawmaking functions, the union was forbidden to make invidious distinctions based on race.

204. *Warrior & Gulf*, 363 U.S. at 580.

205. For an authoritative review and critique of the Board’s regulation of campaign conduct, see J. GETMAN & B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 35-63 (1988).

206. White, *Thinking About Our Language*, 96 *YALE L.J.* 1960, 1966 (1987) (footnote omitted).

Not surprisingly, the habits of thought that our language of individualism encourage also find expression in labor cases that arise at the sub-constitutional level. Thus, for example, in its landmark *Borg-Warner* opinion,²⁰⁷ the Court construed the Labor Act to contain a distinction between mandatory and permissive bargaining topics, holding that parties legally are required only to bargain over the former. Consequently, the status of a topic depends ultimately upon its characterization by the judiciary. The real significance of this case does not lie in its impact on the identity of the subjects with which the parties deal.²⁰⁸ Rather, this case and its progeny have afforded the Court a means to shape for itself—and for the readers of its opinions—a view about the nature of the Labor Act's lawmaking processes and the types of issues capable of being handled within it. Likewise, these cases have influenced views about the types of concerns about which employee associations appropriately and legitimately may speak. To a large extent then, the *Borg-Warner* line of cases has created a vicious circle in which the Court's understanding about the purposes and functions of unions and collective bargaining is based upon its own characterization of them.

Our individualistic discourse has two further consequences for the way the Court treats unions as well as other associations. As noted, this discourse suggests that associations be viewed as limited purpose alliances. It invites the Court to identify an association's range of purposes and to evaluate the legitimacy of decisions made within the association by judging them against those ends. As a result, the Court has become increasingly involved in the internal affairs of associations like unions. The Court's recent opinion in *Pattern Makers League v. NLRB*²⁰⁹ furnishes a good illustration of this sort of involvement and its ramifications. At issue in *Pattern Makers* was the legality of a provision in a union's constitution that forbade members from resigning while a strike was ongoing or imminent. The provision only bound those who actually had assumed union membership. Persons who were not members, such as the plaintiffs in *Abood*, were not affected. The Court construed the Labor Act to find that such restrictions were illegitimate. As Justice Blackmun stated in his dissent, the Court did so even though the affected workers "freely made the decision to join the union and freely made the promise not to resign at such time, and even though union members democratically made the decision to strike in full awareness of that promise."²¹⁰ The Court's intrusion into the em-

207. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

208. For a graphic explanation of this point, see Feller, *Response*, 11 N.Y.U. Rev. L. & Soc. CHANGE 136, 137-39 (1982-83).

209. 473 U.S. 95 (1985).

210. *Id.* at 117 (Blackmun, J., dissenting). *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), fits the same motif. *Roberts* is discussed *supra* text at notes 141-48.

ployee association has several unfortunate proclivities. The Court's involvement tends to diminish or to preclude altogether the continuance of a conversation within the union, by those directly affected, about what is fair and why. It also removes from members the opportunity to take direct responsibility for the course of action settled upon. It instead imposes a solution formulated by an arm of the state—in this instance, a court—which is both unelected and generally unfamiliar with the problems of the workplace. Such a decision tends to corrode the association. It supplants the institution of collective bargaining as a system of self-governance with an order promulgated primarily by the courts.

Our individualistic discourse has another consequence for the way we conceive of the nature of association. It suggests that associations are artifices that exist only through the sufferance and protection of government. Hence, government becomes the proper judge of the subjects of concern to an association; activities beyond the scope of these concerns are tantamount to being *ultra vires*. They are seen as violating the association's implicit state-granted "charter." Thus, for example, the Court in *Allied* strongly agreed with the First Circuit's view that it is "more rather than less objectionable that a national labor union has chosen to marshall against neutral parties the considerable powers derived by its locals and itself under federal labor laws in aid of a random political objective."²¹¹ Political protests over foreign policy exceeded what the Court viewed as the legitimate scope of a union's concern.

This approach to associations ignores the truth expressed in an observation made long ago by Otto Gierke that many groups preexisted the state and would continue regardless of state sanction or recognition, and thus, it is a mistake to see the state as the only grounds of a group's existence or the appropriate arbiter of its proper concerns.²¹² This point, echoed by Maitland, Maine and others in the common law tradition, is worth remembering. It is especially true of unions, whose early development in this country (and nearly all of whose development in England) occurred without the sanction or the protection of the state, and indeed despite of its antipathy, which so often found expression through the judiciary.

