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The Open Window and the Open Door
An Inquiry Into Freedom of Association

Charles E. Wyzanski, Jr.*

The following article was delivered September 11, 1947, before The State Bar of California as the 1947 Morrison Foundation Lecture.

California is deservedly known throughout the land as being first in many ways: in the warmth of its hospitality, in the number of clear and sunny days, in the quantity of students engaged in higher learning, in the quality of its educational opportunities, and, certainly, not least, in the variety and vigor of the groups into which people combine to express their political, economic, religious, social and humanitarian ideas. This rich diversity of group movements, the manifold problems they raise and the curative legislative proposals they evoke make California an especially appropriate place to deliver a lecture inquiring into the nature and limits of freedom of association.

And if this be the appropriate place for such an inquiry, now is even more clearly the appropriate time to wrestle with the conflict between the claims of society as a whole, and the claims of partial, parochial or partisan groups. For as the recent sessions of deliberative bodies in Sacramento, Washington and Lake Success indicate, it is a topic at the forefront of current local, national and international debate. It lies at the root of controversies that require immediate decision by lawyers, by legislators, by leaders of public opinion.

I need not begin by reminding this learned audience that, unlike the draftsmen of the constitutions of postwar France,¹ postwar Japan,² prewar Russia,³ and more than thirty other countries, the Fathers of our Constitution did not insert into our eighteenth-century Bill of Rights a declaration in favor of freedom of association. They were not deceived by the verbal kinship of the phrases freedom of speech, freedom of assembly and freedom of association. They observed that the

*United States District Judge for the District of Massachusetts.

² Ibid., March 9, 1946, at 6.
³ U. S. S. R. CONST. (1937) art. 126. Note that according to the usual translation the right is stated to be that of “combining in public organizations”.

triad represented an ascending order of complexity. Or, to use the legal catchword of the day, they represent successively closer approaches to a “clear and present danger”. For, in common usage the term “association” implies a body of persons who have assembled not on an *ad hoc*, but on a more or less permanent, basis and who are likely to seek to advance their common purposes not merely by debate but often in the long run by overt action.  

That the problem of freedom of association is peculiarly complicated finds ready illustration in events of the last year. In March, President Truman directed heads of government departments when hiring or firing an employee to consider whether he had a sympathetic association not only with the Communist party but with any group deemed by the Attorney General to be subversive. Yet a few months later, representatives appointed by the President to attend an International Labour Conference held in Geneva, Switzerland, successfully pressed for the adoption of an international resolution declaring that freedom of association should be accepted as a universal principle for all employers and workers. In June, Congress enacted the Taft-Hartley Act. It opens with a reaffirmation of the Wagner Act’s declaration that workers are entitled to “full freedom of association”, yet it denies an association of workers the right to bring its cases before the National Labor Relations Board if one of its officers is a Communist, or if it fails to file with the Secretary of Labor prescribed information regarding its organization and finances.

Lest you suppose these at least superficial contradictions are eccentricities of the Washington scene, let me turn for a moment to the work of the Commission on Human Rights. You will recall that this is a subordinate agency of the Economic and Social Council of the United Nations. It was established obedient to the Charter of the United Nations adopted in California. And it is seeking with the aid of governments and nongovernmental organizations to draft an International Bill of Rights. Now strangely enough those who are coming forward with proposals couched in the broadest language take action which is in conflict with the apparent meaning of their words. Take,  

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8 Ibid. § 101 amending § 1 of the National Labor Relations Act.
9 Ibid. § 101 adding to the National Labor Relations Act § 9(h).
10 Ibid. § 101 adding to the National Labor Relations Act § 9(g).
for example, the American Federation of Labor which urges that there must be "freedom of association . . . for those who oppose no less than those who support a ruling party or a regime." Yet only a few weeks ago the California State Federation of Labor refused to seat a delegate at its annual convention on its finding that he was a Communist. Or consider the dilemma in which the leaders of the Labour Party in England have found themselves. In their role as spokesmen for the government of the United Kingdom they favor freedom of association. In their role as party officers they must obey a party resolution expelling any member who joins the Society of Anglo-Soviet Friendship.

Surely this apparent gulf between these recent unlimited professions of abstract principle and the specific decision of concrete cases reveals a situation which invites scrutiny. Therefore, I propose to examine with you the history of the idea of freedom of association, the values which are at stake and the possible evolution of the concept. In this examination I shall at the outset make three assumptions.

