In the years following World War II, courts began to develop legal rules that regulated the relationship between unions and the workers they represented. These doctrines — the duty of fair representation and the right of exclusive representation, as well as the regulation of union member freedom of expression and union security arrangements — required courts to balance individual rights with the rights of unions. In the immediate post-war period, the courts sacrificed the rights of union members in order to promote the strength of the unions. By the 1960s, however, the courts had reversed themselves, protecting the rights of individual workers, even if it meant weakening organized labor in the process. This change in the judiciary’s attitude was the result of broader changes in post-war intellectual thought. During the 1940s and 1950s, American intellectuals argued that democracy functioned best when government responded to the clash of competing interest groups. By the 1960s, however, thinkers argued that...
interest groups were unrepresentative and that government could never be truly representative if individuals could not participate directly. This intellectual framework provided the courts with the tools necessary to craft specific labor law rules. By the close of the 1960s, those rules, imbued with hostility towards interest groups and faith in participatory democracy, were profoundly disadvantageous to unions and brought about a weakening of the American labor movement.

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This and other cases before us give ground for belief that the labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to be culminating in a victory for labor forces. We appear now to be entering the phase of the struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining.

I.
INTRODUCTION

In 1941 the Brotherhood of Locomotive Firemen and Enginemen demanded that the Louisville and Nashville Railroad Company sign a collective bargaining agreement that prohibited the railroad from promoting African-American workers until at least half of the positions in each job classification were filled by whites. The railroad agreed.

That same year, rival unions battled for the allegiance of workers at a West Virginia clothespin plant. They agreed that all the workers in the plant would join whichever union gained a majority in an election run by the National Labor Relations Board (NLRB). After the election, the victorious union double-crossed the loser, signing a contract with the employer that required him to fire the workers who belonged to its rival.

Early the following year, an Illinois farm equipment manufacturer agreed to negotiate with a union that had been chosen by a majority of its workers as their bargaining representative, but balked at signing a contract that would cancel the individual employment contracts it had made with seventy-five percent of its work force. It suggested that those workers be brought under the collective bargaining agreement after their individual contracts expired. Despite the fact that the individual contracts were quite generous (or perhaps because of that fact), the union refused.

Two years later, in 1944, the National Association of Manufacturers began an intensive campaign to enact right-to-work legislation in California. In response, the American Federation of Radio Artists (AFRA) levied a one-dollar assessment on each of its members to pay for the cost of campaigning against the measure. Dissident AFRA members, led by Cecil B. DeMille, refused to pay, were expelled from the union, and lost their jobs.

4. See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); 42 NLRB 85 (1942).
5. See De Mille Will Quit Rather Than Pay $1, S.F. CHRON., Dec. 4, 1944, at 10. For the sponsors of the right-to-work initiative see OFFICE OF THE SECRETARY OF STATE, STATE OF CALIFORNIA, PROPOSED AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION,
It was these situations that caused Justice Jackson to ruminate about the new era that labor law was entering in the 1940s. With the passage of the Wagner Act in 1935, it seemed as if the right of workers to organize was no longer the central issue of labor law. Industrial relations had become more than simply the conflict between "workers" and "capital." Instead, courts had to settle disputes between workers and unions as well. Schisms within the labor movement and the relationship between workers and their unions suddenly became justiciable issues for the federal judiciary and the newly-created NLRB. It was now the responsibility of the courts and the NLRB to settle conflicts within the labor movement that had long gone on outside the purview of legal institutions.

In fashioning doctrines to address these new problems, Justice Jackson and his colleagues on the Court had to make judgments about the relative importance of groups and individuals in the process of adjusting economic and political conflict. How should judges balance the rights of workers with the rights of the union to which they belonged? This article argues that the post-World War II intellectual environment provided judges with the answer to this question. Indeed, as notions of individual and group rights changed during the post-war period, the doctrines that judges developed to settle disputes between workers and unions — the duty of fair representation and the right of exclusive representation, as well as the regulation of union member freedom of expression and union security agreements — evolved to reflect those changes. During the immediate post-war period, the "phase" to which Justice Jackson referred in Wallace Corporation, American intellectuals conceived of representative government as a group pluralist process. American democracy was sustained by the clash of interest groups that bargained for particular public policy outcomes. Accordingly, the rights of these groups had to be protected, even at the expense of individual liberties. By the 1960s, this conception of policy-making had come under withering attack and was replaced by a participatory/rights-based policy-making ideal. To be truly democratic, American government had to become participatory, involving each individual in the governmental process. It also had to become more concerned with the rights of individuals lest these rights be abridged by a government dominated by unrepresentative interest groups.

These two visions of policy-making produced analogues in labor law. During the 1940s and 1950s, labor law developed in a group pluralist fashion, bolstering the strength of unions, even at the expense of the rights of their members. Beginning in the 1960s, however, this changed. Courts, agencies, and Congress sought to protect the rights of individual workers, even if it meant undermining the strength of labor unions. The benefits that

unions had derived from group pluralist labor law disappeared. It is one of the ironies of post-war liberalism that one of its greatest triumphs — the "rights revolution" — helped to undermine the strength of the labor movement, an institution that was among the progenitors and nurturers of post-war liberalism itself. This article will examine the intellectual and legal changes that created this historical irony.

The first part of this article explores the theory of labor relations prevalent in the immediate post-war period: industrial pluralism. After defining industrial pluralism, I will demonstrate its relationship to the general ideas of interest-group pluralism that dominated the intellectual firmament after the Second World War. The next section examines the effect that group pluralist thought and industrial pluralism had on post-war legal scholarship and, more importantly, on judicial decision-making in the areas of labor law that evolved to regulate disputes between workers and unions. As the theory of interest-group pluralism declined in the early 1960s, labor law changed, reflecting that decline. The final two sections of this article explore these changes, examining the connection between the rise of the participatory/rights-based theory of policy-making and shifts in labor law that undermined the power of labor unions.

II. INDUSTRIAL PLURALISM AND THE THEORY OF POST-WAR POLICY-MAKING

A. Industrial Pluralism

Industrial pluralism had its intellectual origins in the thought of University of Wisconsin economist John R. Commons and several of his students. Writing during the first four decades of the twentieth century, these men developed a coherent theory of industrial relations aimed at promoting industrial peace by lessening what they saw as the imbalance of power between workers and management. Under a series of Progressive governors, Commons was able to put his ideas into effect in Wisconsin and, as a chairman of the United States Industrial Relations Commission, make his voice heard nationally. Similarly, the Depression allowed several of his students, in particular William Leiserson, Harry Millis, and Edwin Witte, to implement these ideas at the national level through their involvement with the Roosevelt Administration.
The goal of industrial pluralist labor theory was to achieve stability in labor relations — to minimize conflict between workers and their employers. "I concede to my radical friends," Commons wrote in 1934, "that my trade-union philosophy always made me a conservative. It is not revolutions and strikes we want, but collective bargaining on something like an organized equilibrium of equality." Thus, industrial pluralist thinkers developed a series of recommendations that they believed would further the interests of workers, managers, and the economy as a whole by promoting industrial peace.

Central to the industrial pluralists' aspirations for labor-management relations was the idea that the workplace be treated as a mini-democracy. Rather than allowing employers to unilaterally run the workplace, workers and managers would run it together as equal citizens of an industrial democracy. Collective bargaining, Commons argued, was "constitutional government in industry." Management and unions would function like the House of Lords and the House of Commons to make legislation to govern the workplace. Leiserson used the same analogy: "joint meetings of employers and union representatives, like the parliament of England, are at the same time constitutional conventions and statute-making legislatures." He also drew connections between industrial governance and what he saw as the United States' democratic heritage: "That labor unionism in the United States is an expression of the American democratic spirit working itself out in industry is hardly to be doubted."

To achieve this sort of industrial democracy, individual workers had to acquire a measure of power equal to that of their employers. The way to do this, industrial pluralists argued, was to form labor unions. Indeed, Com-
mons' major contribution to American social science was the idea that in a complex, industrial society, economic actors, be they workers, investors, or employers, could exercise power only through groups or institutions. The labor union was simply one example of this phenomenon. Thus, according to Commons, the history of trade unionism in the United States was the history of workers gradually coming together to assert economic power so as to make the workplace more democratic. Leiserson also drew an analogy the rise of the labor movement to the increasing democratization of government in general. When workers were completely unorganized, industrial government was a monarchy with the employer as the absolute ruler. As skilled laborers organized, an aristocracy of bosses and craft workers developed. Finally, with the advent of industrial unionism, industrial democracy was born.

Thus, according to the industrial pluralists, group action was a prerequisite for industrial democracy. Only through collectivization could workers achieve the strength necessary to act as equal citizens in the industrial state. Pluralists viewed unions as interest groups, amassing the otherwise atomized power of workers. This emphasis on the necessity of the group caused industrial pluralists to discount the rights of individuals within those groups. As a Progressive during the Lochner era, Commons viewed appeals to individual liberties with suspicion. This was the language of laissez-faire constitutionalism, used by state and federal courts to obstruct reform and, in the minds of Progressives like Commons, to entrench elites by denying the realities of bargaining power in industrialized America. Individual liberty was achieved through group strength. An individual in a union was "supreme but coerced," obtaining liberty through collectively negotiated rights under a bargaining agreement.

Accordingly, Leiserson unapologetically stated that individual trade union members' rights would have to be sacrificed in order to ensure unity and discipline within the union. A worker was free to join a union that represented his particular interests, but once he chose, his individual rights were restricted. In fact, Leiserson questioned whether such rights really existed at all:

15. See Ernst, supra note 7, at 63. See also Gerald G. Somers, Labor, Management, and Social Policy: Essays in the John R. Commons Tradition 9-10 (1963); Harter, supra note 6, at 241-55; Schatz, supra note 6, at 87-89.
16. See generally John R. Commons, The History of Labour in the United States 3-21 (1918) (summarizing the development of unions as political and economic organizations from 1787-1918).
18. See Ernst, supra note 7, at 68. See generally Schatz, supra note 6, at 99-100.
20. Ernst, supra note 7, at 68 (quoting Commons).
21. See Leiserson, supra note 14, at 7-8. See also, William M. Leiserson, Right and Wrong in Labor Relations 45-46 (1938) [hereinafter Leiserson, Right and Wrong].
No individual employees or minority groups of workers sacrifice any legitimate rights when the majority selects and instructs the representatives to bargain collectively regarding matters in which all have a common interest. If the workers are to have any voice at all, it must be exercised through representatives who will negotiate with the management at the time the labor policies and the rules and regulations to govern employees are being formulated. If, on the other hand, individuals or minorities are permitted to bargain separately for themselves, the terms and conditions they accept necessarily have an influential effect on the rest of the employees.22

Industrial democracy without labor unions was impossible, so individual rights had to be ignored in the interest of the group. Leiserson went so far as to say that the rights that individual workers would demand at the expense of organizational unity were not "legitimate rights" at all.

The industrial pluralists' aspirations for the workplace — that it would become a self-governing entity, regulated by bargaining among industrial interest groups — dictated a minimal role for federal and state governments in labor relations. The government was to encourage and promote collective bargaining, but to avoid direct intervention in industrial disputes. Its role was to respond to the desires of the interest groups that participated in the governance of the workplace, to enforce the bargains at which they arrived.23 The government was also to ensure the procedural regularity of the bargaining process, but was never to dictate the terms of the agreement.24 By limiting the government's role in this manner, industrial pluralist thinkers believed they were leaving labor relations to those who understood the peculiarities of a particular work environment. Doing so would make the entire process seem more legitimate. "If the arbitrator or judge has only his sense of justice to guide him, this kind of arbitration may well be distrusted and condemned; for it is government by men and not by law . . . ."25 Instead, the arbitrator could avoid this administrative arrogance by being "bound by the trade agreement or the law made by the workers or employers themselves."26 He would thus avoid the authoritarian overtones that came with governmental administration and would instead reinforce the legitimacy of the outcome. "[H]is decisions will represent not his own personal ideas of what is fair and just, but the sense of justice of the management and the workers in the industry, as embodied in the laws which they have jointly enacted."27

Accordingly, industrial pluralists believed that the government should confine itself to applying the terms of the contract and should avoid inserting its opinion. Its actions should reflect the desires of the "voters" (that

22. LEISERSON, RIGHT AND WRONG, supra note 21, at 47-49.
23. See Ernst, supra note 7, at 67.
24. For Commons' hostility to compulsory arbitration see COMMONS, supra note 9, at 67.
25. Leiserson, supra note 17, at 64.
26. Id.
27. Id. at 64.
is, the parties to the contract) and not attempt to prescribe what was best for them. There was no reason to assume, Leiserson wrote, that governmental actors, be they arbitrators, judges, or administrative agencies, would be "any wiser or more capable" of resolving contentious issues than the parties to the contract.28 The main function of government was to ensure that the democratic processes within the industrial democracy worked smoothly. The state could create a legal obligation to confer and ensure that the parties bargained in good faith,29 but any further compulsion by the government simply did not work. In fact, it "stimulate[d] rather than settle[d] labor disputes."30 At most, the government should use its powers to "persuad[e] the parties to agreement."31

Thus, industrial pluralism had four main tenets: First, the workplace was analogized to a polity governed by a collective bargaining agreement that served as a constitution, a document that established rules of governance for the polity. Second, both the process of drafting this constitution and the process of living under it (drafting legislation, if you will) were carried out through the clash of interest groups representing the desires of management and various groups of workers. Third, the rights of individual workers were given short shrift because the only way they could achieve power that matched that of their employer was by collectivizing. Finally, industrial pluralism minimized the role of the actual state in governing the workplace. Once the various interest groups hammered out the constitution that was to govern the shop floor, the job of the state was limited to ensuring that the citizens of the industrial state followed the agreed-upon constitution. The state was supposed to be responsive, not prescriptive — implementing compromises, not dictating results.

B. Industrial Pluralism and Post-War Policy-Making

In the years between the First and Second World Wars, industrial pluralism had limited impact on policy-making at the national level. Conservative politicians had no interest in a vision of labor relations that suggested that the power of workers and employers should be equalized in order to promote fairer bargaining. Indeed, from the end of World War I to the beginning of the Great Depression, a laissez-faire ideology that focused on the sanctity of the individual’s right to contract was in its ascendancy.32 Additionally, Progressive reformers of the 1920s, the main critics of this

28. LEISERSON, RIGHT AND WRONG, supra note 21, at 74.
29. See id. at 78-79.
30. Id. at 81.
31. Id.
laissez-faire conception of labor relations, were unsympathetic to the voluntarist strand of industrial pluralist thought, preferring a greater role for a technocratic state.\textsuperscript{33} Even after the Depression and the advent of the New Deal, industrial pluralist thought was marginalized by the more prescriptive preferences of the Roosevelt Administration.\textsuperscript{34} However, by the end of the 1930s the political and intellectual climate had become much more hospitable to industrial pluralism.

By 1939 the NLRB was in the midst of a crisis of legitimacy. The American Federation of Labor (AFL) was pressuring the Roosevelt Administration to replace several board members whom it considered to be biased in favor of the Congress of Industrial Organizations (CIO).\textsuperscript{35} At the same time, the Board was under continuous attack by conservative interest groups and politicians who added allegations of communist subversion to their long list of objections to the Board’s very being.\textsuperscript{36} Additionally, the Board was plagued by institutional problems such as soaring case loads and tensions between Washington and the regional offices brought about by unreasonable prosecutorial demands from the Board’s Secretary, Nathan Witt.\textsuperscript{37}

The AFL’s attacks turned out to be particularly effective in advancing the cause of industrial pluralism at the Board. The AFL’s objections centered around the Board’s tendency in the late 1930s to authorize the CIO as the bargaining agent for an entire workplace rather than allowing the AFL to carve out separate bargaining units for groups of craft workers, even if these workers had traditionally bargained with their employer as a group. Thus, an industrial pluralist conception of labor relations, with its explicit recognition of the shop floor as a place populated by different interest groups, was appealing to the AFL. Similarly, the AFL favored the pluralists’ voluntarism, which rejected the forced agglomeration of all the workers into a single unit by state fiat, endorsing instead the pre-existing separate units agreed upon by the employers and the AFL. Thus, it was not surprising when, in an attempt to mollify the AFL, Roosevelt appointed two

\begin{thebibliography}{9}
\bibitem{35} See Tomlins, \textit{supra} note 34, at 29-31.
\bibitem{36} See Melvyn Dubofsky, \textit{The State and Labor in Modern America} 152-62 (1994).
\bibitem{37} See Tomlins, \textit{supra} note 8, at 200-203.
\end{thebibliography}
committed industrial pluralists (and Commons protégés), William Leiserson and Harry Millis, to the Board in 1939 and 1940.38

In addition, in the late 1930s events in Europe changed the way that American intellectuals viewed government, producing a sympathetic intellectual climate for industrial pluralism. The successes of European totalitarianism forced American thinkers to distinguish American politics and culture from the European variants that seemed to act as a seed bed for fascism and Stalinism.39 Many thinkers of the time suggested that America’s cultural and political pluralism, as well as the presence of diverse interest groups, prevented the flourishing of so-called “alien,” totalitarian ideologies on this side of the Atlantic.40 American intellectuals began their two decade-long love affair with what Amherst College political scientist Earl Latham called “the group basis of politics.”41 According to this view, stable, non-ideological democracy was the product of the peaceful clash of interest groups.

Several leading political scientists of the post-war period defined American democracy as a product of interest group interactions. Like Latham, David Truman, Robert Dahl, and V.O. Key each argued that interest groups were the primary method for organizing individual desires and transmitting them to the government.42 The government would then respond to the clashes of these interest groups, implementing the compromises at which they arrived.43 Latham put it this way: “The legislature referees the group struggle, ratifies the victories of the successful coalitions, and records the terms of the surrenders, compromises, and conquests in the form of statutes.”44 Thus, democratic politics were driven by interest group interactions, with the government as a passive agent, responding to their desires.

38. See generally Tomlins, supra note 34, at 29-34 (exploring the connection between the AFL’s objections to the Board and industrial pluralism). See also Dubofsky, supra note 36, at 146-57; Gross, supra note 7, at 89-91, 226-29.


43. See Dahl, supra note 42, at 145-46; Key, supra note 42, at 198; Truman, supra note 42, at 506.

44. Latham, supra note 41, at 35. See also Key, supra note 42, at 224.
Echoing contemporary political scientists, many intellectuals believed that even the crassest pressure group served a valuable function in the republic.\textsuperscript{45} The idea of the benefits of opposing factions, as enunciated in Madison's \textit{The Federalist No. 10}, appeared again and again in post-New Deal political thought.\textsuperscript{46} One of the earliest articulations of this theory was in John Chamberlain's widely and positively reviewed book \textit{The American Stakes} (1940).\textsuperscript{47} For Chamberlain, the state barely had an identity independent from the interest groups that made demands upon it. It was merely a broker, "the reflex of an adjustment of power groups."\textsuperscript{48} Politics, he wrote, was "the right of various groups to struggle for a shot at using the fulcrum of the State."\textsuperscript{49} Interest groups thus made democracy work; they were its basic building blocks:

Indeed, the pressure group, far from being the loathsome thing that it is commonly accounted by the philosophical idealist, is absolutely necessary to the functioning of an industrial democracy. The pressure group has long since become the new democratic unit, the corporate age's analogue to the individual freeholder of Jeffersonian times. No Good of the Whole can be considered fairly representative unless it is the result of compromising the demands of the various pressure groups, which may be described as the watchdogs of democracy.\textsuperscript{50}

Chamberlain's better-known contemporaries, Daniel Bell, Seymour Martin Lipset, and John Kenneth Galbraith, agreed. The diversity of interest groups was what kept extremism out of American politics. Individuals belonged to too many groups to be considered simply members of a "class."\textsuperscript{51} Instead, politics was fluid, with people endorsing a variety of groups and moving back and forth among them. "The growing complexity of society necessarily multiplies . . . interests, regional or functional, and in

\textsuperscript{45} Public adulation for political pressure groups was never as widespread as for other, non-political, groups. \textit{But see} KARL SCHIFFGIESSER, \textit{THE LOBBYISTS: THE ART AND BUSINESS OF INFLUENCING LAWMAKERS} 225 (1951) (arguing that "the present system of pressure politics has assumed extraordinary proportions in recent years and is now assumed to be not an evil but an important and necessary ingredient of democracy.").