Given this discourse, it is hardly surprising that the Court's efforts to accommodate the Wagner Act's scheme to first amendment doctrine have resulted in distortions. More remarkable, perhaps, is that the

211. *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225-26 (1982).

212. The best-known piece of Gierke's work available in English is his *POLITICAL THEORIES OF THE MIDDLE AGES* (1900) translated by F.W. Maitland, who also wrote for it a justly celebrated introduction. For a brief essay setting forth his theories of groups and the law's response to them, see Gierke, *Das Wesen der menschlichen Verbände* (1902) (translated as *The Nature of Human Associations*, in J. LEWIS, *THE GENOSSENSCHAFT-THEORY OF OTTO VON GIERKE* 139 (1935)).

Court has attempted accommodations at all. Accounting for these efforts is the task of the next section.

V. JUDICIAL DEFERENCE TO THE NATIONAL LABOR RELATIONS ACT: INSTITUTIONAL CAPACITY AND LANGUAGE

At least two factors explain the Court's willingness to grant such wide deference to a statute that in both its Wagner and Taft-Hartley provisions is inconsistent with judicially developed first amendment norms. One is a sensitive recognition of the difficulty in legislating in the field of labor relations. As Clyde Summers observed some time ago, in enacting labor legislation, Congress does "not move by small steps but rather by sporadic leaps."²¹³ Since 1935, only two major amendments to the statute have been enacted, those in 1947 and 1959. In 1974, Congress revised the Labor Act (ironically enough, at the urging of Senator Taft, son of the sponsor of the 1947 amendments) to again include within its coverage the employees of nonprofit health care institutions who had been excluded by the Taft-Hartley amendments.²¹⁴ The following year, however, Congress failed to override the veto of a bill that would have amended section 8(b)(4) to extend the protection to publicize disputes at the worksite to construction workers.²¹⁵ Although hearings on and inquiries into the Labor Act and its administration are a regular feature of the work of the Congress, there have been, with very minor exceptions,²¹⁶ no further changes in the statutes' terms. Given the difficulty of achieving consensus in this area, the Court properly seems most reluctant to jeopardize whatever scheme Congress adopts. The Court's repeated citation to Justice Blackmun's partial concurrence in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*²¹⁷ manifests this hesitancy. Justice Blackmun's willingness to uphold section 8(b)(4)'s ban against peaceful consumer picketing was only because of his reluctance "to hold unconstitutional Congress' striking of the delicate balance between union freedom of

213. Summers, *A Summary Evaluation of the Taft-Hartley Act*, 11 *INDUS. & LAB. REL. REV.* 405, 405 (1958).

214. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395-97 (1974) (codified as amended in scattered sections of 29 U.S.C. §§ 151-69 (1982 & Supp. V 1987)) (the Health-Care Amendments).

215. H.R. 5900, 94th Cong., 1st Sess. (1975). This bill, the so-called common-situs picketing bill, was intended legislatively to overrule the Court's decision in *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), by permitting construction site work-stoppages "directed at any of several employers who are in the construction industry and are jointly engaged as joint-venturers or in the relationship of contractors and subcontractors"

216. For example, an Act of November 8, 1984, Pub. L. No. 98-620, title IV, § 402(31), 98 Stat. 3360 (1984) repealed 29 U.S.C. § 160(i) which provided for expeditious hearings on certain petitions.

217. 447 U.S. 607 (1980).

expression”²¹⁸ and the protection of neutrals that is the provision’s asserted rationale. He further indicated that his vote “should not be read as foreclosing an opposite conclusion where another statutory ban on peaceful picketing, unsupported by equally substantial government interests, is at issue.”²¹⁹ In short, labor is different.

A second factor that explains the Court’s deferential approach to the Labor Act, at least in the face of first amendment challenges, is the problematic character of the statute as a whole. To find any portion of the Labor Act unconstitutional might risk bringing down the statute in its entirety. For example, if the provisions of section 8(b)(4) were found to constitute (as they plainly do in light of prevailing first amendment doctrine) an unconstitutional restriction on union speech rights, would not the restrictions of employer speech in union organizing campaigns, upheld in *Gissel*, be equally suspect? Anxieties about a slippery slope abound, and are manifested in opinions like *Allied* in which the Court lamely asserts, absent explanation, that the statutory restriction of union speech constitutes no infringement of first amendment rights. The Court may well be perplexed over some comprehensive way to think about labor and first amendment issues. It is aware that it treats employee associations differently. Because of the conflicting languages, stories about associations, and notions of the human being that the Labor Act as a whole embodies, the Court has little other choice unless it is prepared to assume completely the role of architect of labor relations schemes. It prudently has resisted fully taking this last step. Certainly, as seen, its intrusion into what is supposed to be a private ordering system has produced sufficiently unhappy results.²²⁰ Their amelioration through further judicial involvement is most unlikely. Nor would the habits and practices of self-government be furthered by the judicial override of the legislative process—even when its product is a piece of legislation as internally inconsistent as the National Labor Relations Act.