First, I shall assume that you, though learned in the law, would not want me to pitch my discussion solely in terms of legal technicalities and precedents. You will realize that the problem of freedom of association cuts underneath the visible law to the core of our political science and our philosophy. Moreover, so far there are few court cases which include an explicit ruling on "freedom of association" _eo nomine_. The phrase, to be sure, crept into at least three opinions of the Supreme Court of the United States. But in none of them was it part of the _ratio decidendi_. And usually up to the present time, the courts have been able to avoid an explicit ruling upon the issue by resort to other and more familiar concepts. This was true, for example in the distinguished opinions of your Chief Justice in _Communist Party v._

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17 In the argument of counsel in Associated Press v. Labor Board (1937) 301 U. S. 103, 119, reported in Sen. Doc. No. 52, 75th Cong. 1st Sess., (1937) 79, the principle of freedom of association was invoked. However, the Court did not rest its opinion on that argument.
Peek and of Mr. Justice Traynor in Danskin v. San Diego Unified Sch. Dist. And I had a similar opportunity to avoid ruling upon freedom of association in Galardi v. Hague where I decided that a captain in charge of the United States Navy Yard in Boston had the right to discharge a machinist whom he believed to be a Communist. I rested my ruling on the narrow ground that a naval officer can discharge for any reason, good or bad, a person whose original appointment was made for a reason which may have been good or bad, but which was not in any event based on Civil Service rules or on contract.

Second, I shall assume that, even if we regard the problem of freedom of association with eyes of political scientists and not of lawyers, we shall agree that whenever society may justifiably forbid one man to take certain action, it may likewise justifiably forbid one thousand men to do the same act in concert. Multiplication of offenders does not give immunity. Hence in this talk I need not consider the right of men to form associations for what are literally treasonable or criminal purposes, including, for example, espionage or acting in defiance of law as the unregistered agent of any foreign power. I am not unaware

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18 (1942) 20 Cal. (2d) 536, 127 P. (2d) 889. In that case the court held that the California legislature may properly deny a place on the ballot to any party advocating the forceful overthrow of the government but it may not without a judicial hearing determine that a specified party—in this case the Communist party—advocates the doctrine of forceful overthrow. Hence those provisions of sections 2540.3 and 2540.4 of the California Elections Code which barred the Communist party by name were held invalid. But such parts of those sections were upheld which provided that “no party shall be recognized or qualified to participate in any primary election... which either directly or indirectly... advocates...; the overthrow by any unlawful means of... or aids... a program of sabotage... against... the Government of the United States or of this State”.

19 (1946) 28 Cal. (2d) 536, 171 P. (2d) 885, (1947) 35 CALIR. L. REV. 120. In this case the San Diego Civil Liberties Committee was denied the use of a public high school auditorium for a series of meetings on the Bill of Rights because the Committee did not sign the defendant’s form stating a disavowal of advocacy or membership in an organization that seeks the overthrow of the United States government by force or violence. The Committee sued to be allowed the use of the high school. It claimed that the defendant’s regulation and form were invalid. Its contention was upheld on the ground that “the state cannot suppress free expression except in the presence of clear and present danger, it cannot enforce a precautionary measure that would deny the right of assembly to those whose political creeds it disapproves”.


21 50 U. S. C. (1940) §§ 31-45d.

that this assumption may exclude a territory of extent as yet unknown. But regardless of what party or group may be thus excluded, I am prepared to stand on the point that the doctrine of freedom of association has never been thought to extend to an alliance for crime. Anyone who knowing its purposes joins a combination for crime is a criminal.  

Third, I shall assume that you, like myself, agree with the remarks of Dean Dickinson in his admirable and as yet unpublished address given June 10, 1947 before the Lawyers Club of San Francisco, that it is legally justifiable and politically wise for our government to exclude from its political departments and its armed services any man who has a *proved* allegiance to a foreign temporal sovereign, regardless of what sovereign it be. We lawyers know that in private matters an agent can not act for two principals on subjects where their interests are antagonistic. So in public matters a man can not serve two nations in fields where their interests may be opposed.

Having limited my topic in the three ways I have just indicated, I now propose to consider the right of groups of men to organize in our society. I shall start from the teaching of the greatest of English historians, F. W. Maitland, and shall stress the family resemblance between all types of voluntary associations, those which exercise power in its grosser political and economic forms and others which rely on the subtle pressures of sentiment and intellectual curiosity: unions and universities, clubs and churches, reform movements and scientific societies.