\textsuperscript{46} In 1951 Douglas Adair wrote a brilliant piece on the rediscovery of Federalist 10 by Progressive historians in the first decade of the twentieth century. \textit{See The Tenth Federalist Revisited}, 8 Wm. & Mary Q. 48 (3rd ser., 1951). Adair's thesis was that Charles Beard misused Federalist 10 when he took portions of it out of context to further his own ideological ends — namely to prove that the framers were aware of class antagonisms when they were drafting the Constitution. \textit{See id.} at 49. Adair's goal, after debunking Beard's interpretation, was to resurrect Madison's reputation as a political theorist. In doing so he was implicitly endorsing the relevance of Madison's conception of counterbalancing factions to the present time.

\textsuperscript{47} For examples of positive reviews of Chamberlain's book, see R.L. Duffus, \textit{American Hopes for the Future}, N.Y. TIMES, Mar. 17, 1940, § 6 (Book Review) at 2; Clifton Fadiman, \textit{Hello to Reform}, NEW YORKER, Mar. 16, 1940, at 93; Max Lerner, \textit{The Broker State}, NEW REPUBLIC, Apr. 8, 1940, at 477; I.F. Stone, \textit{Hello to Reform}, NATION, Mar. 23, 1940.

\textsuperscript{48} \textit{JOHN CHAMBERLAIN, THE AMERICAN STAKES} 27 (1940).

\textsuperscript{49} \textit{Id.} at 32.

\textsuperscript{50} \textit{Id.} at 28.

\textsuperscript{51} \textit{See DANIEL BELL, THE END OF IDEOLOGY} 61 (1960).
an open society the political arena . . . is a place where different interests fight it out for advantage." Divided loyalties reduced the "emotion and aggressiveness involved in political choice," thereby promoting stable democracy. The same was true in the economic arena. What made American capitalism work, Galbraith wrote in *American Capitalism: the Concept of Countervailing Power* (1952), was not competition among producers but the countervailing demands of different economic actors such as industrial producers, labor unions, consumers, and farmers. By forming into groups based upon economic interests, individuals would promote societal stability and economic prosperity by ensuring that all economic relationships involved bargaining among groups of equal strength.

In this intellectual environment, industrial pluralism flourished. In the post-war period, ideas that industrial pluralist thinkers had been articulating since the turn of the century — creating stable industrial relations through the clash of interest groups, a responsive state implementing the compromises fashioned by private actors — were being used to describe politics as a whole. Industrial pluralism was an attempt to apply to the workplace principles that post-war thinkers believed were responsible for the success of American democracy and its exceptional resistance to totalitarian ideologies. Industrial pluralism was simply interest-group pluralism for the shop floor. Since group pluralism had proven so successful, surely industrial pluralism was a worthwhile aspiration, if not an inevitability.

C. Pluralist Theory and the Legal Academy

With interest-group pluralism dominating the post-war intellectual milieu, it is not surprising that legal thinkers adopted group pluralist ideas and applied them directly to legal doctrines. In particular, interest-group pluralism affected the manner in which legal theorists thought about the proper role for the judiciary in the governmental process. However, individual thinkers applied the precepts of interest-group pluralism in divergent ways. For some, interest-group pluralism dictated a minimal role for the courts. For others, it required courts to buttress the group pluralist process by ac-

52. *Id.* at 60.

53. *Seymour Martin Lipset, The Political Man* 88, 200-19 (1960). Intellectuals and social critics were not the only ones praising pressure groups after World War II. Remarkably, during the post-war period, even politicians were able to speak highly of interest groups. Obviously politicians condemned their abuses (bribery and corruption, for example) but for the most part they viewed interest groups as an integral part of the functioning of government and defended them to the public as such. *See, e.g.*, John F. Kennedy, *To Keep the Lobbyist Within Bounds*, *N.Y. Times*, February 19, 1956, § 6 (Magazine) at 42; Robert M. LaFollette Jr., *Some Lobbies Are Good*, *N.Y. Times*, May 16, 1948, § 6 (Magazine) at 15.


55. *See id.* at 146-53.
tively protecting the rights of interest groups. An example of the former were the so-called "Process Theorists." 56

Legal academics, such as Alexander Bickel, Herbert Wechsler, Harry Wellington, Albert Sacks, and Henry Hart, focused their attention on the processes of government. In particular, they were concerned that each branch of government undertake the tasks for which it was best suited. Thus, choices among policy preferences were best left to the politically responsive legislature. 57 The judiciary, on the other hand, had the "leisure, training and intuition" to determine the society's "enduring values" and to ferret out "neutral principles" upon which legislation should be judged. 58 Legislatures were not to be left completely alone in formulating policy. 59

This is not to say that process theorists had a luxuriant vision of judicial review. On the contrary, their pluralist outlook on policy-making led them to adopt a very deferential attitude towards the decisions of the legislature, the ultimate responsive organ in a pluralist conception of government. Bickel's "Passive Virtues," his famous Foreword to the Harvard Law Review's analysis of the Supreme Court's 1960 term, illustrated this point. 60 In "Passive Virtues," Bickel argued that the Supreme Court should use a variety of procedural devices, such as standing, mootness and the political question doctrine, to avoid rendering decisions on the merits in cases where such a determination would invade the prerogatives of the legislature. 61 Instead, the Court should use "the process of avoidance and admonition" to inform the legislature that the statute in question was constitutionally problematic and force it to make difficult policy decisions knowing that fact. 62 Essentially, Bickel would have had the Court lecture the legislature, hoping that the latter would adjust its behavior accordingly. 63 He suggested that this would make the pluralist process function more smoothly by ensuring that the political branches did what they were


58. Alexander Bickel, The Least Dangerous Branch 24-26 (1962); Wechsler, supra note 57, at 1.

59. See Wechsler, supra note 57, at 2-10; Bickel, supra note 58, at 23-33. It is worth noting in this regard that the major proponents of Process Theory, with the exception of Wechsler, defended the Brown decision. See William N. Eskridge, Jr. and Philip P. Frickey, The Making of the Legal Process 107 Harv. L. Rev. 2050 n.115 (1994).


61. See id. at 79.

62. See id. at 67.

63. See id. at 77.
supposed to do: make substantive policy choices with full knowledge of
the consequences. If one role of the Court, as envisioned by the process theorists, was to
be the kindly professor instructing the impatient student that was Congress,
Bickel's Yale colleague Harry Wellington articulated another role, again
fully consistent with the pluralist assumptions of the 1950s: The judiciary
was to police the legislative process to ensure that certain groups, particu-
larly African-Americans, were not unfairly excluded. Wellington discussed
this "representation-reinforcing" function of the judiciary in a 1961 article
that addressed the issue of whether acts undertaken by labor unions pursu-
ant to the National Labor Relations Act should constitute state action, thus
bringing unions under the restrictions of the Fourteenth Amendment.
Wellington argued against the extension of state action, stating that Con-
gress was "more capable institutionally of dealing with" the issues implic-
cated by the application of the Fourteenth Amendment to labor unions than
were the courts. These issues, such as whether unions should be able to
restrict the speech of members, involved policy choices that were best made
by the political branches of the government. Because the people who
would benefit by the application of the Bill of Rights to unions — workers
who had some disagreement with the union leadership — "receive[d] ade-
quate representation in Congress," there was no reason for courts to inter-
vene. With respect to African-American workers, however, Wellington
could rationalize judicial intervention. The interests of black workers, he
wrote, were not represented in Congress. Thus, while Congress could
vindicate the rights of white workers whose freedom of speech had been
restricted by unions, it could not protect the right of African-American
workers not to be excluded from unions. It was when the pluralist process
broke down that Wellington thought it appropriate for the courts to inter-
vene. Thus, for process theorists, the judiciary was supposed to guide the
legislative process. It was to inform the legislature when it was making

64. See Alexander Bickel and Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 34-35 (1957) ("The point after all is to ask Congress for sober reconsideration, leaving to Congress the last word. . . . A candid avowal that a matter the implications of which Congress failed to see is being sent back for a second reading, so to speak, is . . . compatible with due respect for the peculiar powers and competences of both institutions.").
65. This is a contemporary term. See John Hart Ely, Democracy and Distrust 87, 135-79 (1980).
67. Id. at 366.
68. See id. at 366-69.
69. Id. at 367.
70. See id. at 372.
71. See id.
72. See id.
unwise decisions and to ensure that the policy-making process excluded no one. Yet it should avoid making substantive policy choices. Also, the judiciary should attempt to guarantee the fairness of the legislative process by ensuring that all of the members of the polity were included. As a last resort, the Supreme Court could strike down legislation, but only in the name of widely held values; values, in other words, that were majoritarian and pluralist, that were based on what most people in the society desired in the long run. Thus, for post-war legal theorists, the judiciary should serve as a buttress for the pluralist process, strengthening the ability of the political branches to respond to the desires of their constituencies.

There was, however, another strand of post-war legal thought that suggested that courts should more actively support interest-group pluralism. These scholars sought to fit the legal system within a group pluralist notion of the policy-making process. They were interested in examining how the judiciary coped with the increasing importance of interest groups in American politics. Scholars such as Mark DeWolfe Howe, Robert Horn, and Thomas Cowan suggested ways to adapt legal doctrines to promote interest-group pluralism.

In his Foreword to the Harvard Law Review’s analysis of the Supreme Court’s 1952 Term, Mark DeWolfe Howe, a professor at Harvard Law School, suggested that the Supreme Court was beginning to recognize that “private groups” have “sovereign authority” and that, accordingly, “an association of men has liberties different from those of the persons constituting the association . . . .”73 Howe tentatively endorsed this recognition. He summarized the holding in a 1952 Supreme Court case that seemed to recognize the special group rights of members of a particular religion,74 and then suggested that there were “large advantages in extending [rights] to other groups . . . .”75 In particular, Howe had in mind protecting the rights of “Negroes considered as a group.”76

Younger scholars took Howe’s tentative suggestion and turned it into a full-fledged clarion call for the legal recognition of “group rights.” Writing in 1956, Stanford University political scientist Robert Horn argued that, under the guise of enforcing individual rights, the Supreme Court had taken to buttressing the power of organized interest groups.77 He applauded this trend, encouraging the Court to explicitly recognize the importance of groups to the American polity by protecting them both from government interference and from the atomistic tendencies of individuals who claimed

75. Howe, supra note 73, at 94.
76. Howe, supra note 73, at 94.
77. See ROBERT A. HORN, GROUPS AND THE CONSTITUTION (1956).
rights against a group. Two years later, Rutgers' law professor Thomas Cowan undertook a similar analysis of private law and administrative law. He castigated the American judiciary for adhering to a conception of the law that recognized individual and societal interests, but ignored the fact that "[m]odern life is lived associatively. The new democracy is an aggregation of sub-groups, not primarily of individuals."

Many other legal scholars studied group interests during the post-war period. Glenn Abernathy and David Fellman followed Horn's lead and published detailed studies of the constitutionalization of the right of association. Cowan authored a study of the group interests at stake in the administration of the Social Security Act, while others analyzed labor law, tax law, food law, contract law, civil rights law, conflict of laws, tort law, trade regulation, and planning from the perspective of group interests. Clement Vose, Jack Peltason, and Victor Rosenblum examined how litigation itself reflected the clash of interest groups. Even a process theorist like Wellington explicitly stated that courts needed to ensure that groups wrongfully excluded from the legislative process had their interests represented. In *The Least Dangerous Branch*, Bickel used interest-group

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78. See id. at 155-69.
80. Id. at 331.
93. See Wellington, supra note 66, at 372-74 (justifying the Supreme Court's decision that labor unions cannot exclude African-Americans from membership). See also Robert G. McCloskey, *Fore-
theory to justify judicial review. He suggested that since Dahl's and Truman's studies of interest groups indicated that institutions other than the legislature could be "responsive to the needs and wishes of the governed [then] one may infer that judicial review, although not responsible, may have ways of being . . . responsive."  

This was the intellectual environment in which post-war labor law developed. There was a commitment to fashioning a role for the judiciary that was consistent with the group pluralist assumptions of the time. For different scholars, crafting a group pluralist judicial role meant different things: judicial passivity, representation reinforcement, protection of group rights. When it came time for courts to actually decide cases, judges used these various strands of pluralist thought to fashion opinions. Labor law, in particular, was shaped by the group pluralist assumptions of the time.

III. INDUSTRIAL PLURALIST LABOR LAW AND THE STRENGTHENING OF UNIONS

Though interest group pluralist and industrial pluralist thought are embedded in the rather rarefied atmosphere of post-war intellectual history, each had a profound effect on labor law. The Supreme Court and the NLRB were hardly immune to the post-war adulation of the interest group and the concomitant boost this enthusiasm gave to industrial pluralism. Accordingly, they took the ideas of industrial pluralism and put them into practice, crafting legal rules based on industrial pluralist premises. This process, many contemporary labor law scholars argue, undermined the strength of labor unions.  

The problem with industrial pluralism, these theorists argue, was that its basic premises — that workers benefitted from stable labor relations, that labor/management relations were essentially a private affair based upon the equal bargaining power of each side, and that the government's only role was to promote optimal conditions for bargaining — were profoundly disadvantageous to unions. Bargaining power was not equal. Workers always had less. As such, the only way to guarantee fair bargains was for the government to weigh in on the side of labor rather than for it to remain an allegedly neutral arbiter. Thus, industrial pluralism was an iron fist inside a

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word: The Reapportionment Case, 76 Harv. L. Rev. 54, 73 (1961) (suggesting that courts allow legislatures to consider geographic and economic minorities when redistricting legislative districts).

94. BICKEL, supra note 58, at 19.

velvet glove: an appealing vision of labor relations that took advantage of Americans’ acceptance of pluralist ideology in order to impose a regime of industrial relations that in fact undermined labor’s strength.\footnote{96}{This theory is, of course, not without its dissenters. Some labor historians and labor law theorists do not deny the existence of industrial pluralism but reject the idea that it had such a deleterious effect on the labor movement. Matthew Finkin, for example, questions whether courts were affected by the thought of a small number of labor-law theorists, whose views he characterizes as unrepresentative. See Matthew W. Finkin, Revisionism in Labor Law, 43 Md. L. Rev. 23, 54-63 (1984). Others argue that industrial pluralism, far from lulling workers into a non-adversarial relationship with employers, has instead fostered industrial strife. See James T. Carney, In Defense of Industrial Pluralism, 87 Dick. L.Rev. 263 (1983). Some labor historians have offered more nuanced critiques of the deradicalization thesis. Melvyn Dubofsky, Robert Zieger, Leon Fink, and George Lovell have each described labor’s ongoing relationship with the state in more nuanced terms. See generally Melvyn Dubofsky, The State and Labor in Modern America (1994); Robert Zieger, The CIO, 1935-1955 (1995); Leon Fink, Labor, Liberty, and the Law: Trade Unionism and the Problem of American Constitutional Order, 74 J. OF AMER. HIST. 904 (1987); George Lovell, The Ambiguities of Labor’s Legislative Reforms in New York State in the Late Nineteenth Century, 8 STUD. IN AMER. POL. DEV. 81 (1994). According to these thinkers, the power of labor was more directly tied to politics. There was no anti-statist ideology at work. Instead, during periods of amicable state/labor relations, such as the New Deal or the Johnson administration, unions were able to use both politics and collective bargaining to gain substantial benefits to workers. During less sympathetic political times, labor’s ability to do so decreased.

This article responds to Finkin’s critique by demonstrating that industrial pluralism was a part of a much broader movement in post-war intellectual thought, not just limited to a few labor-law scholars. On the other hand, I have a little more sympathy with Dubofsky, et al. Indeed, this article takes a page from their historiography, suggesting that, during the 1950s, group pluralist thought caused the judiciary to make decisions that were quite advantageous to labor. However, I reject their political instrumentalism. The irony that underlies my story — that the ascendency of liberal, rights-based thought in the 1960s weakened the labor movement — suggests that even in a political climate that was sympathetic to organized labor, state institutions were driven by ideologies antithetical to its interests.}

For example, by analogizing the workplace to a mini-democracy, industrial pluralism served as a justification for limiting the economic weapons that unions could bring to bear on employers. Collective bargaining and arbitration, with their emphasis on industrial stability, became staples of industrial pluralist jurisprudence even though union strength flowed from labor’s ability to create disorder through picketing, strikes, and other interruptions of production.\footnote{97}{See Klare, supra note 95, at 318-25; Stone, supra note 95, at 1526-31, 1565.}

Similarly, the courts and the Board resorted to the political analogy when crafting rules governing representation elections even though these rules resulted in an election process that profoundly disadvantaged unions. The conventional political process requires both sides to freely espouse their positions. Accordingly, the Board regulates campaign speech in a unionization election as little as possible. Yet, the analogy, these theorists argue, is inapposite.\footnote{98}{See Craig Becker, Democracy in the Workplace: Union Representation Election and Federal Labor Law, 77 Minn. L.Rev. 495 (1993).}

In what conventional election does one side have economic control over the voters, or the power to force them to listen to campaign propaganda?\footnote{99}{See id. at 532-61.}

Industrial pluralism’s emphasis on the importance of interest groups, these scholars suggest, has also undermined the contemporary labor move-
ment. Legal historian Chris Tomlins argues that industrial pluralist thought was used by the NLRB to approve bargaining units that weakened broad-based industrial unionism in favor of more sectarian, and presumably less radical, craft unionism. Industrial pluralism's voluntarist premises have also been accused of betraying the Wagner Act's promise of equalizing bargaining power between workers and employers. Courts repeatedly used voluntarist language to avoid reviewing results that emerged from the arbitration and the collective bargaining processes even if those results were corrupted by gross imbalances of bargaining power. Additionally, industrial pluralism seemed to encourage unions to bargain away rights granted to workers under the Act.

If all these legal disabilities brought about by a judicial and administrative commitment to industrial pluralism were not bad enough, what is most galling to scholars who subscribe to this view of labor law's "deradicalization" is that the labor movement offered little resistance to its implementation. These legal rules, based on industrial pluralist premises, were not created by labor's traditional enemies. Instead, they reflected a vision of industrial democracy subscribed to by liberal labor reformers from John Commons to Archibald Cox. Unions themselves applauded a regime that seemed to guarantee them a place at the bargaining table and, in the decades following World War II, steadily increasing wages and benefits. Indeed, industrial pluralism was in line not only with a voluntarist labor strategy that had its roots before World War I; it also harmonized with many basic values of American democracy, such as self-determination, limited government, and Madisonian liberal-group pluralism.

Thus, much historical scholarship about labor law has argued that, in the guise of industrial pluralism, an interest group pluralist conception of policy-making weakened the labor movement. It gave judicial sanction to the fiction of equal bargaining power between workers and their bosses; it

101. See Stone, supra note 95, at 1531-40; Klare, supra note 95, at 318-36.
103. See Stone, supra note 95, at 1514-16, 1516 n.29.
106. For a discussion of the deradicalizing effect of post-war political ideology on labor unions see Gary Gerstle, Working Class Americanism 278-318.
limited the types of issues that unions and management bargained over; and it depoliticized unions, causing them to focus their energies on the circumscribed politics of the "democratic" workplace, rather than the actual politics of post-war America.