The conflict between the Labor Act and the first amendment is more than a doctrinal problem that can be left to the Court for its resolution. Similarly, it stands as more than a question of drafting that can be settled by quick legislative action, or that the more attentive use of language alone can remedy. Rather, the entire matter is representative of a series of complex issues that de Tocqueville described as “mores,” a term which he meant to refer “not only to ‘*moeurs*’ in

218. *Id.* at 617 (Blackmun, J., concurring in part and concurring in result).

219. *Id.* at 618.

220. Spiros Simitis has described this trend as the “juridification of labor relations.” See Simitis, *Juridification of Labor Relations*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW* 113, 122-23 (G. Teubner ed. 1987). For a discussion of the idea of juridification, see Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *id.* at 3.

the strict sense, which might be called the habits of the heart, but also to the different notions possessed by men, the various opinions current among them, and the sum of ideas that shape mental habits.”²²¹ One way to put the question for resolution here is to ask what role association plays in self-governance. To attempt its answer invites serious investigation of the unspoken notions, assumptions, and attitudes that shape and bound our intellectual horizons. It also necessitates inquiring into the extent to which the habits of thought that both mold and are molded by our legal rules and discourse are consistent with setting the conditions for authentic self-governance and individual liberty.

VI. SETTING THE CONDITIONS FOR SELF-RULE: RE-IMAGINING UNIONS, ASSOCIATION AND HUMAN CHARACTER

Individual autonomy is the predominant American ideology. Indeed, for many—and especially for lawyers—the very mention of such evocative terms as liberty, rights or choice almost immediately calls to mind the word individual. As a society, through our legal system, we place a paramount value on protecting and furthering the ability of individuals to decide, judge and choose for themselves. Nevertheless, despite our Whitmanesque emphasis on the “single, separate person” we remain aware, however vaguely, of the importance of community and association to our lives. The *Roberts* Court, for example, recognized the significance of association even as it struggled to come to grips with the meaning of the term. The Court’s difficulty poignantly reflects the ambivalent ideas most Americans hold about community, association and obligation. Manifestations of this ambivalence surround us. Thus, for example, Robert Bellah and his colleagues found that most Americans are unable to express themselves in other than what the authors termed the “first language” of individualism. Consequently, the Bellah group suggests, most Americans have difficulty in articulating the richness of their commitments and their notions about association and community.²²² The two stories the Labor Act tells about the individual and association furnishes a concrete example of this ambivalence—and testifies to the difficulty we encounter in attempting to resolve it. The idea of the person that our discourse (and particularly that our legal discourse) conveys implies that community and individual exist in an unresolvable tension. This discourse tells only part of the story; it leaves us with the distortions that result from having but a partial perspective. While portraying the potential for harm that community can pose to

221. A. DE TOCQUEVILLE, *supra* note 110, at 287.

222. HABITS, *supra* note 12, at 20-21. For further discussion of Bellah’s two languages, see *supra* note 12.

the individual through its shared biases, our discourse tends strongly to conceal the insight that community also grounds and opens the possibilities for the achievement of one's individuality. What appears to be an unanswerable dilemma may instead be the result of having put forth the wrong questions. As Alexander Bickel reminded us, "[n]o answer is what the wrong question begets."²²³ Until we are able to pose different questions, we will remain in a quandary. While we sense the importance of association and fear its loss, we also see association as a threat to our individuality and our ability to choose for ourselves. A start in a more fruitful direction may be to ask what our notion of individualism assumes about the individual and the activity of self-determination.

True individualism has been described as "a rejection of presumptive control from without."²²⁴ A fundamental difficulty with our current individualistic language of choice and freedom—particularly as we employ it in our first amendment discourse—is that it deflects our attention from considering the conditions that nurture and further individual reflection and choice. Yet, self-government, and thereby, individual liberty depend on reflection and choice.²²⁵

A. De Tocqueville's Tyranny of Individualism

Writing in the mid-1830s de Tocqueville observed that the term individualism had been "recently coined to express a new idea."²²⁶ Our parents, he wrote, "only knew about egoism," a condition he described as a passionate and exaggerated love of self which leads people to think of everything in terms of themselves, and to prefer themselves before all others.²²⁷ While egoism springs from blind instinct, the new idea that individualism expresses "is based on misguided judgment rather than depraved feeling," and "due more to inadequate understanding rather than to perversity of heart."²²⁸ In contrast to egoism, individualism "is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself."²²⁹ Individual-

223. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 103 (1962), quoted in J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43 (1980).