This is, admittedly, an inclusive approach not characteristic of the best lawyers and judges in their daily practice. In our professional work we warily move from case to case. We know the merits of separate diagnosis and prescription. And we pride ourselves on our professional contribution to social stability through sensible, concrete *ad hoc* adjustments rather than through logical and universal patterns.

That there is a time for such particularism, I agree. Such would be the case if we were holding court and had to render a judicial decision on the strict legal right of the President, or of Congress or of a labor union to exclude from office some person deemed to be undesirable. But now I seek to invoke your interest not in the small side eddies of judicial decision, but in the broad currents of political theory.

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24 Maitland, Selected Essays (1936) 128; Maitland, Introduction in Gierke, Political Theories of the Middle Age (1927) xxvii.
And in such a philosophical inquiry I have more than one reason for inviting you now to take a generalized view. One of the greatest thinkers of our time, the Cambridge philosopher Professor Alfred North Whitehead, has told us that in almost all intellectual fields progress comes from the fruitful generalization.\(^{25}\) And this aphorism has a special application to the social sciences because of the large risk which comes from the personal prejudice of every observer in those contentious fields. If he looks only at the organization which he already loves or hates the observer merely has his prejudice reinforced. He may, on the contrary, have his emotion diluted and his vision deepened if he will try to see resemblances and comparisons.

Indeed, is that not the way we moderns came to write constitutions and formulate the concept of liberty itself? What is a constitution but a generalization drawn from many codes? And is not the difference between the way we moderns understand liberty and the way Chaucer did, attributable in part to the fact that he used the word liberty in the particularized sense of the right of a bondsman to be released from captivity,\(^{20}\) while we generalize it as representing the sum total of that and many other emancipations and franchises.\(^{27}\)

If we take the generalized view that I have proposed, the first point which commands our attention is the obvious hostility of Americans of the eighteenth century to the broad principle of the freedom of men to form whatever political and economic associations they pleased.

The Fathers of the American Constitution plainly did not believe in such a wide freedom. In the tenth paper in the Federalist series\(^{28}\) Madison denounced the "dangerous vice"\(^{29}\) of "faction". "By a faction," he wrote, "I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."\(^{30}\) And the same attitude was restated in memorable form nine years later on September 17, 1796, by George Washington in the *Farewell Address* which had as one of its main themes


\(^{27}\) Ibid., "liberty", meaning 2.


\(^{29}\) The Federalist, op. cit. supra note 28, at 51.

\(^{30}\) Ibid. at 52.
a declaration against the forming of combinations. In this hostility
Americans were representing not some quirk of provincialism, but the
generally accepted democratic view of their time as is illustrated in
France, for example, by the passage of the well-known Loi Le Chape-
lier of 1791 prohibiting the creation of occupational associations, and in England by the judicial outlawing of combinations of work-
ingmen.

In the United States three roots for this hostility deserve mention. First, as the Declaration of Independence recites, the experience of the American colonists with royal cliques and royal monopolies had left an indelible mark. Powerful private associations had become symbols of interference with individual liberty. Second, the United States, like other nations of the world, had a relatively weak govern-
ment one hundred and fifty years ago—weak in the force it could bring to bear not only externally but internally. We are apt to forget that even the practice of a standing paid well-staffed domestic police force is only just one hundred years old. In 1800 the larger cities of the Atlantic seaboard had merely a night watch; the other cities often depended on posses. And when in 1844 the New York State Legis-

ture made the first provision for a consolidated day-and-night police, the City of New York began with a regular police force of 16 men. In such circumstances the nation and the state looked at every private combination as a potential rival and a challenge to its authority. Third, the Founders of our Republic were heirs, and to a large extent conscious heirs, of a tradition more than two thousand years old which up to then had sharply separated the rights of the individual from the rights of the group. Of this tradition I must give a brief parenthetical review because it forms no small part of the intellectual climate of our day as it did of theirs.