While the deradicalization theorists have amassed many cases that use industrial pluralist thought, their argument lacks a basis in the broader intellectual context of the post-war period. They do not explore the relationship between the legal doctrines they describe and the political culture of the post-war years. In particular, they do not explain why so many "sober-minded" labor lawyers and theorists with liberal credentials accepted industrial pluralism despite its flawed assumptions about bargaining power. As we have seen, an examination of industrial pluralism's intellectual context answers this question. Industrial pluralism was so powerful because of its relationship to the dominant, post-war view of how politics worked: interest-group pluralism. This discovery boosts the deradicalization theorist's argument, explaining the widespread acceptance of industrial pluralism.

However, the case law in certain areas of labor law that were profoundly affected by group pluralist premises also reveals a flaw in the deradicalization theorists' argument: unions sometimes benefitted from decisions that were influenced by group pluralist conceptions of policymaking. As group pluralist ideas made their way into post-war case law, they led to doctrines that helped unions control the atomistic tendencies of their members and resist legislative attempts to prevent unions from participating in the political process. Confronted with situations where courts had to weigh the interests of individuals against those of a union, they favored the latter. In order to maintain the strength of interest groups, they ensured that the rights of individuals would not hamper the ability of the larger group — the union — to carry out the economic and political functions that group pluralist thinking assumed only large entities could. This tendency was most noticeable in three areas of labor law that regulated the interaction between unions and their members: the doctrine of exclusive representation, the duty of fair representation, and the regulation of union and union-member freedom of speech.

A. Exclusive Representation

J.I. Case Co. v. NLRB, decided by the Supreme Court in 1944, involved a dispute between the CIO union that represented workers at the J.I. Case plant and several members of the union. In mid-1941, before the union had organized the plant, J.I. Case signed individual contracts with

seventy-five percent of its work force. The NLRB held that these contracts were not coerced or signed as a result of an unfair labor practice. Six months later, after the CIO had been elected to represent the workers, the union attempted to negotiate a collective bargaining agreement. The company refused to negotiate until the individual contracts it had signed with the majority of its workers expired. The NLRB ruled that by refusing to negotiate, the company had violated the Wagner Act, and the Seventh Circuit directed enforcement of the Board’s order. J.I. Case then appealed to the Supreme Court, which affirmed the circuit court’s ruling.110

Justice Jackson’s majority opinion, from which only Justice Roberts dissented, mirrored the industrial pluralists’ emphasis on the importance of groups in promoting the needs of individual workers. “The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.”111 Because the group was so important, the Court had to disregard the interests of individuals if they undermined the power of the group. “[A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages . . . . Increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.”112 The individual’s rights, Jackson wrote, were represented in the group insofar as each worker was allowed to vote against representation. Beyond that, individual interests had to be subordinated to the will of the majority:

The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result . . . . Individual contracts cannot subtract from collective ones . . . .113

Thus, both the language and result of J.I. Case mirrored the conception of the proper relationship between individual workers and unions suggested by industrial pluralist thinkers. Recognition of the rights of minorities or individuals within a labor union would weaken the union’s strength so much that it could not properly represent the interests of the workers. To ensure that business and labor could negotiate from positions of equal bargaining power, it was necessary to value the interests of the group over those of the individual.114 These decisions also harmonized with the

110. The facts of this case are given at 321 U.S. at 333-34.
111. Id. at 338.
112. Id. at 338-39.
113. Id. at 339.
114. In addition to J.I. Case, the Supreme Court decided two other cases in the 1943 term that, at the behest of a union, voided agreements that individual employees had made with employers. See
thought of pluralist legal theorists like Howe, Horn, and Cowan, who believed that the Court needed to develop a jurisprudence that recognized the rights of groups and balanced those rights against those of individuals. Thus, by the early 1940s, a group pluralist conception of labor relations, with its deemphasis of the rights of individual union members, began to influence labor law, giving unions increased control over their members.

B. The Duty of Fair Representation

The Supreme Court’s creation of a “duty of fair representation” followed a similar pattern. The Court first recognized the duty in two cases handed down on the same day in December 1944. The more famous of the two, Steele v. Louisville and Nashville Railroad Co., involved a contract between the Railroad and the Brotherhood of Locomotive Firemen and Enginemen, an all-white union. The contract required the Railroad to stop hiring African-American firemen until at least half of the positions in each seniority class were filled by whites. Construing the Railway Labor Act (RLA), the Court held that the union was required to represent the interests of all the workers in the bargaining unit, even if they were not members of the union, and that it was not permitted to make invidious discriminations among them. Because the racial distinctions in hiring were “obviously irrelevant and invidious,” the Court remanded the case to the district court to enjoin enforcement of the contract.

While Steele was a unanimous decision, the second duty of fair representation case decided that day, Wallace Corporation v. NLRB, split the Court 5-4. In Wallace, the employer signed a closed-shop contract with an unaffiliated union that promptly excluded a group of workers who had opposed the independent union, wishing instead to af-

Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); Order of R.R. Tel. v. Railway Express Agency, 321 U.S. 342 (1944). See also Elgin, J & E Ry. v. Burley, 325 U.S. 711, reh’g granted, 326 U.S. 801 (1945), 327 U.S. 661 (1946). In its initial decision in Elgin, the Court limited the extent to which the Railway Labor Act allowed unions to bargain away the rights of their workers. Frankfurter, joined by Stone, Roberts, and Jackson, dissented. Allowing workers to challenge a union’s ability to bargain away certain rights “weakens the union by encouraging divisive elements [and] gravely handicaps the union in its power to bargain responsibly . . . . It reintroduces the destructive individualism in the relations between the railroads and their workers . . . .” 325 U.S. at 758 (Frankfurter, J., dissenting). After reargument the majority came around to Frankfurter’s view and changed its mind, though Frankfurter dissented again, this time objecting to what he perceived as the intellectual dishonesty of the Court’s opinion. See 327 U.S. at 663 (majority holding); id. at 674-77 (Frankfurter, J., dissenting).

115. 323 U.S. 192, 204 (1944).
116. Id. at 195.
117. Id. at 202-203.
118. Id. at 203, 208.
119. 323 U.S. 248 (1944).
120. A closed-shop contract is one that requires an employer to hire only people who are members of the union negotiating the contract. It thus gives the union control over the employer’s personnel decisions.
The NLRB held that it was an unfair labor practice for the employer to execute a closed-shop contract knowing that the union would exclude employees who had favored the CIO. Justice Black, writing for the majority, believed that the independent was nothing more than a company union that was being used to crush the CIO’s attempt to organize the plant. The contract was thus a device to fire workers that the company considered to be agitators. Accordingly, the Court affirmed the Board’s decision, holding that when a union was certified under the Wagner Act, “it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.” Unions could not use closed-shop contracts “to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers.”

Though both these cases established the principle that a union must protect the interests of all workers in the bargaining unit it represented regardless of union membership, each had a different rationale. In Steele, the Court analogized to the Equal Protection Clause to establish the duty and to determine that racial classifications were “irrelevant and invidious.” The majority based its holding on the language of the RLA, namely that the Act required the union to represent all the workers in exchange for the benefit of being the only legally recognized bargaining agent. However, the logic of its decision was driven by the Equal Protection Clause. The “legislature” (the union) could not draw impermissible distinctions when passing “legislation” (the contract). “We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.” Indeed, the cases that the Court cited for the proposition that racial discrimination was impermissible under the RLA were all equal-protection cases: Yick Wo v. Hopkins, Yu Cong Eng v. Trinidad, Missouri ex rel. Gaines v. Canada, and Hill v. Texas. Justice Murphy’s

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121. Id. at 250.
122. Id. at 250, 253.
123. Id. at 255.
124. Id. at 256.
125. Id. at 255.
126. Id. at 202.
127. 118 U.S. 356 (1886) (holding that a California laundry licensing ordinance violated the Equal Protection Clause because it was targeted against Chinese immigrants).
128. 271 U.S. 500 (1926) (holding that a colonial Philippine law forbidding Chinese merchants from keeping account books in their own language violated the due process and equal protection clauses of the Philippine Bill of Rights).
129. 305 U.S. 337 (1938) (holding that Missouri’s maintenance of an all white law school violated the Equal Protection Clause).
130. 316 U.S. 400 (1942) (holding that Texas’ exclusion of blacks from juries violated the Equal Protection Clause).
conciliation was even more explicit and was based directly on the Constitution: "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color."\(^{131}\)

This application of the Equal Protection Clause to the non-governmental processes of a labor union was a direct outgrowth of the concept of industrial pluralism. After all, if the collective bargaining arena was supposed to be a mini-democracy, and the union was "clothed with power not unlike that of a legislature,"\(^{132}\) the state had to guarantee that all the workers had their interests represented: "Unless the labor union representing a craft owes some duty to represent non-union members . . . the minority would be left with no means of protecting their interests . . . ."\(^{133}\) The Court held that the bargaining process must reflect the pluralist assumptions of the time, which mandated representation of all interests within the polity. In *Steele*, the Court was simply policing the polity to ensure that it was inclusive.

Contemporary labor law scholarship had a similar vision of the rationale behind the duty of fair representation. Harry Wellington, then a student at Harvard Law School, but destined to become one of the United States' foremost authorities on labor law, wrote in 1952 that "the labor contract resembles legislation rather than the traditional private contract."\(^{134}\) The similarity to legislation meant that the duty of fair representation should require that economic distinctions made among workers be minimally scrutinized ("at least rational")\(^ {135}\) while racial classifications be accorded heightened scrutiny.\(^ {136}\) "[A] collective agreement," wrote University of Chicago law professor Charles Gregory three years earlier, "is not a contract between private parties in the ordinary sense of that term. It is more like a privately drawn code of laws to govern the employment relationship in a limited area."\(^ {137}\) Clay Malick, a political scientist at the University of Colorado, argued in 1949 that the common law doctrines such as contract and agency that were used to regulate the union activity should be discarded as inappropriate for modern labor relations.\(^ {138}\) Instead, courts should recognize unions for what they were: "*When [union] activities . . . affect the *

\(^{131}\) 323 U.S. at 209 (Murphy, J., concurring).

\(^{132}\) *Id.* at 198 (Stone, C.J., for the Court).

\(^{133}\) *Id.* at 201.


\(^{135}\) *Id.* at 499. *See also*, *Id.* at 502 ("Where explicit labor policies are not involved, but rather questions of industrial adoption, the union should be able to function with a fairly free hand.").

\(^{136}\) *Id.* at 491-93.


public they should be deemed to have quasi-public status because of their function in society . . . ." The proper way to police these "quasi-public" entities was through doctrines that recognized the existence of groups, such as the Equal Protection Clause.

Even scholars who were less sanguine about unions' respect for the rights of individual members believed in the analogy between the labor contract and legislation. Clyde Summers believed that "the power to bargain is the power to govern . . . ." Though Summers was more troubled by the effect of union powers on individual rights than Wellington, Gregory, or Malick were, he agreed that the standards that restrained government action were the appropriate ones to apply to labor unions: "[Unions] should be required to maintain the same democratic standards which would be required of government itself." The main defense of individual liberties within the union, Summers wrote, was the right to participate in its governance through democratic procedures. Other scholars concurred with this quintessentially pluralist vision of individual rights. Substantive protection of worker's rights was not needed so long as the state ensured that each worker had the freedom to participate in the democratic processes of his union.

While Steele and much of the scholarship in response to it reflected group pluralist notions of government, the Wallace case was based on a much more individualistic premise: that the union owed a fiduciary duty to individual employees by virtue of an agency relationship between the worker and the bargaining representative. The Wallace majority noted that the union's actions disadvantaged a minority group, but its emphasis was on the unfairness of the action, not the illegitimacy of the classification. The opinion focused on the fact that the employer was attempting to get around the requirements of the NLRA by acting through a company union. There was no mention of equal protection jurisprudence, or the standards under which union actions should be scrutinized, because the bad acts, in the majority's opinion, were taken by the employer.

To the Wallace dissenters (Stone, Frankfurter, Jackson, and Roberts), the Court's interference with the desires of the majority was impermissible.

139. Id. at 274-75.
140. Id. at 268-72.
142. Id. at 819.
143. Id. at 820-31.
144. See generally Benjamin Aaron and Michael I. Komaroff, Statutory Regulation of Internal Union Affairs --Part I, 44 U. Ill. L. Rev. 425 (1949); Benjamin Aaron and Michael I. Komaroff, Statutory Regulation of Internal Union Affairs--Part II, 44 Ill. L. Rev. 631 (1949). See also Joseph Kovner, The Legal Protection of Civil Liberties Within Unions, 1948 Wis. L. Rev. 18 (arguing that the civil liberties of union members must be protected in order to maintain the status of the union as a democratic organization in society).
judicial policy-making. The violence and resentment that developed surrounding the battle between the CIO and the independent to represent the plant were perfectly valid reasons for excluding the CIO's supporters. Absent the racial animus evident in Steele, courts were not empowered to judge the substance of a collective bargaining agreement. The dissent thus tracked contemporary equal protection jurisprudence, just as Wellington's note would eight years later. Racial classifications should be scrutinized, while economic ones should be left to the democratic processes within the union.

If the duty of fair representation was born with two rationales — Steele's equal protection rationale and Wallace's fiduciary duty rationale — the former was ascendant throughout the 1940s and 1950s. State and federal courts repeatedly ruled against unions that discriminated against African-Americans. On the other hand, courts rarely enjoined even the most egregious violations of the duty when racial minorities were not involved. For example, after a merger of two auto-parts manufacturing companies, the union representing the workers at both plants disregarded the interests of one group of employees in adjusting the seniority schedules at the plants. Yet the Supreme Court held that the union had not breached its duty of fair representation. Indeed, courts rejected claims that groups of workers had been unfairly represented when unions negotiated changes in seniority, determined vacation days, adopted mandatory retirement provisions, distributed overtime pay, and engaged in flagrant gender

146. Id. at 271.
147. Id. at 268.
152. See Foster v. General Motors Corp., 191 F.2d 907 (7th Cir. 1951).
153. See, e.g., McMullans v. Kansas, Oklahoma and Gulf Railway Co., 229 F.2d 50 (10th Cir. 1956); Dougherty v. General Motors Corp., 176 F.2d 561 (3d Cir. 1949).
discrimination. Some courts went so far as to hold that, contrary to Wallace, the duty of fair representation applied only to instances of racial discrimination. Indeed, even when courts allowed non-race-based fair representation cases to proceed, they were simply rejecting claims that denied any such duty even existed.

The courts' vigorous application of the duty of fair representation in cases involving race discrimination, and its anemic application in non-race cases, was no doubt attributable to shifting American attitudes about race in the post-war period. However, the outcomes of these cases were also indicative of how industrial pluralist assumptions affected judicial thinking. The fact that the non-race cases were so unsuccessful demonstrated that courts in the 1940s and 1950s were unwilling to use a doctrine with potentially powerful individualist leanings to undermine the power of labor unions. Even the race cases used the group pluralist idiom to further the cause of civil rights. Steele and its progeny protected the rights of African-Americans as a group, not as individuals. The Court's analogy to equal protection was telling, since it focused attention on whether the unions were treating groups equally, and had nothing to say about the treatment of individuals. Thus, it was not surprising that when courts were faced with ill treatment of individuals or groups that were not defined by an immutable characteristic, as in the non-race cases, they declined to enforce the duty. The notion of fair representation based on a union's fiduciary duty to individuals, as spelled out in Wallace, simply did not have the same resonance with contemporary political thought as the group oriented, equal protection arguments of Steele.

The other pluralist characteristic of the fair representation cases was the manner in which they analogized collective bargaining to the political process itself. The case law, as well as the scholarship, saw the union's powers as "comparable to those possessed by a legislative body." By enforcing the duty of fair representation in race cases, courts were doing nothing more than policing the political process. The courts guaranteed the process worked by ensuring that the group interests of African-Americans were represented within the "legislative process" that was collective bargaining, and by overturning policy decisions that disadvantaged groups not

159. See Jack Greenberg, Race Relations and Group Interests in the Law, 143 Rutgers L. Rev. 503-10 (1959).
161. Id. at 202.
represented within that process. Given these protections, any outcome was legitimate. Like the government itself, labor unions needed to do nothing more than respond to the interests of their constituents as manifested by the results of battling interest groups.

C. Union Freedom of Expression

The Supreme Court's manipulation of the Free Speech Clause of the First Amendment also illustrates the ascendancy of group pluralist thinking in labor law during the 1940s and 1950s. As the guardian of the pluralist process, the Court supported the free-speech rights of unions to engage in politics. The Court's sympathy for interest-group politics was manifested in its disinclination to use the First Amendment to protect the rights of workers who objected to the political positions their unions adopted. As with the duty of fair representation, the First Amendment was not used to protect individual workers from potentially oppressive or unfair union activity. Instead, courts viewed it as a tool for ensuring that labor, as an important interest group, was not kept out of the economic or political decision-making process. Thus, between the end of the New Deal and the late 1950s, free-speech jurisprudence contained a double standard. The speech rights of unions were protected while the rights of their members were not. This double standard was consistent with a group pluralist conception of policy-making. Free speech for interest groups was needed to keep the political process functioning. Giving individuals speech rights, however, only served to undermine the strength of groups. Accordingly, courts felt no need to be solicitous to the speech rights of the individual members of groups.

In several cases in the late 1930s and early 1940s, the Supreme Court used the First Amendment to protect unions from politicians who wished to undermine their power. The first of these cases was *Hague v. CIO*, a 1939 case in which the Court struck down a Jersey City ordinance that prohibited the leasing of any hall, without a permit from the police, if the hall was to be used for subversive purposes. The ordinance also prohibited the distribution of newspapers and handbills by similarly subversive groups. Mayor Hague had been using the ordinance to prevent union organizing within the city. Though the decision was doctrinally fragmented (Justices Roberts and Black held that the ordinance violated the Privileges and Immunities Clause; Chief Justice Hughes and Justices Stone and Reed held that it violated the First Amendment; Justices Butler and McReynolds dissented), certain themes that would become prevalent in interest-group pluralism were evident in the various opinions. Both opinions striking down the ordinance discussed the importance of the right of assembly for

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162. 307 U.S. 496 (1939).
163. Justices Douglas and Frankfurter did not participate.
self-governance. Additionally, Justice Roberts' opinion emphasized the relationship between free speech and political debate.

The Court fleshed out these themes the following year in *Thornhill v. Alabama.* In *Thornhill,* the Court struck down an Alabama anti-picketing statute. This case marked the first time a majority of the Court adopted the clear-and-present-danger test. It also contained several other free-speech chestnuts, including the concept of overbreadth and the danger of chilling valuable speech. More importantly, the Court made explicit the connection between free speech and maintaining the power of groups to effect public policy:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

The Court thus portrayed politics as the clash of interest groups. It condemned the restrictions on union activity, because such restrictions limited the ability of unions to participate in the political process.

A similar focus on the importance of free speech to the rights and powers of groups was evident in *Thomas v. Collins,* a 1945 case in which the Court struck down a Texas statute that required union organizers to register with the state: "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." The Court read the First Amendment in such a way as to allow individuals to form into groups to pursue their goals:

> The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones . . . . If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious, or political cause.