224. Weaver, *Two Types of American Individualism*, in *THE SOUTHERN ESSAYS OF RICHARD M. WEAVER* 77, 82 (1987).

225. In the first number of *The Federalist Papers*, Hamilton emphasized that the question facing Americans as they considered the proposed Constitution was this: Can Americans establish "good government from reflection and choice"? If not, "accident and force" would determine the order of their lives.

226. A. DE TOCQUEVILLE, *supra* note 110, at 506.

227. *Id.*

228. *Id.*

229. *Id.*

ism, de Tocqueville observed, originated in democracy and threatened to grow as conditions of democratic social equality spread. Individualism's effect, he forecast, would ingrain in people "the habit of thinking of themselves in isolation" and imagining "that their whole destiny is in their own hands."²³⁰

De Tocqueville warned that such conditions imperil a democracy's existence. Despotism guarantees its continuation through the isolation of its citizens. Although dangerous in all times, despotism is especially to be feared in a democracy because the "vices originating in despotism are precisely those favored" by the conditions democracy promotes.²³¹ Thus, "the two opposites fatally complete and support each other."²³² Democratic individualism "puts men side by side without a common link to hold them firm. Despotism raises barriers to keep them apart. It disposes them not to think of their fellows and turns indifference into a sort of public virtue."²³³

De Tocqueville counseled that the kind of despotism that threatens a modern democracy would be of a different character than the despotism of the past. It would consist of soft tyranny, whose effects "would degrade men rather than torment them."²³⁴ In this kind of deformed democracy, the populace, preoccupied by their own concerns, will pay little attention to, and assume almost no role in, public affairs. Over a people so habituated, government will stand as a protective power.²³⁵ It seemingly will work for the citizenry's happiness by anticipating and providing for their needs, managing and settling their concerns, and ordering their affairs. Such a governmental order daily makes the exercise of individual reflection and choice "less useful and rarer"; little by little it "robs each citizen of the proper use of his own faculties" as it continually extends the reach and scope of its decision-making over matters both great and slight.²³⁶ Intervention of this deformed democratic government into small affairs, de Tocqueville cautioned, is more pernicious than its control over large matters. "Subjection in petty affairs is manifest daily and touches all citizens indiscriminately."²³⁷ It habituates citizens to dependence rather than self-direction. Increasingly, in these circumstances, democracy will come to exist in name only. Citizens will "quit their state of dependence just long enough to choose their masters and then fall back into it."²³⁸ Democracy's core, individual self-direction, will have collapsed.

230. *Id.* at 508.

231. *Id.* at 509-10.

232. *Id.* at 510.

233. *Id.*

234. *Id.* at 691.

235. *Id.* at 692.

236. *Id.*

237. *Id.* at 694.

238. *Id.* at 693.

The malignant effects of individualism on persons and democratic institutions alike, de Tocqueville pointed out, had been neutralized in the United States through the populace's well-ingrained habit of forming themselves into associations. This habit encouraged citizens to accomplish the ends of daily life for themselves, without reliance on government. Associations thus placed control over and responsibility for these affairs directly into the citizenry's hands. Consequently, self-government at both the individual and institutional level was enhanced, and personal autonomy increased. Associations thus acted as schools for democracy, where the habits of self-rule were inculcated and practiced. Because of the importance of association to establishing and maintaining the conditions necessary to personal and political self-rule, de Tocqueville concluded that if people "are to remain civilized or to become civilized, the art of association must develop and improve among them" ²³⁹

B. Unions and Associations as Schools for Democracy

Although our language and the habits of thought that it encourages may conceal the fact from us, unions are the type of association that de Tocqueville described. As institutions, unions can enable citizens to assume control over and responsibility for the order that governs their everyday lives in the workplace and beyond.²⁴⁰ Re-imagining what a union is can lead unions to become more like schools for democracy than some presently are. It also can enhance our views about the nature of association generally. More importantly, it can cause us to reconsider the conditions that foster self-governance.