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164. 307 U.S. at 512, 527.
165. Id. at 513.
166. 310 U.S. 88 (1940).
167. Id. at 105. See also HARRY KALVÉN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 179-81 (1988).
168. See 310 U.S. at 97-98.
169. Id. at 104.
170. 323 U.S. 516 (1945).
171. Id. at 530.
172. Id. at 531, 540.
Indeed, many free-speech cases in the 1940s involved the protection of the rights of unions against state regulation or judicial injunction. The speech rights that the Court created in *Hague*, *Thornhill*, and their progeny were rights for groups, designed to increase their political and economic power. Additionally, the Court's emphasis on the importance of disseminating information about a labor dispute, and about petitioning the state, the public, and the employer for a redress of grievances, was quintessentially pluralistic. Since the government must respond to the needs of groups, it was crucial that the state not use its power to restrict their ability to make their desires known, to fight it out in the proverbial marketplace of ideas. Thus, *Thomas*, as well as *Thornhill* and *Hague*, not only served to promote group participation in the political process; they also reflected the responsive assumptions of pluralist thinking by eliminating government interference in the contest between labor unions and business for political and economic supremacy. Finally, these decisions were indicative of the new conception of the institutional competence that courts developed in the forties. Their job was to ensure that pluralist processes, be they political or economic, ran smoothly. The courts would not judge outcomes, but they would ensure that groups were allowed to participate in the process by which these outcomes were achieved.

1. **Union Political Speech**

*Hague*, *Thornhill*, and *Thomas* each involved attempts to regulate speech related to the economic activities of unions. This type of speech, be it in the form of pickets or boycotts, was crucially important to the formation of unions, and thus to their ability to exercise power in the economic arena. However, the influence of interest-group pluralist thought was most apparent in cases where courts were required to balance the First Amendment interests of unions with those of their members. Thus, legislative attempts to regulate the political speech of labor unions generated much litigation during the 1940s and 1950s. As courts reacted to these statutes, the two strands of post-war legal thought that stemmed from interest-group pluralism — the bolstering of group pluralism and the virtues of judicial passivity — clashed, resulting in doctrinal confusion that worked to the benefit of the labor movement.

173. See, e.g., *Carlson v. California*, 310 U.S. 106 (1940); *American Fed'n of Labor v. Swing*, 312 U.S. 321 (1941); *Bakery & Pastry Drivers and Helpers Local 802 v. Wohl*, 315 U.S. 769 (1942). State courts were similarly active in protecting the free-speech rights of unions. See *American Fed’n of Labor v. Bain*, 165 Or. 183 (1940); *Alabama State Fed’n of Labor v. McAdory*, 246 Ala. 1 (1944); *American Fed’n of Labor v. Reilly*, 113 Colo. 90 (1944). Unions were not always successful, but their failures occurred in instances where the union was engaged in secondary picketing which appeared to the Court to be only distantly related to the labor action in which the union was engaged. See *Carpenters & Joiners Union of Am., Local No. 213 v. Ritter’s Cafe*, 315 U.S. 722 (1942); *Giboney v. Empire Storage & Ice Co.* 336 U.S. 490 (1949).

Prior to the 1930s, the AFL had limited its political activities to supporting particular legislation that directly affected a union's economic activities, such as statutes outlawing yellow-dog contracts or convict labor.\(^\text{175}\) Under Samuel Gompers, the stated policy of the AFL was to avoid interfering with the political opinions that workers manifested through their locals.\(^\text{176}\) Labor was best served, Gompers believed, not through an alliance with any particular party, but by "rewarding its friends and punishing its enemies."\(^\text{177}\) It was not until the 1936 presidential election cycle that organized labor abandoned this disavowal of partisan politics. Led by schismatic CIO unions such as the United Mine Workers and the International Ladies Garment Workers, organized labor gave over $750,000 to progressive political parties, including $435,000 to the Democratic Party and the American Labor Party.\(^\text{178}\) This was more than eight times as much as the AFL had given during the previous thirty years.\(^\text{179}\) In 1943, the CIO formed a political action committee (CIO-PAC), which, along with the union-dominated National Citizens PAC, raised over a million dollars in support of Roosevelt's reelection campaign.\(^\text{180}\)

This dramatic increase in labor's political spending occurred at the same time that the country's politics were growing increasingly conservative. Republican politicians reacted with alarm to increased political spending by what they considered to be communist-dominated CIO unions.\(^\text{181}\) As a result, when the Smith-Connally Anti-Strike Act, a wartime measure primarily designed to prohibit work stoppages in defense-related industries, became law despite an attempted veto, it prohibited trade union contributions to federal election campaigns.\(^\text{182}\) Though the CIO easily circumvented this restriction by forming the CIO-PAC, the anti-union sentiment it represented carried over into the post-war period. Accordingly, section 304 of the Taft-Hartley Act made Smith-Connally's restrictions permanent.\(^\text{183}\) It amended the Federal Corrupt Practices Act, legislation passed in the 1920s to prevent corporations from giving money to candidates running for federal office, to include labor unions.\(^\text{184}\) Indeed, Congress was following a trend that had begun at the state level. Throughout the late 1930s and early

\(^{175}\) See Philip Taft, Organized Labor in American History 234-45 (1964); Tomlins, supra note 8, at 76-77.

\(^{176}\) See Taft supra note 175, at 236.

\(^{177}\) Louise Overacker, Presidential Campaign Funds 49 (1946).

\(^{178}\) See Louise Overacker, Labor's Political Contributions, 54 POLI. SCI. Q. 56, 56-59 (1939).

\(^{179}\) See id.

\(^{180}\) See Taft supra note 175, at 611.


\(^{182}\) See Overacker, supra note 177, at 55.

\(^{183}\) Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 304, 61 Stat.136, 159-160 (1947), codified as amended at 18 U.S.C. § 610 (1948), repealed (1976). Courts have sometimes referred to the section as "section 304" or as "section 610." In the interests of consistency, I will use "section 304" throughout this article.

\(^{184}\) Id.
1940s, nine states passed legislation prohibiting unions from giving money
to political candidates in state and local elections. The fate of these
laws illustrates the extent to which courts assimilated group pluralist polit-
ical ideals as well as the manner in which various manifestations of these
ideals could come into conflict. Their fate also demonstrates how the incor-
poration of industrial pluralist assumptions into the law could strengthen the
labor movement.

Labor was consistently successful in having state laws limiting union
political spending held unconstitutional. For example, a 1946 Massachu-
setts case, Bowe v. Secretary of the Commonwealth, involved an attempt
to place on the ballot a referendum that would have prohibited union polit-
ical spending. The state supreme court held that because the referendum
was unconstitutional, it could be stricken from the ballot before the elec-
tion. In its decision, the court was particularly candid about the nature of
the free speech right upon which it based its holding:

Liberty of the press is enjoyed, not only by individuals, but also by associa-
tions of individuals such as labor unions . . . . Individuals seldom impress
their views upon the electorate without organization. They have the right to
organize into parties, and even into what are called "pressure groups," for
the purpose of advancing causes in which they believe. They have a right to
engage in printing and circulating their views, and in advocating their cause
in public assemblies and over the radio. All this costs money, and if all use
of money were to be denied to them the result would be to abridge even to
the vanishing point any effective freedom of speech, liberty of the press,
and right of peaceable assembly.

The court thus explicitly endorsed interest-group pluralism. It recognized
that only through banding together could individuals have any effect on the
political process. Accordingly, to further the purpose of the Free Speech

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185. See J. Albert Woll, Unions in Politics: A Study in Law and the Workers' Needs, 34 S. CAL. L.
186. Labor won early victories against attempts to limit union campaign contributions in Oregon,
Alabama, and Colorado. In 1940, the Oregon Supreme Court held the state's anti-picketing statute
unconstitutional. See AFL v. Bain, 106 P.2d 544 (1940). Though the court did not express an opinion
on the section of the law that restricted the uses of union funds, the court's hostility and the section's
vagueness (section 4 prohibited the creation of any union fund in excess of the union's "legitimate
requirements") rendered the statute a dead letter. See Woll, Unions in Politics, supra note 185, at 135 n.
25. In 1944, the highest courts of Alabama and Colorado struck down restrictions on union campaign
contributions. The Alabama case, Alabama State Fed'n of Labor v. McAdory, 18 So.2d 810, 829-830
(Ala. 1944), cert. dismissed 325 U.S. 450 (1945), did not address freedom of expression, holding instead
that the restrictions violated the state constitution's anti-log-rolling provision. The Colorado case, AFL
v. Reilly, 155 P.2d 145 (1944), held that a state statute requiring unions to incorporate if they wished to
organize workers within the state violated union members' right to freedom of assembly. It then held
that the political contribution restrictions also contained in the act were "so inseparably intertwined"
with the registration requirements that if the former was unconstitutional, the latter must be as well. Id.
at 150.
187. 69 N.E.2d 115 (1946).
188. Id. at 130.
189. Id. at 131.
and Press clauses of the First Amendment — that is, to ensure that the political process worked — the court had to protect the speech rights of groups of people, of "pressure groups."\footnote{190}

The year after \textit{Bowe} was decided, the federal courts began judging the constitutionality of attempts to regulate union political activities. The CIO was determined to test the constitutionality of section 304 of the Taft-Hartley Act. Accordingly, the July 1946 issue of the \textit{CIO News} carried a statement by CIO President Philip Murray, urging members to vote for a particular candidate from Maryland who was running for the House of Representatives. The Attorney General indicted Murray and the CIO for violating the Corrupt Practices Act. The district court dismissed the indictment, holding that section 304 ran afoul of the First Amendment:

I am of the opinion that the questioned portion of Section 304 of the Act is an unconstitutional abridgment of freedom of speech, freedom of the press and freedom of assembly. At no time are these rights so vital as when they are exercised during, preceding or following an election. If they were permitted only at times when they could have no effect in influencing public opinion, and denied at the very time and in relation to the very matters that are calculated to give the rights value, they would lose that precious character with which they have been clothed from the beginning of our national life.\footnote{191}

The fact that individual union members might object to the union's use of their dues for political activities was not enough of a reason to justify limiting the speech of the union.\footnote{192} The district court would not allow Congress to disrupt the actions of an interest group, the basic unit of the polity, simply to protect the rights of individual workers.

The Attorney General appealed directly to the Supreme Court.\footnote{193} The Supreme Court, however, refused to speak with the same candor as the district court. Chief Justice Vinson, as well as Justices Reed, Jackson, and Burton, avoided the constitutional issue altogether. Writing for the plurality, Reed held, through a strained reading of section 304's legislative history, that the Act was not intended to prohibit statements in periodicals published with union funds.\footnote{194} Accordingly, the indictment was properly dismissed.

\footnote{190. Id. Of the nine statutes passed by states restricting campaign contributions by unions, only four remained by the end of the fifties. In addition to the laws struck down in Oregon, Alabama, and Colorado, Wisconsin and Delaware both repealed their laws. \textit{See} \textit{Woll, Unions in Politics}, supra note 185, at 134-35 n. 23-25.}
\footnote{192. \textit{Id.} at 358.}
\footnote{193. The case was appealed directly to the Court under the Criminal Appeals Act, which at the time allowed the Attorney General to bypass the Court of Appeals when a district court dismissed an indictment because the allegedly violated statute was unconstitutional. \textit{Criminal Appeals Act of 1907}, 18 U.S.C. \textsection{} 682 (1940).}
by the district court. However, Reed refused to identify what constituted an impermissible use of union funds. Though he stated that he had "the gravest doubt" as to the constitutionality of any statute that would prohibit the type of expenditures that were before the Court, Reed declined to consider the constitutionality of the statute absent an expenditure that Congress had intended to prohibit. Frankfurter concurred, arguing that there was not enough of a record to consider the statute's constitutionality.

Justices Black, Douglas, Murphy, and Rutledge concurred as well, but they would have reached the constitutional issue and held the statute unconstitutional. Rutledge, writing for all four, accused the plurality of "abdicating[ing] its function." The policy against deciding constitutional questions unnecessarily did not justify the "invasion of the legislative function by rewriting or emasculating the statute." Reed had engaged in such a rewriting. Rutledge pointed out that the breadth of the statutory language, which prohibited "expenditures . . . in connection with" federal elections, easily encompassed an endorsement in a union newspaper that was printed and distributed with union funds. He then appended numerous instances of Senator Taft stating that the prohibition would cover such a use of union monies.

Having demonstrated that the statute was intended to cover expenditures such as the one involved in the case, Rutledge then argued that such a prohibition clearly violated the First Amendment. Citing Bowe, he framed his argument in terms of the importance of interest groups to the political process. He wrote that "the expression of bloc sentiment is and always has been an integral part of our democratic and legislative processes. They could hardly go on without it." Accordingly, an interest group's right to free speech was integral to the preservation of democracy:

To the extent [free speech is] curtailed the electorate is deprived of information, knowledge and opinion vital to its function. To say that labor unions as such have nothing to contribute to that process is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society.

Thus, because of its importance, the political speech of groups was a right secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press and conscience. It is not by
accident, it is by explicit design . . . that these freedoms are coupled together in the First Amendment's assurance . . . . The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process.\textsuperscript{205}

Rutledge's opinion also contained a theme characteristic of group pluralist political assumptions: the need to elevate group freedoms above individual ones. Supporters of section 304 had argued that the section served to protect workers who disagreed with the politics of their union from having their dues spent on political matters. Rutledge rejected this argument outright. "Unions too must operate under the electoral process and the principle of majority rule."\textsuperscript{206} The effect of section 304 "is not merely one of minority protection. It is also one of majority prohibition."\textsuperscript{207} According to Rutledge, the dichotomy between individual and group rights was a false one: "It would be a very great infringement of individual as well as group freedoms, affecting vast numbers of our citizens, if labor unions could be deprived of all right of expression upon pending political matters affecting their interests."\textsuperscript{208} Since the group was the only way that a citizen could effectively exercise his political voice, discussing the rights of individual union members was nothing more than a smoke screen for more sinister intentions of the legislators:

\begin{quote}
[M]inority protection was not the only or perhaps the dominant object of [section 304's] enactment. That object was rather to force unions as such entirely out of political life and activity, including . . . the expression of organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective.\textsuperscript{209}
\end{quote}

Despite its excoriation in Rutledge's concurrence, Reed's plurality opinion also reflected the pluralist assumptions of the time. It was a perfect example of what Bickel called "the process of avoidance and admonition."\textsuperscript{210} Through a narrow reading of the statute, Reed sustained it but then warned Congress that he had "grave doubts" about its constitutionality. Through this exercise of its "passive virtues," the plurality followed the pluralist ideal. It allowed the legislature a free hand, informed it of potential problems with the statute, and arrived at a result that allowed the interest group at issue to continue its activities.

Indeed, though \textit{United States v. CIO} did not declare section 304 unconstitutional, its ambiguous holding took the teeth out of the Corrupt Practices Act. Reed's opinion, with its refusal to come down one way or another on section 304's constitutionality, and its complete lack of guidance

\begin{itemize}
\item \textsuperscript{205} \textit{Id.} at 143-44 (citations omitted).
\item \textsuperscript{206} \textit{Id.} at 149.
\item \textsuperscript{207} \textit{Id.} at 147.
\item \textsuperscript{208} \textit{Id.} at 150.
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} Bickel, \textit{supra} note 60, at 67.
\end{itemize}
as to the scope of the statute, was not a useful guide for further prosecutions. The Justice Department, plagued by grave doubts about the statute’s constitutionally, sought only four indictments between 1948 and 1956.211 Lower court judges read the Court’s opinion as implying that most expenditures were outside of the scope of the statute, and that the prohibition of others was “of exceedingly doubtful constitutionality.”212 Accordingly, they were decidedly unsympathetic to the cases that the government did bring. “Labor organizations,” held a federal district court in Missouri, have a right to engage in political activities just the same as any other group, and certainly Congress has the right to control the expenditures and contributions of such groups . . . . But in exercising this prerogative, the Congress hasn’t the constitutional power to deprive them of the right to free speech, the right to express themselves in the choice of candidates and political ideals, and the right to engage in political activities as guaranteed them under the Bill of Rights.213

Thus, by 1956, the Justice Department’s track record for 304 prosecutions was dismal: only fifty-four complaints over nine years and not a single conviction.214 Not surprisingly, the Department, as well as the section’s original supporters, began to question its utility. In 1949, Senator Taft sponsored a bill to repeal the section that passed the Senate only to die in the House.215 Testifying in 1955 before a Senate subcommittee that unsuccessfully attempted to revise the law, Warren Olney III, the assistant attorney general in charge of the Justice Department’s criminal division, stated that he himself had “serious reservations” about the constitutionality of section

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211. For doubts about constitutionality see Revision of the Federal Election Laws: To Prevent Corrupt Practices in Federal Elections: Hearings on S. 636 Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 84th Cong. 197-215 (1955) (statement of Warren Olney, III, Assistant Attorney General in Charge of the Criminal Division of the Department of Justice) [hereinafter 1955 Hearings]. Exhibit 27 to the following year’s hearings give statistics for the number of complaints received, indictments obtained and cases brought to trial between 1950 and 1955, as well as brief summaries of the subject matter of the complaints during that period. See 1956 Presidential and Senatorial Campaign Contributions and Practices Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 84th Cong. 562-65 (1956) [hereinafter 1956 Hearings]. These statistics indicate that there were two indictments during this period. Those two plus the two cases from before 1950 (the CIO case and the Painters Union case, discussed below) were the only four cases for which the Justice Department obtained indictments between 1948 and 1955.


214. See 1956 Hearings, supra note 211, 84th Cong. 562. The 54 complaint figure is only for the period from 1950 to 1955. Figures for the previous three years are unavailable.

Additionally, he said that the Supreme Court "expressed so many doubts about [the constitutionality of section 304] . . . that it made it almost impossible, and certainly impractical, to prosecute under it." Without further guidance from the Supreme Court, lower courts would not declare the statute unconstitutional. Instead, they simply held that every expenditure they encountered was not within the scope of the statute because to ban such expenditures would be unconstitutional. Essentially, the courts had combined Justice Reed's tactic with Justice Rutledge's constitutional philosophy: every prohibition was unconstitutional, so each would be excluded from coverage under the section as it came before the bench. So the situation stood when the Supreme Court agreed to hear the Justice Department's appeal of a dismissal of a 1955 prosecution, in which it alleged that the United Auto Workers had spent an undisclosed amount of money from mandatory union dues on a series of television commercials endorsing certain candidates for Congress. The Court's decision, however, only added mud to the already cloudy waters.

By the time the UAW case reached the Court in late 1956, Rutledge had died and been replaced by Justice Minton who, only weeks before the case was to be heard, was in turn replaced by Justice Brennan. Frankfurter wrote the opinion reinstating the indictment but, once again, the Court declined to judge the constitutionality of section 304 until the case returned with a complete record. Justices Reed, Burton, Harlan (who had replaced Jackson), Clark (who had replaced Murphy, a signatory to Rutledge's opinion in the CIO case) and Brennan joined Frankfurter's opinion. Justice Douglas dissented, joined by Black and Warren, who had replaced Vinson.

Frankfurter's decision evidenced the judicial passivity that was both central to his conception of the Court's role and consistent with group pluralist assumptions about legislative supremacy. After filling twenty pages of the United States Reports with the legislative history of the Federal Corrupt Practices Act, Frankfurter ducked the constitutional issue altogether. Citing Dred Scott, Frankfurter warned of the terrible consequences of ignoring "the self imposed prohibition against passing on the validity of an Act of Congress 'unless absolutely necessary to a decision of the case.'" Exceptions to this admonition, he wrote, "have rightly been characterized as among the Court's notable 'self-inflicted wounds.'" Only after the facts

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216. See 1955 Hearings, supra note 211, 84th Cong. 209.
217. Id. at 210.
218. See supra notes 211-12.
221. Id. at 590 (1957), quoting United States v. Burton, 196 U.S. 283 (1905).
of the case were revealed could the constitutionality of the statute be judged: “Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface and in the outcome constitutional questions may disappear.”\textsuperscript{223} Accordingly, after suggesting some questions that needed to be answered before the Court would be prepared to judge the constitutionality of the statute, Frankfurter reinstated the indictment and remanded the case for trial.\textsuperscript{224} In doing so, he used the Court’s “passive virtues” to avoid the constitutional issue.\textsuperscript{225}

Justice Douglas’ dissent was a virtual carbon copy of Rutledge’s con- currence in the CIO case. Claiming that the constitutionality of section 304 was “as important an issue as has come before the Court,” Douglas argued that each of the questions Frankfurter wished to have answered was irrele- vant to the constitutionality of the statute.\textsuperscript{226} Douglas, like Rutledge, emphasized the importance of group speech to the political process: “The principle at stake is not peculiar to unions. It is applicable as well to associations of manufacturers, retail and wholesale trade groups, consumers’ leagues, farmers’ unions, religious groups and every other association representing a segment of American life and taking active part in our political campaigns and discussions.”\textsuperscript{227} In the dissenters’ view, the Congressional desire to limit political speech by groups considered too powerful was not a justifiable reason for restricting speech:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group — labor or corpo- rate . . . . First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.\textsuperscript{228}

Justice Douglas also followed Rutledge’s lead in rejecting the minority protection justification for section 304: “To date unions have operated under a rule of the majority. Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig . . . . Today’s ruling abolishes First Amendment rights on a wholesale basis. Protection of minority groups, if any, is no excuse.”\textsuperscript{229} Thus, like the concurrence in the CIO case, the dissenters stressed two of the main themes of interest-group pluralism: the need to allow interest groups absolute freedom in the political process in order to make that process function properly,

\textsuperscript{223} \textit{Auto Workers}, 352 U.S. at 591-92.
\textsuperscript{224} \textit{id.}
\textsuperscript{225} \textit{Bickel, supra} note 60, at 51-58.
\textsuperscript{226} \textit{Auto Workers}, 352 U.S. at 593, 595-69 (Douglas, J., dissenting).
\textsuperscript{227} \textit{id.} at 593.
\textsuperscript{228} \textit{id.} at 597.
\textsuperscript{229} \textit{id.} at 596-97.
and the need to favor the rights of the group over those of its component members.

The reaction to the Court’s decisions in the CIO and UAW cases was mixed. Law students and the mainstream media condemned the Court’s findings in both cases. The CIO case made the bigger splash, spawning a plethora of notes in law reviews condemning the decision either for failing to declare the statute unconstitutional\(^\text{230}\) or for failing to reach the issue in the first place.\(^\text{231}\) Similarly, the New York Times and the New Yorker castigated the Court for not holding section 304 unconstitutional.\(^\text{232}\) Though the reaction to the UAW case was more muted, the consensus was the same: the Court should have reached the issue and it should have struck down the section.\(^\text{233}\) The reaction within the academy was more favorable. Most commentators conceded that Congress was not completely powerless to regulate union contributions, and several authors applauded the Court for not “committing itself too rashly to a position from which further reflection may still warn it away.”\(^\text{234}\) Others thought that the de minimis basis for the lower court’s decisions (no need to worry about small expenditures) was appropriate until Congress could straighten out the confusion caused by the wording of the statute.\(^\text{235}\)

The divergence of views about the Court’s actions in the section 304 cases was indicative of the two conflicting strands of post-war legal thought. Commentators who applauded the Court’s actions did so because it indicated that the Court was going to stay out of the political process, thereby facilitating pluralist government. Harry Wellington argued that judicial application of the Constitution was not the appropriate method of regulating union conduct: “[t]he wisdom of restraints on unions involves considerations plainly fundamental to the working of the political process.

\(^{230}\) See, e.g., Roland E. Ginsberg, **Recent Decisions**, 47 Mich. L. Rev. 408 (1949); 48 Nw. U. L. Rev. 64 (1953); 96 Pa. L. Rev. 888 (1948); 34 Va. L. Rev. 461 (1948); George N. Shampo, **Notes**, 1949 Wis. L. Rev. 184 (1949).


\(^{234}\) See Horn, supra note 77, at 121. See also HARRY H. WELLINGTON, **LABOR AND THE LEGAL PROCESS** 232 (1968) (noting that it would have been wrong for the Court to move directly to the constitutional question).

yet basically unsusceptible to intelligent testing by the abstract constitutional propositions available to the Court."236 Those who demanded that the Court declare section 304 unconstitutional also used an argument based on the political process but took a different approach, arguing that restricting the speech of interest groups interfered with the workings of the pluralist system. After all, it was only through groups that individual interests could be voiced:

Labor is a new found and frequently articulate spokesman for non-dominant socio-economic groups. Unions' political "coming-of-age" means also that Democrats may no longer be so dependent for money on the same business interests sustaining Republicans. To the extent the two parties rely on different groups, they are better able to present voters conflicting policy choices.237

In the end, the clash of these strands of legal thought resulted in an outcome that increased the strength of labor unions. What all the commentators on section 304 agreed upon was that the Court's reading of the statute rendered it ineffective.238 In the UAW case, the defendant was acquitted after the case was remanded to the district court.239 Indeed, between 1956 and 1961, the Justice Department received 121 complaints and brought 4 cases to trial, each of which resulted in an acquittal.240 The confusion surrounding the statute and its resulting ineffectiveness were the result of the clash of two powerful components of post-war legal thought. Frankfurter's and Reed's judicial deference met Rutledge's and Douglas' attempts at bolstering group pluralism. The result was judicial chaos. Yet both these conflicting jurisprudential views grew out of pluralist political assumptions that sought to protect the strength of interest groups in the pluralist political process.

2. Union Security Agreements

At other points where labor law and the First Amendment met, these two seemingly conflicting visions of the proper role for the judiciary steered courts away from a conception of individual freedom that challenged group assumptions about the political process. One such point is what is known to

238. See Lambert, supra note 235, at 1058 (arguing it tends to drive political expenditures underground); Ruark, supra note 235, at 77 (anticipating it will be narrowly interpreted by the courts, or modified by statute); Bicks & Friedman, supra note 237, at 992-96. For a contemporary view, see Thomas J. Schwartz & Alan G. Straus, Federal Regulation of Campaign Finance and Political Activity (1985), §1.02[4].
239. See Lambert, supra note 235, at 1047.
240. See Lambert, supra note 235, at 1041 n. 38. See also Schwartz & Straus, supra note 238.
the initiated as "union security" or "compulsory unionism."\textsuperscript{241} In order to be effective bargaining agents, unions must be able to negotiate on behalf of all the workers in a particular unit, whether they are in the union or not. As the Supreme Court recognized in \textit{J.J. Case}, if employers could negotiate special deals with individual employees, the union's power would be effectively undermined.\textsuperscript{242} Since the theory behind the NLRA was that stable labor relations would exist only if there were strong unions, one of the primary goals of the statute was to authorize a union, once it had been certified by the NLRB, to be the exclusive bargaining agent for all the workers in the unit.\textsuperscript{243} While this right of exclusivity gave labor unions tremendous power, it presented them with a problem. Since NLRB authorization required that only a simple majority of workers vote for the union, it was conceivable that as many as forty-nine percent of the workers in a particular unit would choose not to join the union. Thus, a union might be acting on behalf of one hundred workers, incurring the expenses associated with negotiating and implementing a contract for them, while only receiving dues from fifty-one workers.

Unions developed two main methods of solving this so-called "free rider" problem. The first was to negotiate a "closed shop" contract with the employer. This type of contract required the employer to hire workers who were union members. If a worker was expelled from the union, the employer was required to fire him. Because all workers were dues paying union members, the free rider problem was eliminated. The second type of contract that a union could negotiate to prevent free riding was a "union shop" contract. This type of contract allowed an employer to hire non-union members, but required the new employee to join the union within a specified period of time, usually sixty days. If the employee had not joined, the employer was required to fire him. While this type of contract left the employer in full control of selecting his personnel, it still ensured that the union would receive dues from every person on whose behalf it was negotiating. The use of either type of these contracts created a scheme of labor relations known, depending on one's perspective, as either "union security" or "compulsory unionism."

"Compulsory unionism" was perhaps the most controversial labor relations issue in the immediate post-war period. Between 1944 and 1958, nineteen states passed so-called "right to work" laws, which banned both

\textsuperscript{241} The description of the issue of union security in the next two paragraphs is based on ROBERT A. GORMAN, \textit{Basic Text on Labor Law}, (1976) 639-42, 644-45; \textit{see also} THOMAS HAGGARD, \textit{Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements} (1977).


closed- and union-shop contracts within the state.244 The labor movement suffered a further defeat when, as part of Taft-Hartley, Congress outlawed the closed shop altogether and explicitly provided that the NLRA did not preempt state right-to-work laws.245 Nevertheless, while these were significant setbacks for organized labor, they did not eliminate union security arrangements in the United States. The states that passed right-to-work laws were relatively unindustrialized and had limited numbers of unionized workers. In states with substantial numbers of unionized workers, such as New York, California, Illinois, Pennsylvania, Ohio, and Michigan, such laws were either soundly defeated or never introduced.246 Additionally, other federal legislation, in particular the Railway Labor Act, explicitly preempted state right to work laws by allowing unions to negotiate for a closed shop in certain industries regardless of state law.247

Because compulsory unionism's opponents failed to eliminate it through legislation, they turned to the courts. Their strategy was to claim that closed-shop and union-shop contracts violated the First Amendment. They argued that mandatory union dues were not simply used to defray the costs of negotiating the contract with the employer; these dues were also used to support various political causes that a dissenting union member (a person who would not have joined the union, given a choice) would not have supported. Thus, union-security agreements violated the First Amendment by forcing dissenting union members to subsidize speech with which they did not agree. Putting aside for the moment the problem of the lack of state action, defenders of union-security agreements argued that this distinction between a union's political and economic activities was a false one. As Albert Woll, General Counsel for the AFL-CIO, wrote in 1961: "even a brief survey of historical and economic data establishes that union political activity is wholly germane to a union's work in the realm of collective bargaining, and thus a reasonable means to attaining the union's proper object of advancing the economic interest of the worker."248

244. Both New Hampshire and Louisiana, which passed and repealed their right to work laws in the 1940s and 1950s are not included in this figure. Indiana, which repealed its statute in 1965, is included within this figure. See Gilbert J. Gall, The Politics of Right to Work 230-231 (1988); J.R. Dempsey, The Operation of The Right-to-Work Laws 24-27 (1961).


246. These were the six states that, in 1953, had more than a million unionized workers. New York had more than two million. See Alexander Heard, The Costs of Democracy 174 (1960). For the failure of campaigns in these states see Gall, supra note 244, at 230-31, 234; Dempsey, supra note 244, at 24-27. Indeed, Texas and Indiana were the only states with more than 200,000 unionized workers that passed right to work laws. See Heard, supra at 174. Indiana's law was repealed in 1965. See Gall, supra note 244, at 230. The success of right-to-work laws in southern and other non-industrialized states suggests that the most significant effect of these laws was to inhibit the expansion of industrial unionism rather than to weaken it where it already was powerful.


248. Woll, Unions in Politics, supra note 185, at 144.
The litigation campaign began in California with a large splash, mainly because the first case's plaintiff was none other than Cecil B. DeMille. Throughout the early 1940s, DeMille directed the Lux Radio Theater, which produced weekly radio dramas. At that time, the radio industry was unionized under the auspices of the American Federation of Radio Artists (AFRA), which had a closed shop contract with the various radio production companies. In 1944, AFRA levied a one dollar assessment on its members to fight an anti-closed-shop amendment to the California Constitution. DeMille, who supported the amendment, refused to pay the assessment, and attempted to enjoin AFRA from demanding that he be fired pursuant to the closed shop contract it had with Lux. The trial court refused, and he was fired in early 1945. (He was replaced by Lionel Barrymore.) DeMille appealed the trial court's decision to the California Supreme Court.

Over two years later, the court ruled against DeMille. The court rejected DeMille's assertion that a compulsory contribution to a union was the same as a compulsory expression of belief such as those the United States Supreme Court had held to be unconstitutional in the Jehovah's Witness flag salute case a few years earlier. A compulsory contribution was not an expression of individual views:

The member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest. Dues and assessments paid by members to an association become the property of the association and any severable or individual interest therein ceases upon such payment. This logic was representative of the strand of interest-group pluralism that valued the rights of a group over those of its individual members. Once the majority acted through democratic procedures, the minority had no choice but to follow along: "Mere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods." The Court then drew an analogy to the government that demonstrated a vision of democracy devoid of any counter-majoritarian checks:

In a government based on democratic principles, the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation

249. The details of this paragraph come from newspaper and magazine articles. See Union Ultimatum to De Mille, N.Y. TIMES, Dec. 2, 1944, at 11; De Mille Won't Pay Union, N.Y. TIMES, Dec. 5, 1944, at 25; De Mille to Battle Ouster from Union, N.Y. TIMES, Dec. 6, 1944, at 27; Court Stay For De Mille, N.Y. TIMES, Dec. 8, 1944, at 23; De Mille's Dollar, NEWSWEEK, Feb. 5, 1945, at 41-42; The $1 Issue, TIME, Feb. 5, 1945, at 53.


252. DeMille, 31 Cal.2d at 149.

253. Id. at 150.
because of a difference in personal views. A member of a voluntary association should not be permitted successfully to seek a similar avoidance.\textsuperscript{254}

The California court thus not only strengthened the group interests that were the basis of the group pluralist polity by discounting the rights of dissenting individuals, it also demonstrated the type of judicial passivity that was required by the responsive state. If a labor union was to function like a mini-democracy, as Leiserson and his industrial pluralist allies suggested it should, then the courts would have to stay out of its decision-making process.

A case challenging the constitutionality of union-shop contracts did not percolate through a state court system to the United States Supreme Court until 1956. That year, the Court decided \textit{Railway Employes' Department v. Hanson}.\textsuperscript{255} \textit{Hanson} involved an attempt by a group of non-union employees of the Union Pacific Railroad to enjoin the railroad from entering into a union-shop contract.\textsuperscript{256} The Nebraska Supreme Court held that a union-shop contract entered into pursuant to section 2(11) of the RLA constituted state action.\textsuperscript{257} It then held that the section was an unconstitutional invasion of the dissenting workers' First Amendment rights of free speech and assembly.\textsuperscript{258} By cobbling together the First and Fifth Amendments, the Nebraska court also found a right to work, which it said the contract violated by prohibiting non-union members from working on the railroad.\textsuperscript{259}

The Supreme Court, with Justice Douglas writing for the eight-justice majority,\textsuperscript{260} agreed with the Nebraska court that the negotiation of a union-shop contract pursuant to section 2(11) was enough state action to bring the First Amendment to bear on the constitutionality of that contract.\textsuperscript{261} The Court declined, however, to judge the constitutionality of the section, once again using "the process of avoidance and admonition." Douglas noted that there was no evidence in the record that the union dues authorized by RLA were used "to impair freedom of expression."\textsuperscript{262} He then added:

It is argued that compulsory membership will be used to impair freedom of expression . . . . Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, and assessments." If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other

\textsuperscript{254} Id.
\textsuperscript{255} 351 U.S. 225 (1956).
\textsuperscript{256} See id. at 227.
\textsuperscript{257} See Hanson v. Union Pac. R.R., 71 N.W.2d 526, 541-42 (Neb. 1955).
\textsuperscript{258} See id. at 545-47.
\textsuperscript{259} See id.
\textsuperscript{260} Justice Frankfurter concurred but wrote a separate opinion. See id. at 238-42.
\textsuperscript{261} Id. at 232.
\textsuperscript{262} Id. at 238.
action in contravention of the First Amendment, this judgment will not prejudge the decision in that case.\(^{263}\) By refusing to reach the merits of the constitutional issue, and then adding this dicta, Douglas did little to clarify what the permissible uses of union dues were. Did Douglas mean that dues could not be used for political purposes, such as giving money to a campaign, or did he mean that the imposition of fees and assessments could not be used to stifle the speech of members by, for example, fining them if they supported or failed to support a particular candidate? The fact that there was evidence in the record that the Railway Employees Department had used dues to support political candidates left the impression among many observers that the latter was the case.\(^{264}\)

Indeed, the most important observers of all, the other courts that heard similar claims, believed that *Hanson* stood for the proposition that the use of dues for political purposes did not violate the First Amendment unless the union somehow used its statutorily authorized power to impose assessments that actually restricted the speech of individual union members. Numerous state courts refused to prevent unions from spending dues on matters unrelated to collective bargaining.\(^{265}\) Those courts suggested *Hanson* prohibited only the collection of fines imposed on members who refused to engage in a voluntary union activity.\(^{266}\) Thus, by 1960, the interpretation of *Hanson* that was most advantageous to labor had the upper hand in the courts. The status quo allowed unions to use mandatory dues for the political activities of the union.\(^{267}\)

3. American Communications Association v. Douds and the Price of Group Pluralist Freedom of Expression

The section 304 cases and the union-security cases demonstrate how two particular aspects of interest-group pluralist thought were reflected in judicial decisions in such a way as to support the political activities of labor unions even as the political climate, as indicated by the passage of Taft-Hartley and the various state-right-to-work laws, was turning against the

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266. See, e.g., *Allen*, 107 S.E.2d at 134.

267. Political scientist Alexander Heard estimated that the UAW alone spent 3 million dollars worth of union dues on political purposes during 1956. See *The Costs of Democracy* 208 (1960). In contrast, the 17 national level union political action committees, funded by voluntary contributions, spent only 2.1 million dollars that same year. See *id.* at 189. To be fair to Heard, his conclusion after presenting these statistics is that the effect of union dues in politics has been overestimated since his statistics indicate that "labor money in politics pays a much smaller share of the nation’s campaign-connected costs than union members constitute of the population of voting age." *Id.* at 208.
unions. The decisions in those cases demonstrate how courts in the late 1940s and 1950s would not protect the rights of individual union members if it meant harming the union's ability to act as a pressure group. The workers' rights of assembly, speech, and association were of no great consequence to those courts as they rendered decisions that allowed unions to continue the type of group-based political activity that was considered to be central to the smooth functioning of the polity.

Additionally, Hanson evidenced a type of judicial passivity that some theorists believed was dictated by group pluralist assumptions. As in the CIO and UAW cases, the Court dodged the constitutional issue. In each case, to decide the constitutional issue would have been to make a substantive judgment about a policy (whether to allow union political contributions) set by the presumably democratic processes within Congress. Doing so would have been inconsistent with the role process theorists saw for the courts. The justices could police the processes by which policy decisions were made, but not judge their substance. Thus, in these cases, the Supreme Court avoided the constitutional issues altogether, and rendered confusing opinions that gave little guidance to lower federal courts and state courts. In the section 304 cases, this judicial passivity was at odds with the union's interest in having its rights supported unequivocally in the face of government regulation. With respect to Hanson, however, the Court's passivity worked to the advantage of the unions by delaying any positive determination of the rights of dissenting workers. In each case, the Court's disinclination to definitively decide the issue ultimately worked to the labor movement's benefit, inserting enough uncertainty into the law to make prosecutions under section 304 and First Amendment claims against unions impossible.