By providing a forum in which to discuss, deliberate and choose what is to be done about the practical affairs of everyday life, unions can involve people in a conversation about what ought to be valued and why. Such discussions are normative; participation in them engages people in the most distinctly human of activities, reflection and choice. What is so crucial about such conversations is that they require people to decide for themselves the kind of people they will be. Consequently, they engage people in self-rule at both the personal and the institutional

239. *Id.* at 517. On the constitutiveness of the involvement of the citizenry in the activities of self-rule and the manner in which these support democratic institutions, also see de Tocqueville's description of New England township government in *id.* at 61-98.

240. As Derek Bok and John Dunlop point out, unions not only give employees a voice in establishing the order of the workplace. They also furnish "a coordinated and coherent political voice to workers who would otherwise be largely disorganized." Unions thus encourage "the political participation of the poorer segments of society," who traditionally are the most apathetic. D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 425 (1970). On the strength of unions' political power, see R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 191-206 (1984).

level. Participating in decisions about eligibility for promotions and advanced training, health and education benefits, the discipline of fellow employees or the best way to handle a novel employment relations issue may seem insignificant. Certainly, these matters lack the glamour that attaches to Supreme Court deliberations or Congressional debates. But it is a mistake to regard these issues as too mundane for serious attention. As de Tocqueville so clearly understood, individuals and society alike become self-governing only by repeatedly and regularly engaging in acts of self-government. It is the habit that sustains the condition. Thus, a democracy encounters the greatest danger of being perverted when people no longer have direct responsibility for making the day-to-day decisions about the order of their lives.

The importance of the association in establishing the conditions for deliberation and judgment, though frequently overlooked, is crucial. As de Tocqueville so early foresaw, in modern democracies, "public opinion becomes more and more mistress of the world."²⁴¹ Since people have "the same means of knowledge" they think it is reasonable that "truth will be found on the side of the majority."²⁴² Majority opinion—or at least what is asserted to constitute the majority's way of thinking by those who control the mass means of its expression—thus poses a subtle but pernicious threat to the exercise of personal judgment. Because the individual is supplied "with a quantity of ready-made opinions" he may be relieved "of the necessity of forming his own."²⁴³ Associations such as unions can reduce this danger. If it is to be successful, the course of action a union pursues on any matter must reflect the consensus of the "rank and file." As with any group decision, consensus represents the product of a discussion. Involvement in a discussion carries with it the potential for discovering what others actually believe. It thereby challenges the participants to examine and explain the basis for their own opinions. By encouraging people to think and act for themselves, association acts as an inhibitor of the conditions that spawn de Tocqueville's soft tyranny. The mindless adoption of the ready made is always possible. But, it is less likely when people bear direct responsibility for a decision, and must live daily with its results.

Small groups greatly facilitate discussion and deliberation. They make more likely the personal knowledge, friendship and trust among participants that ground the possibility of conversation and consensus. Ideally then, unions should be as small as practicable. Further, negotiations (i.e., the lawmaking process) should occur at the local level. Unfortunately, the impulse of the Taft-Hartley amendments is to push unions and bargaining in the opposite direction. Through its broad and

241. A. DE TOCQUEVILLE, *supra* note 110, at 435.

242. *Id.*

243. *Id.*

undifferentiated ban on secondary activities, the law prohibits small employee associations from calling upon one another for support during labor disputes.²⁴⁴ Nothing in the Court's *DeBartolo II* decision challenges this ban. Since small associations may not call upon one another for support, unions may attempt to increase their economic power by increasing their size. They may also seek to move negotiations away from the local level to one where greater pressure can be brought to bear in times of crises. These alternatives undermine the features of employee associations that most contribute to maintaining conditions that promote self-rule. They also concentrate attention on unions as economic power organizations to the exclusion of the roles they play in fostering a democracy. Thus, the impact of Taft-Hartley is not confined to restricting union communicative activities. The amendments unintentionally create incentives for the growth of large, centralized union organizations, while they corrode the structures that encourage individual reflection and choice.

Unions can aid in inculcating the habits of decision, commitment and direct responsibility that a democracy requires. But, they can make other contributions as well. By functioning as "communities of memory," unions can reduce the personal isolation and indifference that pose a pernicious threat to self-rule.²⁴⁵ A community is a group of socially interdependent people who participate together in discussion and decisionmaking, and who share certain practices that define and support the community.²⁴⁶ Such communities are constituted in part by their pasts. Consequently, for a community to be intelligible to itself and to others, and for it to retain and transmit its meaning, community must become "involved in retelling its story, its constitutive narrative."²⁴⁷ In so doing, a community offers examples of the men and women who have embodied the ideals and meanings about which the community coheres.