Thus, like J.L. Case and the duty of fair representation cases, the free-speech cases indicate that group pluralist thought was used in a manner that strengthened labor unions during the 1940s and 1950s. Courts saw unions as an important interest group. As such, their right to participate in the political process had to be preserved, as did their ability to make decisions without being second-guessed by individual union members. This is not to say that these pluralist assumptions created a free-speech jurisprudence that worked solely to the benefit of the labor movement. The benefits of group pluralist speech regulation came with a price.

In 1950, the Court decided American Communications Ass'n v. Douds, the first in a series of cases in which it construed the First Amendment in such a way as to avoid bringing it into conflict with the consequences of the post-war rise of vigorous anti-Communist senti-
Douds involved the CIO's challenge to the section of the Taft-Hartley Act that required the officers of labor organizations to sign affidavits stating that they were not members of the Communist Party. The Court's decision and the two concurrences gave a variety of reasons for finding that the requirement did not violate the First Amendment, but one of them, found in Chief Justice Vinson's majority opinion, had a decidedly familiar sound to it: "Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them."

Here he cited J.I. Case, then continued: "The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility." The two main themes of interest-group pluralism were evident in this brief passage. Groups were important enough to the polity to warrant policing them to ensure their ideological purity. Additionally, the individual rights of the union officials were insignificant compared to the need to have groups that participate honestly in the political process rather than try to subvert it. By the end of the 1940s, the same conception of pluralism that justified giving unions expanded rights and power, both over their members and with respect to the state, was invoked to regulate the use of those rights and powers. Because interest groups were the driving force behind pluralist democracy, the non-subversive nature of the groups had to be ensured, even at the expense of individual liberties.

IV. THE DECLINE OF INTEREST-GROUP PLURALISM AND THE RISE OF PARTICIPATORY THOUGHT

By the late 1950s and early 1960s, the group pluralist vision of policymaking was under attack. Among intellectuals, a consensus was emerging that group pluralism reflected the optimistic assumptions about American public life that were extant during the 1950s. American democracy seemed to be successfully representing such a diverse group of people. Interest-group pluralism was an explanation for why the system worked. See Raymond Seidelman & Edward J. Harpham, Disenchanted Realists 149-59 (1985); John G. Gunnell, The Descent of Political Theory 223 (1993). It also had the appearance of a pragmatic recipe for politics that may have been particularly appealing to a generation of liberal intellectuals whose encounters with Hitler and Stalin left them averse to ideological absolutes. See Richard H. Pells, The Liberal Mind in a Conservative Age 142-43 (1985). Historians have not successfully explained the decline of group pluralist political theory. They have theorized that group pluralism reflected the optimistic assumptions about American public life that were extant during the 1950s. American democracy seemed to be successfully representing such a diverse group of people. Interest-group pluralism was an explanation for why the system worked. See Raymond Seidelman & Edward J. Harpham, Disenchanted Realists 149-59 (1985); John G. Gunnell, The Descent of Political Theory 223 (1993). It also had the appearance of a pragmatic recipe for politics that may have been particularly appealing to a generation of liberal intellectuals whose encounters with Hitler and Stalin left them averse to ideological absolutes. See Richard H. Pells, The Liberal Mind in a Conservative Age 142-43 (1985). Historians of a more critical stripe have theorized that an interest group pluralist conception of government hid the unrepresentative nature of the
ing that public policy did not emerge from the clash of different interest groups, but was instead the result of the manipulation of the power of the state by certain entrenched elites. The battle of interest groups was the battle of elite economic actors whose interests did not coincide with those of the people. At best, interest-group pluralism described the way that these elites formed public policy. At worst, it was an illusion that tricked people into believing their interests were represented, when they actually were not. This new generation of intellectuals viewed the much-praised stability of the 1950s as a manifestation of popular apathy towards a political system in which most people had no part.

The most prominent spokesman for these ideas was Columbia University sociologist C. Wright Mills. Mills saw policy-making as nothing more than the implementation of the desires of business and military elites. Parochial interest groups were incapable of balancing the force of this “power elite” and, thus, any notion that the resolution of conflicting interests somehow resulted in public policy that was beneficial to all was false:

There is no effective countervailing power against the coalition of the big businessmen — who, as political outsiders, now occupy the command posts — and the ascendant military men — who with such grave voices now speak so frequently in the higher councils. Those having real power in the American state today are not merely brokers of power, resolvers of conflict, or compromisers of varied and clashing interest — they represent and indeed embody quite specific national interests and policies.275

Others echoed Mills’ skepticism of group pluralism. Thinkers increasingly portrayed the government as nothing more than an agent of elite inter-

political order behind a rhetoric that purported to prove that it was actually democratic. See, e.g., THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969).

None of these historians, however, provide a detailed explanation for the decline of interest-group pluralism. Some subscribe to the belief that, as Raymond Seidelman put it, pluralism ran aground on reality. The Civil Rights Movement, opposition to the Vietnam War, urban unrest, and the student movement all undermined the central assumption of interest-group pluralism: that diverse interests could be represented by pressure groups within the political system. See Gunnell, supra this note, at 263. Other historians account for the emergence of a less optimistic vision of American society in the late 1950s by pointing to various events that occurred before the conflagrations of the 1960s. As the fears of domestic communism and the Cold War waned in the late 1950s, an intellectual climate more suited to critical thinking emerged. See Pells, supra this note, at 346; MORRIS DICKSTEIN, GATES OF EDEN: AMERICAN CULTURE IN THE SIXTIES 55-58 (1977). At the same time, the Sputnik launch, the Montgomery bus boycott, and an economic downturn gave intellectuals concrete failures in American society to criticize. See Pells, supra this note, at 347-48.

These explanations for the decline of the group pluralist conception of policy-making are promising first steps, but they are no more than a beginning. Other than Pells, none of the historians and social scientists who have addressed this issue have done so in anything more than a cursory manner — generally a few paragraphs in the midst of a narrative history. In addition to this superficiality, no historian has attempted to explain why the critique of group pluralist thought took on a participatory/rights-based tone. Thus, the causal questions of why the group pluralist conception of democracy declined and why it was replaced by the participatory ideal are ones that remain for the historical profession to answer.

est groups. In 1961, Harry Kariel argued that private associations had essentially become the government. Unions and businesses had become unaccountable conglomerations of power that forced the government to respond to their interests: “When a splintered government responds to an economic order which modern technology is depriving of its pluralist character, it tends simply to sanction the bargains struck by unrepresentative private interests.”276 Grant McConnell, writing in the mid-1960s, chronicled this repeated “capture” of agencies by the groups they purported to regulate.277 Contemporary policy-making, McConnell wrote, was characterized by “the conquest of pieces of governmental authority by different groups.”278 Interest groups had established “varying degrees of control and exercise of public authority by the private groups within the public areas with which they are concerned. This authority is available . . . for exploitation of public policy in the groups’ own interests.”279

Perhaps the most famous proponent of the idea that the government had been captured by elite interest groups was Gabriel Kolko. As a graduate student at Harvard in the late 1950s, Kolko had written an award-winning dissertation arguing that the federal government had created the Interstate Commerce Commission at the behest of huge railroad corporations that wished to limit the cutthroat competition that was destabilizing their industry and driving down their profits.280 In The Triumph of Conservatism, published in 1963, he generalized this argument to encompass all the administrative agencies that came into being between the turn of the century and the end of the First World War.281 Turning previous interpretations of Progressivism on their head, Kolko argued that the administrative state did not spring from popular attempts to limit the power of big business, but was instead the result of the concerted efforts of business interests to rationalize capitalism in a way that allowed them to maximize their profits:

[The regulation itself was invariably controlled by leaders of the regulated industry and directed towards ends they deemed desirable . . . . It is business control over politics (and by “business” I mean major economic interests) rather than political regulation of the economy that is the significant phenomenon of the Progressive Era. Such domination was direct and indirect, but significant only insofar as it provided means for achieving a greater end — political capitalism. Political capitalism is the utilization of political

278. Id. at 7.
279. Id.
280. The dissertation was published in 1965 as GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965).
outlets to attain conditions of stability, predictability, and security — to attain rationalization — in the economy.²⁸²

Under Kolko’s theory of “political capitalism,” there was no need for special interests to capture administrative agencies, because they had been beholden to those interests all along. Nor was this observation limited to the Progressive period. While Kolko was writing about events that occurred during the first two decades of the twentieth century, he did not doubt that what was true then was still true in 1963. The administrative state established under the principles of political capitalism “became part of the basic fabric of American society.”²⁸³ The Progressive Era, Kolko believed, “set the stage for what was to follow.”²⁸⁴

The idea that interest-group politics resulted in elite domination of the mechanisms of government was not limited to the thought of left-leaning thinkers like Mills and Kolko. Even theorists who had been stalwart defenders of the group pluralist model during the 1950s had changed their positions by the early 1960s. By 1959, David Truman, for example, had reevaluated the significance of interest groups in policy-formation. While he rejected Mills’ vision of a power elite creating policy in their own self-interest, he was willing to acknowledge that elites played a larger role in policy creation than he had admitted in the early 1950s.²⁸⁵ Truman had discarded the idea put forward in The Governmental Process that interest-group pluralism promoted responsive government because of the existence of “potential interest groups” that would spring into being if their members’ interests were ignored by policy-makers. Instead, he acknowledged “that a mass of people cannot act except through organizations and in response to the initiatives of small numbers of leaders.”²⁸⁶ Accordingly, policy-making was “the lot of those in positions of privilege in the structure of elites intervening between the government as such and the ordinary citizen.”²⁸⁷ Similarly, Robert Dahl, in his famous study of New Haven municipal politics, Who Governs?, stepped back from the group pluralist model of policy-making he proposed in A Preface to Democratic Theory. Dahl portrayed New Haven as a city governed by those with political resources, which included social standing, popularity, access to the media, and the ability to dispense patronage.²⁸⁸ Indeed, Who Governs? was just one of a large number of so-

²⁸². Id. at 3.
²⁸³. Id. at 287.
²⁸⁴. Id. at 305.
²⁸⁶. Id. at 489.
²⁸⁷. Id. at 497.
²⁸⁸. ROBERT A. DAHL, WHO GOVERNS? (1961), supra note 42. I do not mean to overstate this point. WHO GOVERNS? argued that the policy making processes in New Haven were basically democratic. Indeed, it was elite dominance in the face of a relatively apathetic citizenry that, Dahl believed, led to political stability. But see DAWKINS, supra note 42; Robert A.
called "city studies" that appeared during the early 1960s chronicling the exclusion of most citizens from the governance of their own cities.289

The idea that interest groups exerted a negative influence on American government was a common one among intellectuals during the early 1960s. A consensus was emerging that interest-group politics excluded the vast majority of Americans from participating in government. E. E. Schattschneider's The Semisovereign People, published in 1960, argued that interest-group pluralism was a method of governance that only provided representation for the elite. The "pressure system," as Schattschneider called it, had a "business or upper-class bias."290 He asserted that "[t]he vice of the groupist theory is that it conceals the most significant aspects of the system. The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 per cent of the people cannot get into the pressure system."291 Charles Frankel, a philosophy professor at Columbia University, concurred. He wrote that government by consent had become a myth as interest groups came to dominate politics, and those who were not represented by such a group were excluded from the body politic.292 Even Hans Morgenthau, a prominent and decidedly mainstream political scientist at the University of Chicago who had served in the Truman administration, was beginning to sound like Gabriel Kolko.293 In 1960, he wrote that the political enthusiasm of the American people was being destroyed "by the competition of political professionals, representing parochial interest groups, for the control of the administrative apparatus."294 Democracy had been replaced by "the new feudalism," where politics became a contest between economic interest groups to control government actions for their benefit.295

According to these thinkers, the consequences of the failure of group pluralism for individuals was dramatic. In The Other America (1962),


291. Id. at 35.


295. Id. at 274-92.
Michael Harrington argued that nearly a quarter of all Americans were excluded from interest groups and were thus politically invisible:

It is one of the cruelest ironies of social life in advanced countries that the dispossessed at the bottom of society are unable to speak for themselves. The people of the other America do not, by far and large, belong to unions, to fraternal organizations, or to political parties. They are without lobbies of their own; they put forward no legislative program. As a group, they are atomized. They have no face; they have no voice.\textsuperscript{296}

Jack Walker, a political scientist at the University of Michigan, put it another way: "For most citizens the world of politics is remote, bewildering, and meaningless . . . [T]hese marginal men are not really citizens of the state."\textsuperscript{297} In \textit{White Collar}, Mills concurred. In "response to a condition of powerlessness," wrote Mills, people simply lost "the will for decision."\textsuperscript{298} Schattschneider quantified this loss of will, which he considered to be "the sickness of democracy."\textsuperscript{299} The fact that over forty million people declined to participate in the political process by not voting called the legitimacy of the democratic process into question.\textsuperscript{300} American politics was stable because so few people participated at all.

Additionally, these thinkers doubted whether elite-dominated interest groups would even look out for the best interests of their own members. Businesses and unions, wrote Kariel, were unaccountable organizations that achieved consensus within their constituencies through "coercion" or "oblique engineering of consent."\textsuperscript{301} Mills also believed that elites simply manipulated the people: "Public relations displace reasoned argument; manipulation and undebated decisions of power replace democratic authority."\textsuperscript{302} "Large scale organizations," Kariel claimed, "do not provide the institutions for adequate representation of individual interests."\textsuperscript{303} Grant McConnell agreed, describing the private groups that exercised political power in the United States as inherently anti-democratic. They lacked "the limitations that guard against tyranny and injustice to minorities and individuals."\textsuperscript{304} Accordingly, the "organization of political life by small constituencies," and here McConnell meant interest groups, "tends to enforce conformity, to discriminate in favor of elites, and to eliminate public values from effective political consideration."\textsuperscript{305}

\textsuperscript{296} Michael Harrington, \textit{The Other America: Poverty in the United States} 6 (1962).
\textsuperscript{298} See Pells, supra note 274, at 255-56 (quoting Mills).
\textsuperscript{299} Schattschneider, supra note 290, at 104.
\textsuperscript{300} See id. at 98, 112.
\textsuperscript{301} Kariel, supra note 276, at 48, 51-56.
\textsuperscript{302} Mills, supra note 275, at 355.
\textsuperscript{303} Kariel, supra note 276, at 181.
\textsuperscript{304} McConnell, supra note 277, at 154.
\textsuperscript{305} Id. at 6.
Interest-group politics had thus disfranchised most Americans. Paul H. Appleby, a former Roosevelt administration official, New York State budget director, and Dean of Syracuse University’s Maxwell School of Public Administration, wrote in 1962 that “citizens entertain feelings of near-impotence in the role of sovereign.” Paul H. Appleby, Citizens as Sovereigns 62 (1962). For biographical details, see Roscoe C. Martin, Paul H. Appleby and His Administrative World, in Public Administration and Democracy 2-4 (Roscoe C. Martin, ed. 1965).

Just as odd bed-fellows like C. Wright Mills and Hans Morgenthau bemoaned the end of Americans’ political enthusiasm, so James MacGregor Burns, a confidant of John F. Kennedy and a famous history professor at Williams College, declared that Americans had become bored with politics because the government was not addressing the problems that they wanted addressed. See James MacGregor Burns, The Deadlock of Democracy 1-7 (1963).

“As a nation,” he wrote, “we have lost control of our politics.”

Thus, in the minds of many intellectuals during the early 1960s, interest-group pluralism had failed. Pressure groups represented only the interests of the elites. These groups had captured the administrative apparatus of the government and forced it to work on their behalf to the detriment of the public good. The responsive government, so idealized in the 1940s and 1950s, was now disparaged. The fact was, these intellectuals argued, that interest-group pluralism was not representative at all. Instead, the post-war political order had achieved a degree of stability by making policy through the clash of elite interest groups that left a vast majority of Americans out of the process altogether. They sat on the sidelines, dispirited, bored, and apathetic. That was the price of stability.

Having thus diagnosed the problems of interest-group pluralism, the goal of many of these thinkers was to re-empower individuals who had been cut off from the policy-making process by what they considered to be group pluralism’s false promises. The solution was participatory democracy. Government, they argued, had to become genuinely representative. That the state responded to interest groups was not enough. For intellectuals of the 1960s, it had to respond to the people directly. To be sure, each political scientist and each pundit saw a different way of achieving this end. Mills believed that intellectuals could rouse mass sentiment against the power elite simply by exposing the manner in which most people were dominated and manipulated by it. Harrington, idealistically, believed that participation would increase if people were presented with clear policy choices and if, when confronted with the evidence of “the other America,” they recognized their duty to help the poor. Indeed, fostering the recognition of this duty was Harrington’s purpose in writing The Other America.
Political scientists suggested more concrete solutions. Burns, Kariel, McConnell, and Appleby all wished to increase the power of the president, the political parties, and the national government. They believed that only these institutions could represent the people of the United States as a national constituency and disregard the parochial concerns of interest groups.\(^{311}\) Kariel wished to break the hold of special interest groups on the political process by publicly funding elections and by preventing corporate monopolization of the news media.\(^{312}\) He also called for a non-partisan civil service that would “actively ferret out interests so diffuse, disorganized, and inarticulate, (and nonetheless real for being so) that they cannot constitute a semiautonomous pressure group.”\(^{313}\) Burns also supported the public funding of elections.\(^{314}\) Additionally, he sought to eliminate institutions and practices that he believed were anti-democratic, like the electoral college, filibustering, and malapportionment.\(^{315}\)

Others thought that participation could be improved by localizing government. Frankel suggested that public participation in government could be increased through the “devolution of responsibility” for policy-making onto the small units of both public government (neighborhoods, for example) and private institutions (union locals, for example).\(^{316}\) He also suggested that guaranteeing people some minimal level of income was necessary for a stable democracy: “The redistributive Welfare State is not simply a mindless response to democratic pressures; it is a necessary condition of democratic stability. . . . [I]f a successful democracy is to endure its good fortune . . . [i]t cannot allow the differences in the abilities of men to be excessively accentuated by violent differences in wealth.”\(^{317}\) Edmond Cahn, a law professor at NYU agreed:

> [O]f what practical value are political and legal equality to a man who has no bread to eat, no clothes to wear, no roof to shelter him, no chance to earn a livelihood? A man must eat before he can discuss public affairs rationally, must have an opportunity for employment under decent conditions for a living wage before he can vote intelligently, and must have a modicum of rest, leisure, and psychic security before he can hold office worthily in a free community.\(^{318}\)

Whether through a strong national government or the deevolution of political power onto local institutions, all these theorists believed that democracy in the United States could only be saved if it became participatory.

\(^{311}\) See Burns, supra note 307, at 235-40; McConnell, supra note 277, at 366-368 (1966); Kariel, supra note 276, at 273-91 (1961).

\(^{312}\) See Kariel, supra note 276, at 273-91.

\(^{313}\) Id. at 283.

\(^{314}\) See Burns, supra note 307, at 329.

\(^{315}\) Id. at 323-340.

\(^{316}\) See Frankel, supra note 292, at 67-71.

\(^{317}\) Id. at 131-32.

When empowered by broad participation, the people would act as the counterbalance to elite interests that was missing from the reality of interest-group politics. Additionally, broader participation in politics would multiply the number of policy alternatives that would, in turn, promote even further participation as the people believed that the government was addressing their interests. Creativity and action had to replace the apathetic stability of the 1950s.