244. Whether the law should recognize distinctions in boycotts based on their objectives was part of the debate over the terms of the 1947 Taft-Hartley Act. Representative of one view was President Truman, who in calling for new labor legislation in his 1947 State of the Union address, said:

Not all secondary boycotts are unjustified. We must judge them on the basis of their objectives. For example, boycotts intended to protect wage rates and working conditions should be distinguished from those in furtherance of jurisdictional disputes. The structure of industry sometimes requires unions, as a matter of self-preservation, to extend the conflict beyond a particular employer.

93 CONG. REC. 5292, reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, Vol. II at 1511 (NLRB 1959). For an exchange between Senator Pepper, who supported President Truman's views on differentiating between boycotts, and Senator Taft, who insisted that boycotts are indistinguishable, see 93 CONG. REC. 4321-4327, reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, Vol. II at 1104-14 (NLRB 1959).

245. For a further discussion of this idea, see Habits, *supra* note 12, at 152-55.

246. *See id.* at 333.

247. *Id.*

Our individualistic discourse encourages us to evaluate unions solely in terms of their members' shared financial concerns. Once again, however, our language has shown us only a portion of the picture, and indeed has concealed some of its most important aspects. Unions not only enhance the activities of self-rule, they also provide that "common link" between people necessary to the support of a democracy. This link is supplied in part by involving people in the conversation that informs ordering decisions, but it does not stop there. By recalling to contemporaries the debt they owe to previous generations, unions can remind the present generation of their obligations to those yet to come. Healthy unions also assist in supporting other types of communities—such as families, neighborhoods, religious organizations and civic groups. The same "mores" or habits that support one community are required to maintain the others. These habits of thought and action must be practiced in order to be maintained and understood. Hence, communities are themselves socially interdependent; in the absence of others, no single association or community is likely to flourish or survive, particularly in the circumstances that a modern democracy tends to promote.

C. Human Character and Association

De Tocqueville's emphasis on the importance of association to self-rule parallels themes in classical political philosophy, which insists on understanding humans as situated beings. In contrast to modern political theory, the classical viewpoint cannot conceive of the human, and what is desirable for the human, in the abstract. In its view, humans are intelligible only in relation to those associations that fundamentally condition human existence. Consequently, in the classical tradition, community is prior to the individual. Determinations about political, moral or economic orders, indeed knowledge itself, are possible only through community. In turn, community exists as the outgrowth of a civic or political friendship among a diversified multitude of people. In the classical viewpoint, humans are seen as coming together to satisfy needs and to sustain life. Because of their shared capacity for reflecting, understanding and judging, however, they stay together to achieve a good life, the highest value of which is developing the potential of all for self-rule and authentic freedom. Hence, the goal of community is the common good. In the modern viewpoint, the good strongly tends to be equated with economic well-being and a claim upon resources. As a result, the good in the modern framework typically is thought of as finite and particular. The generation and distribution of the good are primarily problems for economics. In the classical view, in contrast, the good for humans is thought of in terms of the perfection of those

capacities which are the most distinctly human—reflection and choice. Thus, the good is not some finite thing peculiar to a specific individual, but something in which all have the capacity to share in common. A well-ordered society is seen as a partnership, founded upon the aim of achieving the good (and hence, a flourishing) life for all. The full character of this good life, and how best to obtain it, are determined through a conversation, presently and across time, about the sound and the hurtful, the just and the less desirable, in light of real-life problems that exist now and require concrete solutions. This conversation, called by the classics a *civilis conversatio*, is normative. By participating in it, one's authentic human potential is actuated and enhanced. Thus, Aristotle could observe that a person without community "is either a beast or a god."²⁴⁸ In this framework, the properly constituted community represents an irreducible good. To attempt to extract the human from community, to consider the human in the abstract, is nonsensical. The attempt to do so leads to an impoverished and grossly distorted account of what it means to be human. The individual situated in a community constitutes the concrete stuff of social reality, and marks the proper starting point for deliberating about political questions and ordering arrangements.

As seen in this Article, our first amendment discourse—and our discourse generally—now proceeds in a framework that posits a very different view. The human prior to and isolated from community constitutes the starting point for prescribing the character of the legal and political order. Since humans in this viewpoint are conceived as being invested with rights that exist by nature, independently of any social context, the right is prior to the good. Likewise, the good for humans involves no particular conception of a good life. Instead, what is good only reflects a specific individual's taste for a particular object or activity. Association may assist that person in acquiring the desired object or end. But, it is not prerequisite to her understanding the things she desires, since these are peculiar to her. Engaging in a conversation to identify the character of the good or desirable is not only pointless, but impossible. Consequently, association is an artifice. It comes into being only to serve an individual's exigent needs, which are conceived as being primarily economic (i.e., comfortable self-survival) and wholly self-directed. As a result, association is intelligible only in terms of the aggregate of individuals of which it is comprised. It represents no value in itself; any good it has is merely derivative. In this view, community is instrumental and exists only to satisfy some need; associative activities beyond this description simply are unintelligible.

Obviously, there is much that separates our current first amendment discourse from that evoked by the writings of de Tocqueville or

248. ARISTOTLE, *supra* note 129, at 37 (Bk I, ch. 2, 1253a 25-30).

Burke. One of the most prominent differences between these discourses is the view each conveys about the importance of association to individual liberty and self-rule. In the classical viewpoint that Burke and de Tocqueville evoke, community among people is possible only because of the qualities people share in common: their capacities to be free, reasonable and responsible beings. In the classical framework, the unique expression of these common qualities that each person embodies is not denied. Participation in community arouses and enhances the individual's unique potential; it furnishes the means by which humans can become truly self-determining and free individuals. Absent association, the conditions for self-rule and individual autonomy disappear. Our first amendment discourse, in contrast, suggests that community among people is possible only to the most limited degree. Our discourse devalues the capacity of the average person to act reasonably and responsibly. It strongly tends to equate autonomy with isolation and to view insulation from others as the ultimate ground for self-rule.

Ideas do have consequences. Whether we like it or not, we are all philosophers. We constantly employ ideas, however vague and indistinct, about what humans are and what motivates them. This is particularly true for those of us who are lawyers or judges. Our work continuously calls upon us to suggest and to decide the way our lives together as a society should be ordered and conducted. In our work, we have increasingly employed—especially during the past thirty or so years—a first amendment discourse that expresses certain views about the nature of association, self-rule, and the meaning of personhood. This discourse has not been without its effects. It has taught us to view association darkly, through the lens of suspicion. It has encouraged the judiciary to review the determinations arrived at within unions and associations, and to displace those with which it disagrees. Whether intentional or not, the trend of the cases has been the restriction, and ultimately the dissolution, of association. The implicit message of the cases to the public is to rely on the state, and not upon themselves, for arranging the order of daily life. Association, the cases suggest, is too fickle and prone to corruption to be trusted. Most disturbing of all, our discourse implies that people generally lack the capacity to participate in governmental decisionmaking.

Despite the problematic nature of the meanings and consequences of our first amendment discourse, we have subjected it to little critical scrutiny. It is time that we do so. The unthinking adoption of any discourse is dangerous. It makes us subject to, rather than the masters of, the attitudes, assumptions and limits that a language imports to its users. Because of the boundaries imposed by the unexamined use of a discourse, we all too often fail to see the questions that must be answered if we are to understand properly the situations that confront us.

One of the truest observations Rousseau made is that “[f]reedom can be acquired, but never regained.”²⁴⁹ We put much at risk if we fail to pay attention to the conditions that support self-rule. A good place to start our inquiry is to ask what our first amendment discourse assumes about the individual and the activity of reflection and choice on which self-rule depends. Being more attentive to our discourse and its meanings will also help to examine the accuracy of the views it suggests about the character of association, and the contribution it makes to authentic personal autonomy. Most importantly, attention to our first amendment discourse may open a new conversation, with new questions, about the type of people we are and wish to become. The development of a new first amendment discourse, one that can comprehend the individual as associationally situated, promises much fruit.

CONCLUSION

“No science can be more secure than the unconscious metaphysics which it tacitly presupposes,”²⁵⁰ warned Alfred North Whitehead. The science of law is no exception. One of the primary concerns of this Article has been to question whether present first amendment doctrine acts to corrode rather than enhance the conditions that support self-rule. Consequently, it has examined the views about human nature, association, and the activity of self-rule that our first amendment discourse assumes. The Article conducted this inquiry by examining a concrete problem: the tension that exists between first amendment doctrine and the National Labor Relations Act. The Article’s first two sections examined the Court’s recent and seemingly mundane opinion in *DeBartolo II* and discovered it to be a deceptively simple decision. The case is a paradigm of the way the Court has attempted to reconcile the Labor Act’s Taft-Hartley provisions, and the restrictions they impose on union speech, to the conflicting demands of first amendment doctrine. The Article found that *DeBartolo II* restates Taft-Hartley’s restrictions on union appeals to the public as Congress originally intended them. Unions now are permitted to make appeals to the public through any means but picketing. The Article analyzed the ramifications of Taft-Hartley for the way we think about union speech. It considered the significance of *DeBartolo II* for first amendment jurisprudence and the issues the case left unresolved. It concludes that *DeBartolo II* is far from resolving the tensions between the first amendment and the Labor Act’s Taft-Hartley provisions. The Article’s third section examined the cause for the tension that exists between the Labor