Reforming the structure of government, however, was not enough for thinkers who wished to break the hold that interest groups had on the political process. An important step towards creating participatory democracy, these thinkers believed, was ensuring that courts promoted individual rights and liberties. Because the allegedly representative branches of the government were dominated by elite interest groups, some institution needed to protect individuals from the policies that were created without their interests in mind. Thus, the failure of the group pluralist state to respond to the needs of a large portion of the population served as a rationale for an activist Supreme Court. According to Kariel, the Court was “functioning at its very best when, taking advantage of opportunities provided by a tired chief executive and an unstable national legislature, it act[ed] affirmatively, responding to latent, inchoate, and undeveloped interests . . . ” Because the political process was dominated by elites and, thus, excluded so many interests, the Court was the institution of government best equipped to respond to the needs of most Americans. Morgenthau repeatedly praised the Supreme Court’s role as a protector of individuals. Such a role, he wrote, “points to the organic connection between the judicial function and the preservation of objective standards [and by this he meant rights] essential to genuine democracy.”

Perhaps the best example of intellectuals’ increasing faith in activist courts and the importance of judicially enforceable rights to participatory democracy was Anthony Lewis’ award-winning and immensely popular book *Gideon’s Trumpet*, published in 1964. In it, Lewis, the Supreme Court reporter for the *New York Times*, described the circumstances surrounding the 1963 case *Gideon v. Wainwright*, in which the Court held that the Constitution required states to provide counsel for indigent defendants accused of felonies. Lewis’ journalistic account of the process by which Gideon’s case made its way to the Supreme Court was meant to illustrate the way a single indigent defendant could affect how public policy was made in the United States: “[Gideon’s] triumph [in the Supreme Court] shows that the poorest and least powerful of men . . . can take his

cause to the highest court in the land and bring about a fundamental change in the law.”

This in itself was an illustration of the way that courts promoted participatory democracy. The Supreme Court was the agent by which Clarence Earl Gideon shaped public policy. The Court was the institution that protected his otherwise unrepresented interests.

According to Lewis, Gideon’s case was an example of what the Supreme Court should be doing: actively protecting individual liberties in order to promote democracy. “The Supreme Court,” he wrote, “often provides a forum for those — the despised and rejected — who have no effective voice in the legislative chamber.”

“The Court can in fact serve as a safety valve, relieving intolerable social pressures that build up when legislatures are unresponsive to urgent needs.” The particular appeal of the judiciary for Lewis was that it was insulated from the political pressures that group pluralist thinkers thought brought about truly representative government:

The diffused, discursive methods of the legislature reflect the fact that its decisions must be political, reflecting compromises and accommodations of interests that may be concerned with issues entirely apart from the one under consideration. But of Supreme Court justices we demand a process of reason. They must not be legislators, engaged in political bargaining . . . . It can never be enough for a court to say, as a legislature properly can, “X wins the case because he has more votes behind him.”

By being removed from the political process, the Court could truly pursue the public good or, as Lewis said, “give voice to national ideals.” For Lewis, these national ideals consisted of individual liberties typified by the rights of criminal defendants. They also included freedom to voice unpopular political beliefs and freedom from racial discrimination, as well as the ideal of participatory democracy where all citizens would have their interests represented, unhindered by malapportioned legislatures or racism.

V.

PARTICIPATORY LABOR LAW

Thus, by the early 1960s, a participatory model of policy-making began to replace the group pluralist one. Government was supposed to respond to the will of “the people” rather than to that of “the special interests.” With this change came parallel changes in legal doctrine.

324. Id. at 211.
325. Id. at 212.
326. Id. at 214.
327. Id. at 217.
328. See id. at 214-15.
329. See id. at 143, 210-213, 218-19.
330. See id. at 212-13.
Courts became more concerned with the rights of individuals, supporting these rights even if they conflicted with the best interests of larger groups. Additionally, by the 1960s, the courts had abandoned the passivity that was a key element of post-war jurisprudence. Instead, courts, and particularly the Supreme Court, began aggressively protecting the rights of individuals and opening up the political process to those whose interests had not been represented by the interest groups that dominated the politics of the 1950s. These changes in political and legal thought had a profound effect on labor law. Unions were portrayed as the embodiment of all that 1960s intellectuals believed was wrong with interest groups. They were corrupt organizations serving only the interests of their leaders at the expense of the rank and file. The judiciary would have to come to the workers' rescue.

A. Participatory Legislation—The Landrum-Griffin Act

Perhaps the most obvious manifestation of the new individual rights-based assumptions about policy-making in labor law was the passage of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), commonly known as the Landrum-Griffin Act. Passage of the Act was driven by the widespread perception that labor unions had become corrupt and dominated by organized crime. Accordingly, the Act sought to regulate the internal affairs of unions. Thus, Landrum-Griffin required unions to file financial statements with the Secretary of Labor and provided that these statements would be a matter of public record. Based on findings that certain unions were taking direct control of locals in order to aggrandize power over the rank and file, the Act also regulated the circumstances under which a labor organization could assume a trusteeship over a subsidiary union. Additionally, the Act regulated the election of union officers, established bonding requirements for these officers, prohibited unions from making large loans, banned felons from holding union offices, and established a statutory fiduciary duty flowing from union officers to the union and its members.

Most significant, however, was Landrum-Griffin's first title, which created a "Bill of Rights of Members of Labor Organizations." This title

332. See Dubofsky, supra note 36, at 217-20; Alan K. McAdams, Power and Politics in Labor Legislation 11-13 (1964); Taft, supra note 175, at 682-706.
listed five rights for union members. The first required that all members have identical privileges within the union.\textsuperscript{337} The second established a "right to meet and assemble freely with other members; and to express any views, arguments or opinions."\textsuperscript{338} The third mandated that dues be imposed only by a vote of the majority of the members of the union.\textsuperscript{339} The fourth prohibited unions from limiting their members' right to sue either the union or the employer.\textsuperscript{340} Finally, the Act guaranteed certain due process rights for union members who were facing disciplinary action by their union.\textsuperscript{341}

The idea of a workers' bill of rights was not unheard of before 1959. The ACLU had been lobbying for one since before Taft-Hartley, and certain academics, in particular Clyde Summers, had been asserting the need for one throughout the 1950s.\textsuperscript{342} However, Congress' response to these suggestions indicated that there was a substantial change between 1946 and 1959 in the prevailing conception about the importance of individual liberties. The 1946 election cycle had been disastrous for labor. Republicans had taken control of both houses of Congress for the first time since 1928, all but ensuring the passage of Taft-Hartley.\textsuperscript{343} Additionally, during 1946 and 1947, sixteen states passed right-to-work laws.\textsuperscript{344}

Yet despite this bitterly anti-union milieu, Taft-Hartley contained only minor provisions regulating internal union affairs, and said little regarding the rights of individual workers.\textsuperscript{345} Instead, the Act focused on more pluralist concerns such as limiting unions' political contributions\textsuperscript{346} and creating a plethora of union unfair labor practices that would balance those that the Wagner Act had imposed on employers.\textsuperscript{347} Landrum-Griffin, though

\begin{footnotes}
\footnote{29 U.S.C. § 411(a)(2) (1988).}
\footnote{See John Patrick Diggins, \textit{The Proud Decades: America in War and in Peace, 1941-1960} 102 (1988).}
\footnote{See Gall, \textit{supra} note 244, at 230-31, 234 (providing vote counts for legislative votes and public elections from 1943-1978); Dempsey, \textit{supra} note 244, at 24-27 (listing legislation status as of 1961).}
\footnote{Taft-Hartley's regulation of internal union affairs consisted only of requiring unions to file their constitutions, annual reports and financial reports with the Secretary of Labor as well as the anti-Communist affidavit requirement. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 9(f), (g), & (h), 61 Stat. 136, 145-46 (1947). These sections were repealed in 1959.}
\end{footnotes}
also widely viewed as “anti-labor,” had a different focus.\textsuperscript{348} Though the Act was passed to remedy the perception that unions were dominated by corrupt ”bosses,” the cure was not increased supervision by the NLRB or greater employer rights. Instead, Landrum-Griffin sought to increase the rights of individual workers, a constituency that Congress (and the courts) seemed unconcerned about during the previous decade despite ample evidence of the same sorts of union abuses that spurred passage of the Act.\textsuperscript{349}

The manner in which the federal courts enforced the workers’ bill of rights was indicative of the decline in group pluralist ideology and the rise of rights-based thought. The two leading cases, \textit{Salzhandler v. Caputo}\textsuperscript{350} and \textit{Vars v. Int’l Bhd. of Boilermakers},\textsuperscript{351} were both decided by the Second Circuit in 1963. In \textit{Salzhandler}, the plaintiff distributed leaflets accusing the president of the Local of embezzling union funds. He was subsequently expelled from the union for violating a provision of the Brotherhood’s constitution that prohibited “libeling or slandering . . . fellow members [or] officers of local unions.”\textsuperscript{352} Salzhandler attempted to enjoin his expulsion, claiming that the free speech provisions of Landrum-Griffin rendered the union’s act illegal. The district court disagreed and he appealed. The Second Circuit reversed the district court and ordered Salzhandler’s reinstatement. The Court of Appeals recognized that a union’s power came directly from its group character: “It is an economic action group, the success of which depends in a large measure on a unity of purpose and a sense of solidarity among its members.”\textsuperscript{353} Yet Congress had determined that this group interest was no longer the most important factor governing the regu-

\textsuperscript{348} Professor McAdams discusses the rather incoherent reaction of organized labor to the legislation that became the Landrum-Griffin Act. While no one within the movement was happy about the law, leaders of the old AFL unions (the AFL and CIO had merged barely three years before) gave certain portions of it lukewarm support, even while protesting that it was unnecessary. The old CIO unions as well as the independent Teamsters and the United Mine Workers vigorously opposed it. \textit{See McAdams, supra note 332, at 113-17, 125-27, 242-44. See also, Benjamin Wyle, Landrum-Griffin: a Wrong Step in a Dangerous Direction, in New York University Thirteenth Annual Conference on Labor 395 (1960); Wilbur Daniels, Union Elections and the Landrum-Griffin Act, in New York University Thirteenth Annual Conference on Labor 317 (1960).}

\textsuperscript{349} It is incorrect, I believe, to argue that Landrum-Griffin represents no particular ideology, and that it was rather just another attempt by Republicans and Southern Democrats to weaken unions using the language of individual rights as their bludgeon. In fact, the 1958 election cycle was one of organized labor’s greatest successes. The Democrats captured fourteen Senate seats and 52 seats in the House, giving them lopsided majorities in both chambers. \textit{See McAdams, supra note 332, at 3. Seventy percent of labor-backed candidates were elected or reelected and right-to-work referenda were overwhelmingly defeated in California, Colorado, Ohio and Washington. See id. at 3-4; Gall, supra note 244, at 234. Labor’s only substantive defeat was in Kansas, which passed a right-to-work referendum in 1958. See Gall, supra note 244, at 234. Perhaps Landrum-Griffin’s passage is instead indicative of liberalism’s declining faith in the labor movement and the movement’s own fragmentation. See Dubofsky, supra note 36, at 219-23.}

\textsuperscript{350} 316 F.2d 445 (2d Cir.), cert. denied, 375 U.S. 946 (1963).

\textsuperscript{351} 320 F.2d 576 (2d Cir. 1963).

\textsuperscript{352} Salzhandler, 316 F.2d at 446.

\textsuperscript{353} Id. at 450.
lation of unions. It "decided that the desirability of protecting the democratic process within unions outweighs any possible weakening of unions in their dealings with employers . . . ."354

In Vars, the Second Circuit construed Landrum-Griffin's due process provisions, which require that a union member be "served with written, specific charges," "given a reasonable time to prepare his defense," and "given a full and fair hearing" before any disciplinary action was taken against him.355 Vars was expelled from the International Brotherhood of Boilermakers after the union accused him of submitting a fraudulent expense and pay claim to the Local.356 He claimed that he had not received a full and fair hearing because he had been "convicted" with insufficient evidence. The Second Circuit reviewed the evidence, concluded that it was indeed insufficient, and ordered Vars reinstated.357

Both Vars and Salzhandler demonstrate the degree to which courts, after Landrum-Griffin, were willing to involve themselves in the internal affairs of unions and, if need be, favor the interests of individuals over those of the group. Vars was particularly noteworthy in that the court had no real authority for the remarkable proposition that the judiciary could actually judge the evidence upon which a union member was expelled. The court cited no legislative history that justified its action. Moreover, the only case it cited was a New York Court of Appeals case decided before Landrum-Griffin was passed that reversed an expulsion, not on free speech grounds, but on free speech grounds.358

These two cases, which were typical of the case law that developed under the Landrum-Griffin Act, make a stunning contrast to judicial interaction with union affairs before the Act was passed.359 The courts were aware that Congress had redefined the relative importance of the individual worker and his labor union. Furthermore, in Vars, the Second Circuit evidenced a new type of activism in protecting the rights of individual workers beyond what was apparent on the face of the statute. Group pluralist thought, which dictated that the government protect the rights of the group, had been replaced by a conception of policy-making that required courts to protect individuals from the depredations of the groups to which they belonged. Accordingly, the courts, like Congress, responded to the changed political culture, aggressively policing the behavior of labor unions lest they interfere with the individual liberties of their members.

354. Id. at 451.
356. See 320 F.2d at 557.
357. See id. at 579.
359. For similar findings see McLAUGHLIN & SCHOOMAKER, supra note 334, at 74-126.
B. The Duty of Fair Representation

Nor was the judiciary’s new-found activism in the defense of the rights of individual workers solely the result of legislation. During the early 1960s, the courts transformed the duty of fair representation from a doctrine designed to prevent unions from discriminating on the basis of race, into one which allowed the judiciary to judge the merits of decisions made by unions that disadvantaged individual workers who belonged to no particular minority. Throughout the 1940s and 1950s, courts applied the duty of fair representation only in cases of racial discrimination. Of the initial two justifications for the duty — equal protection stemming from Steele and fiduciary duty stemming from Wallace — only the former had any impact before 1960. Thus, the duty of fair representation was conceived of in group pluralist terms. Courts ensured that all groups could participate in the mini-democracy that was a labor union, but they would not judge the decisions this mini-democracy made. Every union decision might disadvantage some minority group within the bargaining unit, but the courts would only intervene if that group was disadvantaged because it was excluded from the decision-making process. However, as thinkers rejected group pluralist assumptions about policy-making in favor of one that focused on the rights of individuals, the nature of the duty of fair representation changed. By the late 1950s, labor law scholars, including Summers, Wellington, and Cox, began calling for a reconceptualization of the duty of fair representation that would have some impact on non-race cases.\textsuperscript{360}

The Court took its first steps in this direction in 1957, when it held that the duty required unions to pursue employee grievances in good faith.\textsuperscript{361} Though this case was a race case (the union had not been pursuing the grievance claims of black workers), it recognized for the first time the right of individual workers to a certain quality of representation, rather than simply the right not to be discriminated against. Then, in 1964, the Court de-

\textsuperscript{360} See Clyde W. Summers, Individual Rights in Collective Agreements — A Preliminary Analysis, in New York University Twelfth Annual Conference on Labor 63 (1959); Cox, supra note 137, at 167-69; Archibald Cox, Individual Enforcement of Labor Law Agreements, 8 Lab. L. J. 850, 858-59 (1957); Harry H. Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1339-43 (1958). How much Wellington’s thought changed is obvious from comparing his 1958 piece with his note, written six years earlier. The Note embraced the equal protection analogy entirely, holding that economic distinction needed only to meet a rational basis test. See supra note 121, at 499. By 1958, Wellington thought that equal protection clause analogy was “inappropriate” for judging the results of collective bargaining. See 67 Yale L.J. at 1340. The change in Summers’ thinking was less dramatic because he had always been more concerned with the rights of individual workers than other labor law theorists. Nevertheless, his 1951 piece Union Powers and Workers’ Rights, 59 Mich. L. Rev. 805 (1951), emphasized, in a pluralist fashion, that the right of each worker to participate in the union’s decision-making process was the primary way to guarantee the rights of the workers. See id. at 837-38. By the 1960s he had become more concerned with protecting the rights of individual workers from the excesses of their labor union. See, e.g., Summers, supra this note, at 63 (1959).

cided *Humphrey v. Moore.* Humphrey addressed a fair representation claim that arose, as so many of these cases did, out of an attempt to determine seniority rights after a merger between two companies ("E&L" and "Dealers"). Both sets of workers were represented by the same local, which negotiated a seniority arrangement with the employer that preserved all of the E&L workers' seniority rights. Several plants were shut down because of the merger, and a number of Dealers' employees were laid off. They claimed that the local had breached its duty of fair representation in negotiating the seniority agreement that resulted in the loss of their jobs.

The Court found that the union had not breached its duty of fair representation. However, in doing so it articulated a standard that, for the first time, indicated a willingness to abandon the analogy to equal protection and examine the actual quality of the union's representation. The Court stated that a union breached the duty if it failed to act "honestly, in good faith and without hostility or arbitrary discrimination." In conducting its contract negotiation, a union was required to act "upon wholly relevant considerations, not upon capricious or arbitrary factors." Unlike the straightforward equal protection standard that the Court had first articulated in *Steele,* *Humphrey* indicated a willingness to rehabilitate the analogy to fiduciary duty that was apparent in *Wallace,* but was missing from the case law during the late 1940s and the 1950s.

After *Humphrey,* courts began to judge unions' actions not by whether they discriminated against a protected group, but by whether they were made in good faith. As one commentator has put it, *Humphrey* opened a "Pandora's box." A flood of non-race-based duty of fair representation cases ensued. Between 1965 and 1970, the number of cases doubled, and it doubled again by the mid-1970s. These cases were successful about twenty percent of the time, a stunningly high number compared to the nearly uniform failure of these types of cases before 1963. Moreover, an increasing number of cases involved allegations that a union had not pur-

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363. See id. at 337-40.
364. See id. at 350. See also JAMES E. JONES, ORIGINS OF THE DUTY OF FAIR REPRESENTATION 37-42 (1977).
365. 375 U.S. at 350.
366. Id.
368. See id. at 269-71. Part of the reason for this increase was that in 1967 the Supreme Court held that a breach of the duty was an unfair labor practice under the NLRA, thus giving the NLRB jurisdiction to hear fair representation cases. Vaca v. Sipes, 386 U.S. 171 (1967). Moreover, the Court held that federal courts and the Board had concurrent jurisdiction over these claims, thus increasing the fora for potential litigants.
369. See Jones, supra note 368, at 270. For the changing composition of these cases see Jones, supra note 364, at 36-37, 42-43.
sued a worker’s grievance with enough vigor. The duty had gone from a method of protecting groups against discrimination by unions to a way of ensuring that unions treated individual workers fairly.

This change was indicative of the decline of interest-group pluralism in three ways. First, and most obviously, it provides evidence that courts had become less concerned with policing the way in which unions treated African-Americans as a group, and more concerned with the way they treated individuals regardless of race. Second, the post-Humphrey duty of fair representation indicated the willingness of courts to police the internal affairs of labor unions in order to guarantee the rights of individual members. In the same manner that courts interpreted the Landrum-Griffin Act as a mandate to focus on the well-being of individuals within the union, the new duty of fair representation favored the rights of individuals over the institutional prerogatives of the union. Finally, the new duty was symptomatic of the activist courts that would typify the federal judiciary of the 1960s. With the passive equal protection analogy transformed into a more aggressive examination of the bona fides of union activity, post-Humphrey courts would become involved in monitoring union activity with a degree of precision unknown in the 1940s and 1950s.

C. Union Security

Starting in 1960, the Supreme Court’s case law concerning union security agreements also demonstrated new-found judicial activism and a deemphasis of the rights of the group in favor of those of individual workers. Even as many state courts followed the interpretation of Hanson that allowed unions to use dues for political activities, the Georgia courts refused. They held that Hanson required unions to rebate that portion of the union dues not used to pay for collective bargaining services to union members who objected to the use of their dues for political purposes. In 1960, the Supreme Court agreed to hear one of the Georgia cases, International Machinists Association v. Street. The case was argued twice before the Court handed down its decision in mid-1961.

Street yielded five different opinions. Justice Brennan, writing for himself as well as for Warren, Clark, and Stewart, held that section 2(11) of

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370. Michael Goldberg’s exhaustive study of the duty of fair representation found that over 80% of the cases filed between 1977 and 1983 involved complaints about the manner in which unions pursued the grievances of individual workers. See Michael J. Goldberg, The Duty of Fair Representation: What Courts Do In Fact, 34 BUFF. L. REV. 89, 89-171 (1985).

371. One reason for this, no doubt, is the passage of the Civil Rights Act of 1964, which removed the need for the original driving force behind the duty of fair representation, the need to prevent employment discrimination by unions. See Jones, supra note 364, at 36-37.


the Railway Labor Act, which permitted union shops, was constitutional because it did not allow union dues to be used for political purposes. Justice Douglas concurred separately. Justice Black dissented, arguing that section 2(11) did in fact allow mandatory dues to be used for political purposes and was, as such, a violation of the First Amendment. Justice Whittaker concurred with Black's dissent, but suggested a different remedy. Finally Justice Frankfurter, joined by Justice Harlan, dissented, holding that section 2(11) allowed dues to be used for political purposes and that this was constitutionally permissible.

Justice Brennan's opinion reviewed the RLA's legislative history and found in it the intent both to guarantee union security within the railroad industry and protect the rights of dissidents within labor organizations. Faced with evidence of both these desires, Brennan concluded that Congress must have intended to provide whatever amount of union security was possible, short of unconstitutionally requiring workers to pay dues that would be used for political purposes. Thus, Brennan ducked the constitutional issue, though in doing so he recognized that an individual's right of free political expression was more important than a union's right to participate effectively in the political process. Strength in compelled unity was permitted for economic purposes but was not allowed in the political arena. As Justice Douglas wrote in his concurrence: "Some forced associations are inevitable in an industrial society. One who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled . . . . [But] [i]f an association is compelled, the individual . . . should be allowed to enter the group with his own flag flying . . . ." Thus, Brennan and Douglas wrote opinions that represented a hybrid of group pluralist and participatory/individual libertarian thought. Both opinions placed the judiciary in a passive position similar to that which the Court took in the CIO and UAW cases brought under section 304 of Taft-Hartley. They construed the statute in such a way as to find it constitutional. On the other hand, Brennan and Douglas both emphasized the rights of individual union members over those of the union itself. The union's power as an interest group was simply not as important to them as it was to the Court of the 1940s and 1950s, or to Justices Harlan and Frankfurter.

Justice Black's dissent marked a more dramatic transformation in the Court's jurisprudence. Not only did he emphasize the need to protect the free speech rights of individuals, but he placed the Court in an activist role, protecting individual liberties. The use of dues for political purposes when a union shop was permitted by a federal statute "injects federal compulsion
into the political and ideological processes . . .”\(^{378}\) Accordingly, Black would have declared the section unconstitutional and affirmed the judgment of the Georgia court. For him, First Amendment rights were not to be balanced against the legislative determination that union political action was an important part of strengthening the rights of workers. The First Amendment rights of the workers were absolute, and any attempt to make dissenting members contribute to the political funds of unions was extortion that the government had “no . . . power to compel.”\(^{379}\) To the modern ear, Justice Black’s absolutism is recognizable as the direction that free speech jurisprudence was to take during the 1960s.\(^{380}\)

What is fascinating about Justice Black’s opinion is the absolute lack of case law in it. He could only cite a single case, *Everson v. Board of Education*,\(^ {381}\) for the proposition that the federal government was prohibited from requiring people to pay money to support positions in which they do not believe.\(^ {382}\) That case upheld public funding of busing children to parochial schools, but contained dicta suggesting that the Constitution limited states’ ability to use money to support religious institutions.\(^ {383}\) In fact, up until *Street*, much of the free speech jurisprudence that Black would have liked to have relied upon involved the protection of the free speech rights of unions, not their workers.\(^ {384}\) Thus, Black’s opinion demonstrated the two characteristics that were to become the hallmarks of the legal thought of the 1960s: First, that individual rights should be protected against incursion by a government that was driven by the desires of majoritarian interest groups; and second, that an activist court was the appropriate institution for undertaking this task.

Frankfurter’s dissent, in contrast, reflected the major assumptions of interest-group pluralism; the rights of groups were more important than those of individuals and courts should passively acquiesce to the desires of these groups as manifest through the legislative process. He began by con-

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378. *Id.* at 789 (Black, J., dissenting).
379. *Id.* at 790-91.
380. For the shift to near-absolutism see HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 227-36 (Jamie Kalven ed., 1988). The best examples of the Court’s balancing test for free speech are the cases in the 1950s that upheld various forms of anti-Communist legislation. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However . . . [w]here First Amendment rights are asserted to bar governmental interrogation resolution . . . [this] always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”). *See also Kalven, supra this note, at 497-505.*
381. 330 U.S. 1 (1947).
382. See 367 U.S. at 791.
383. See 330 U.S. at 16. Indeed, in 1961, when *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), was handed down, it was unclear whether *Everson*’s dicta should be accorded any weight at all since the most recent Establishment Clause case at that time, *Zorach v. Clauson*, 343 U.S. 306 (1952), seemed to indicate that the Court was shying away from the absolutism of *Everson*’s rhetoric. *See* 343 U.S. at 312.
384. *See supra* notes 162-74 and accompanying text.
vincingly demonstrating that nothing in section 2(11)’s legislative history indicated that Congress intended to prohibit the use of union funds for political purposes.\footnote{385} In fact, Frankfurter argued that Congress recognized that the distinction between labor unions’ economic and political activities was artificial.\footnote{386} Having determined that section 2(11) was intended to allow the use of dues for political purposes, Frankfurter continued by explaining why such a use was constitutional. Unions, he argued, taking a page from the industrial pluralists, were like little democracies. So long as dissenting members were not deprived of the right to participate in determining union policy, they could not object to what was done with their dues any more than a taxpayer could refuse to pay taxes for government expenditures of which they disapproved.\footnote{387} It was not the role of the Court to interfere with Congress’ determination that industrial harmony required compelled political and economic unity: “It disrespects the wise, hardheaded men who were the authors of our Constitution and Bill of Rights to conclude that their scheme of government requires what the facts of life reject.”\footnote{388} For the Supreme Court to prohibit political use of dues was to return to the era of substantive due process where courts judged the validity of legislation based on their own political preferences.\footnote{389} Yet, by 1961, Frankfurter’s vision of the Court’s role was an increasingly endangered one. Street marked the start of the Court’s transformation from an institution intent on supporting interest-group pluralism and the rights of groups, to one more concerned with protecting the rights of individuals and guaranteeing their enfranchisement in a pluralist system that had excluded them.

The Court took another step away from pluralist labor law and toward fashioning a participatory conception of union security two years after Street in \textit{NLRB v. General Motors Corp}.\footnote{390} \textit{General Motors} involved the interpretation of a section of the Taft-Hartley Act that permitted unions and employers to make union shop contracts.\footnote{391} General Motors argued that by explicitly permitting the union shop, the Act implicitly prohibited every other type of union security arrangement, including the less strict agency shop, wherein a worker could be forced to pay the costs of collective bargaining and contract administration, but not be required to join the union.\footnote{392} Accordingly, if a state prohibited only the union shop, as was allowed by

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\begin{itemize}
  \item 385. See 367 U.S. at 801-03, 811-14 (Frankfurter, J., dissenting).
  \item 386. See id. at 801, 816-18. Frankfurter also notes that “[t]he notion that economic and political concerns are separable is pre-Victorian.” Id. at 814.
  \item 387. See id. at 808.
  \item 388. Id. at 815.
  \item 389. See id. at 815-16.
  \item 390. 373 U.S. 734 (1963).
  \item 392. See 373 U.S. at 737-38.
\end{itemize}}
Taft-Hartley, employers and unions were not permitted to sign agency shop contracts in those states.393

Writing for a unanimous court, Justice White rejected this argument. The purpose of permitting union shop contracts was to allow unions to eliminate the free rider problem.394 Accordingly, a less restrictive contractual arrangement that served the same purpose, such as an agency shop contract, was allowed by the Act.395 Up to that point, White’s argument was amply supported by Taft-Hartley’s legislative history. His next move, however, was not. Because union shop contracts were permitted only to solve the free rider problem, it followed that the compulsory union membership allowed under the Act could mean nothing more than paying for the cost of contract negotiation and administration: “If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of ‘membership’... is nevertheless satisfied and the employee may not be discharged...”396 Thus, White converted every union shop contract in the United States into an agency shop contract. He lessened the control unions had over workers by refusing to allow the ultimate form of union discipline — loss of a worker’s job — for any offense other than refusing to pay dues. For the Court, the individual rights of the workers had assumed a place above promoting unions as a strong interest group.

Another consequence of General Motors was that it provided a rationale for further judicial and administrative intrusion into the internal workings of labor unions. If the only justification for tolerating “compulsory unionism” was the problem of free riding on the cost of contract negotiation and administration, then it was only a short step to hold that unions could only compel their members to pay for those costs. Why should members be forced to subsidize any union activity not directly related to bargaining or grievance arbitration? Indeed, in Local 959, Teamsters,397 the NLRB took that step. The Board held that it was an unfair labor practice to dismiss a worker pursuant to a union shop contract when he refused to pay a dues increase that was to raise money to build a union hall and establish a savings and loan:

[I]t is manifest that dues that do not contribute, and that are not intended to contribute, to the cost of operation of a union in its capacity as a collective-bargaining agent cannot be justified as necessary for the elimination of ‘free riders.’ Here neither the ‘dues’ for the credit union nor those for the building fund were for the purpose of supporting the Respondent as a collective

393. See id. at 738.
394. See id. at 740-41.
395. See id. at 741.
396. Id. at 743.
397. 167 N.L.R.B. 1042 (1967).
bargaining agent, and they therefore do not fall within [the union shop proviso].

Along with the judiciary, the NLRB had become the defender of the individual union member's rights against their union, even if this meant inserting itself into the previously private activities of a union. As American political culture began to value the rights of individuals over those of the group, courts and the Board followed suit.

D. Section 304

A similar change in emphasis, from the protection of the group rights of unions to the protection of individual workers' liberties, was evident in changing judicial attitudes towards section 304. Judicial resistance to prosecutions under section 304, which had been crippling in the 1950s and early 1960s, began to diminish by the middle of the decade. In 1966, the Justice Department for the first time succeeded in punishing someone for violating section 304. The case, United States v. Lewis Food Co., involved the prosecution of a corporation that, shortly before the 1962 primary and general elections, ran an advertisement in several Los Angeles area newspapers rating state and national politicians according to their beliefs in "our enterprise system, our constitutional government and freedom under God." Like every other court that had come into contact with 304, the district court read the statute very narrowly and dismissed the indictment. It held that expending money simply to publicize the voting record of a candidate did not constitute an expenditure in connection with an election because "obviously, it was not an attempt to control the election." The Ninth Circuit reversed the district court and reinstated the indictment. The circuit court was more worried than the district court that Lewis Foods' expenditure might corrupt the political process:

[A] jury question was presented as to whether the advertisement . . . was designed to influence the public at large to vote for or against particular candidates. A jury could find that the 'Notice to Voters' was not intended to give an objective report on the voting record of public officeholders . . . [I]t makes it plain that, in Lewis' opinion, those office holders who are given low ratings . . . should not be reelected.

398. Id. at 1045.
399. For the Board's flip flops on this issue and of the Supreme Court's ultimate acceptance of the logic of Local 959 see infra note 419.
401. Id. at 851.
402. Id. at 853.
403. 366 F.2d 710 (9th Cir. 1966).
404. Id. at 712.
The circuit court then remanded the case, and the defendant pleaded no contest to violating the Act.405

Similar language appeared in United States v. Pipefitters Local Union No. 562.406 A prosecution of a St. Louis union under section 304 that began in 1968.407 Three union officers were convicted of establishing a political fund that funneled union member dues to political candidates.408 The union appealed the conviction arguing, among other things, that section 304 was an unconstitutional restriction of freedom of expression, and that the statute was not intended to prohibit unions from amassing the voluntary contributions of their members and passing them on to political candidates.409 The Eighth Circuit upheld the convictions. After holding that there was sufficient evidence for the jury to have found that the union members’ contributions were coerced, the court, unlike every other court that had previously heard a 304 case, addressed the constitutional issue. The First Amendment gave the union a right of expression, but that right had to be balanced with “[t]he substantial interest each individual has in his own political activities.”410 That interest, the court held, was enough to trump the union’s right.411

The union appealed the conviction to the Supreme Court, and won reversal when the Court held that the trial court had failed to properly instruct the jury that the government had to prove that the funds were coercively extracted from the union members.412 The Court refused to address the constitutional issue, but interpreted 304 in such a way as to balance the rights of the individual workers with the rights of the union. Section 304, it held, permitted unions to establish political funds, provided that they were segregated from the union’s operating expense, and provided that they were funded only by voluntary contributions that are unrelated to the requirements of membership in the union.413 Thus, the Court fashioned an interpretation of 304 based on its holdings in Street and General Motors.414 Like both the opinion below and the Ninth Circuit opinion in Lewis, the

406. 434 F.2d 1116 (8th Cir. 1970), aff’d en banc 434 F.2d 1127 (8th Cir. 1970), rev’d 407 U.S. 385 (1972).
408. The facts are described at 407 U.S. at 387-88.
409. See 434 F.2d at 1118.
410. Id. at 1123. By the time the case got back to the district court, the two leading defendants had died and the case was dismissed. See United States v. Pipefitters Local Unions No. 562, 68-CR99(3), order dismissing the indictment dated March 11, 1972. United States Archives, Kansas City Regional Office, Record Group 21.
411. See id.
412. See 407 U.S. at 441-42.
413. See id. at 414.
414. Congress did the same thing when they amended section 304 in 1971, adding language to the end of 304 permitting certain non-partisan political expenditures, but forbidding the use of dues money to finance those expenditures. 86 Stat. 10 (1972), repealed (1976). In Pipefitters the Court asserted,
Supreme Court was willing to put some teeth into section 304. No longer would the rights of groups triumph over those of individuals. As interest-group pluralism was displaced as the dominant policy-making paradigm, the courts came to view doctrines that protected the rights of groups at the expense of individuals with suspicion. Accordingly, a balance between the rights of individuals and of groups had to be struck. Indeed, as the 1970s began, it was a balance that courts struck increasingly in favor of the individual union member.

Thus, in the early 1970s several courts found that labor unions had breached their fiduciary duty to their members by making expenditures that violated section 304. Additionally, the Justice Department successfully prosecuted United Mine Worker’s president W. A. Boyle under the Corrupt Practices Act. On appeal, Boyle challenged the constitutionality of section 304. He argued that the union’s free speech rights required the government to protect the individual liberties of union members by the least restrictive means possible. According to Boyle, simply ensuring that the democratic processes within the union functioned was enough protection for the rights of dissenting minorities. This group pluralist argument, which paralleled Frankfurter’s and Harlan’s dissent in *Street*, was summarily rebuffed by the circuit court. Participatory assumptions cast doubt upon groups’ abilities, or desires, to protect the interests of their individual constituents:

> Democratic majority rule does not, in itself, necessarily protect minority interests. Indeed, it is based on the premise that the losing side (the minority) must accept the dictates of the winning side (the majority) . . . . By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority.

After the emergence of rights-based, participatory thought in the 1960s, these group pluralist arguments simply did not resonate with courts that saw themselves as the defenders of individual rights against the predations of corrupt interest groups.

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with a good deal of support in the amendment’s legislative history, that the Act did nothing more than codify existing court decisions on section 304. See 407 U.S. at 410-11.


417. The circuit court recounts his argument at 482 F.2d. at 763. It is impossible not to comment upon the irony of this argument. Boyle’s reign as the president of the UMW was legendary for its antidemocratic nature, culminating in his conviction for the murder of UMW reform candidate Jock Yablonski as well as his wife and daughter. *See Paul F. Clark, The Miners’ Fight for Democracy* 1-31 (Ithaca, N.Y.: Cornell Studies in Industrial and Labor Relations, # 21, 1981).

418. 482 F.2d at 763.
E. Union Strength and Participatory Government

As the dominant conceptions of policy-making changed from group pluralist to participatory in the early 1960s, labor law doctrines conformed to these new assumptions. Group pluralist idealization of the interest group was replaced by a belief that individuals should participate directly in their own governance, and that interest groups inhibited that process. Landrum-Griffin reflected this assumption, as did the federal judiciary's interpretation of it. Internal union affairs became subject to public regulation, with courts aggressively policing the relationship between unions and their members. Federal courts transformed the duty of fair representation from a doctrine that simply ensured group representation within the union's internal political processes into a device for regulating a union's actions with respect to an individual worker. Section 304, a virtual dead letter under a group pluralist conception of freedom of expression, had new life breathed into it by courts that began to value the speech rights of individual workers over those of unions. Similarly, the rights of workers subject to union security contracts, judicially minimized under the group pluralist ideology of the 1950s, began an expansion in the 1960s that would culminate two decades later in increasing restrictions on what unions could do with the dues that they collected. Thus, by the end of the 1960s, labor unions had to cope with a new legal regime. The cozy, group pluralist days, when courts were disinclined to limit the rights of unions regarding their members were gone. Instead, participatory labor law threatened to strip unions of their ability to discipline their members and to prevent free riding on the benefits derived from unionization. It limited their ability to influence political actors and inserted the federal judiciary into the relationship between unions and their members.

VI. Conclusion

This article has argued that during the 1940s and 1950s, industrial pluralism had an ambiguous effect on labor unions. While, as the deradicalization theorists argue, it fostered a system of labor law that limited unions' most powerful weapons, it also strengthened labor unions as political and economic organizations. Interest-group pluralism, and the legal doctrines

that sprang from it, gave unions control over the atomistic tendencies of their members and protected unions from certain legislative attempts to curtail their power. However, as the dominant intellectual conception of policy-making shifted in the early 1960s, participatory, rights-based ideology entered labor law in such a manner as to strip the labor movement of the few benefits it derived from industrial pluralism. Pluralist assumptions about equality of bargaining power and minimal state involvement in labor relations continued to permeate contract negotiation and interpretation, while individual rights-based assumptions replaced pluralist ones in the areas of union security, freedom of expression, and the duty of fair representation. Labor was stuck with the worst of both worlds.

The history of this phenomena is a sadly ironic one, paralleling as it does the fragmentation of American liberalism. The economic and political arrangements that emerged from the New Deal rested to no small degree on the successes of the labor movement as a political and economic actor during the 1930s and the immediate post-war period.\(^\text{420}\) It was the groups whose political voices were amplified during this period — African-Americans, immigrants, women — who were at the forefront of redefining citizenship and civil rights during the 1960s. Similarly, it was New Deal Justices who set the doctrinal groundwork for the “rights revolution” that engulfed the country in the 1960s.\(^\text{421}\) Thus, the political movement that labor helped to set in motion has undermined the power of its progenitor. Post-war American liberalism had at its base a commitment to both group rights and the rights of individuals. Since the 1960s, the labor movement has suffered from American liberalism’s rejection of the group basis of its own past and its inability to find a place for group rights within the model of individual rights it clings to so dearly.

\(^{420}\) On organized labor’s support of the New Deal see BADGER, supra note 7, at 250-51; WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 188-89; OVERACKER, supra note 177, at 56-59; Geoffrey D. Berman, Note, A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s, 80 VA. L. REV. 291 (1994).