249. J.-J. ROUSSEAU, *supra* note 134, at 71 (Bk II, ch.VIII).

250. Quoted as the epigraph to M. MEYERS, *THE SOUL OF MODERN ECONOMIC MAN: IDEAS OF SELF-INTEREST, THOMAS HOBBS TO ADAM SMITH* (1983).

Act's Wagner provisions and the first amendment. It found that the Wagner Act and first amendment doctrine employ different discourses that reflect different understandings of human nature, reason and the character of association. The Article showed how the ideas about association that inform our first amendment discourse are manifested in the way the Court conceives of the nature of the family relationship. It also examined views about the character of association that an alternative discourse suggests. Like the Wagner Act, this alternative discourse is framed in terms that place a high value on association, and sees association as the grounds for self-rule. The Article also found that the Labor Act's Taft-Hartley provisions are framed in the same highly individualistic language that our first amendment discourse employs. This reveals that the National Labor Relations Act essentially is a statute at war with itself. It also explains the different character of the first amendment problems that each portion of the statute presents. The Article's fourth section investigated how the Court has attempted to reconcile the Wagner Act to first amendment doctrine. This section reveals how the individualistic discourse of first amendment doctrine influences the way the Court perceives unions. Emblematic of the tension between the first amendment and the Wagner Act is the latter's exclusivity principle. This principle establishes the union formed by a majority of employees to be the representative of all. The Court has considered the constitutionality of this principle in a series of cases that deal with union security agreements. These agreements require all employees, including dissenters, to pay union dues where such an agreement is in force. The Court consistently has upheld the constitutionality of these statutorily approved agreements, even though it has characterized them as presenting substantial first amendment freedom of association problems. How it has done so reflects the influence of our first amendment discourse.

Consistent with the ideas that inform this discourse, the union-security cases reveal that the Court increasingly has come to perceive of unions as limited purpose affiliations, whose main goal is to increase their members' incomes. Perceiving associations like unions as such limited purpose organizations has invited the Court to evaluate the legitimacy of determinations arrived at within such organizations, and to displace those which are inconsistent with the judicially-identified purpose for an association's existence. Since unions exist to enhance their members' economic well-being, unions may not require those nonmember employees they represent to pay for costs other than those directly pertaining to the unions' collective bargaining activities. This foreshortened notion of the purpose of unions has found expression in cases beyond the union-shop line. The Court's understanding of association has encouraged increasing state intrusion into their internal

affairs. This has the effect of dissolving the association, and displacing it with an organ of the state.

In its fifth section, the Article explained the reasons for the Court's attempt to defer to the terms of National Labor Relations Act even though the statute is inconsistent with first amendment doctrine. The difficulty of legislating in the labor area is one explanation. Further, the Court fears that finding any portion of the Labor Act unconstitutional might risk bringing down the statute as a whole.

The Article closed with an extensive consideration of our first amendment discourse and the problematic character of the views that inform it. The Article considered de Tocqueville's observations about the importance of association to setting the conditions for self-rule. It examined the contributions unions can make as "schools for democracy." The Article observed that de Tocqueville's emphasis on the importance of association to self-rule parallels themes represented in classical political philosophy. It examined these themes, and contrasted them with the ideas that inform our present first amendment discourse. The Article closed by criticizing our unthinking use of first amendment discourse. It warned that this discourse deflects our attention from considering the conditions that nurture and further the individual reflection and choice on which self-government depends. It encourages us to open a new conversation that may lead to the development of a new discourse that can conceive of the importance of association to self-rule and authentic liberty.

The purpose of this Article is not to deny the dangers that associations may pose to dissenters. Nor does it recommend that a simple-minded return to classical political philosophy—or what we conceive it to be—is the solution to our problems. Rather, it has tried to point out the significant problems inherent in our present approach, and to suggest some alternative ways for us to begin to think about how best to secure the conditions for self-rule. It is easy cynically to overlook the role unions can play in establishing and maintaining these conditions. However, as recent events in Poland and Eastern Europe demonstrate, that role indeed can be remarkably powerful.