The tradition of individual liberty of which the Framers were lega-

tees was woven from five principal strands—strands supplied by

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32 Dicey, Law and Opinion in England (1905) 467; Lauterpacht, An Interna-

tional Bill of the Rights of Man (1945) 112. Cf. Napoleonic legislation summarized in Dicey, supra, at 150, n. 2, 466, 474.
33 Dicey, op. cit. supra note 32, at 97.
34 The Declaration of Independence recites as one of the many colonial grievances that the King "has excited domestic Insurrection amongst us".
36 Becker, Modern Democracy (1941) passim; Becker, New Liberties for Old (1941) passim; Whitehead, Adventures of Ideas (1933) passim.
the Athenians of the Periclean Age, the Stoic lawyers of Ancient Rome, the religious leaders of the Christian Church, the English lawyers of Tudor and Stuart days, and the philosophers of the seventeenth and eighteenth centuries. While each of these sources has contributed to the creation of our faith in the dignity of the individual man and in his right to freedom of expression, almost all of them have opposed unlimited freedom of association and have looked with misgivings upon the claim of men to form groups not specifically licensed by the state.

Thus Thucydides, to whom we owe our report that Pericles advocated "discussion" and "the knowledge which comes from discussion" and preached that "liberty is the secret of happiness, and courage is the secret of liberty", inveighed against political clubs and associations "for such associations are not entered into for the public good in conformity with the prescribed laws, but for selfish aggrandizement contrary to the established laws". And in this warning Thucydides spoke as a typical Greek.

Taking their cue from the Greeks, the Stoic lawyers and their successors who codified the Corpus Juris Civilis of Justinian never recognized the right of men to form associations without official authority. And the mediaeval glossators interpreted Roman law principles to condemn all unlicensed corporations, even those which had been formed by university students and teachers. Even in the period of the post-glossators, after the teachings of Innocent IV and of Bartolus had been absorbed, the only organizations which were permissible were those formed for religious and charitable purposes, mining organizations, farming partnerships, trade guilds and other purely domestic associations which were not offensive to the jus civile. Thus there was no right to form a combination with men outside the local area of government. It was thought that the jus gentium, or as we should say principles of international law, forbade "civitates" who already owed allegiance to one sovereign to form an independent fed-

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37 Thucydides, II, 40, 3.
38 Ibid., II, 43, 4-5.
39 Ibid., III, 82, 6.
40 See Aristotle, Nicomachean Ethics, Bk. VIII.1; Isocrates, III Nicocles or The Cyprians 54, (Loeb. ed. vol. I, at 109) ; 2 Vinogradoff, Historical Jurisprudence (1922) 8, but see at 119.
41 Buckland, The Main Institutions of Roman Private Law (1931) 88.
eration. In Bartolus’ day that conclusion was directed at the far-flung Papal and Imperial parties, the Guelphs and the Ghibellines. Some of you may be reflecting on a contemporary parallel.

The very limited amount of freedom of association which mediaeval theorists recognized was not, surprisingly enough, much extended in the period of the Reformation when it might have been supposed that diversity of religious affiliations in the same territory would require substantial modification of earlier doctrines. In the respective areas where they were a minority the Jesuits and the Dutch Protestants, each, of course, from a different standpoint, successfully established the right of each man to belong to two separate communities, the one civil, the other religious. This right was founded on the doctrine that the state and church are each, as they said, perfect societies. Such a doctrine was formulated in terms of, was intended to be applied to, and was in fact restricted to the right to belong to the two types of association known as state and church. The doctrine never grew to include the unfettered right of men to join other associations or the right of other associations to exist without specific governmental sanction.

The view of the ancient, the mediaeval, and the Reformation thinkers that, with few and peculiar exceptions, associations had no claim to exist unless officially authorized, was also held by the English lawyers and philosophers who were best known to those who moulded our governing charter.

Thus English lawyers from Tudor times were familiar with an interpretation which the Court of Star Chamber had added to the common law of conspiracy. That court applied the broad rule that it was against the common law of England for an unlicensed body of men to combine for any purpose which the judges regarded as against public policy even if those purposes were not criminal or even tortious. That is, the law of conspiracy implied the proposition that what is permitted to one man is not necessarily permitted to one thousand men.

A similar restrictive rule won the approval of philosophers. Thus, Hobbes in The Leviathan had written that “all uniting of strength by private men, is if for evil intent unjust; if for intent unknown, dan-

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44 Ullmann, op. cit. supra note 42, at 290.
45 Figgis, FROM GERSON TO GROTIIUS (1916) 163.
46 Ibid. at 178.
47 3 Holdsworth, HISTORY OF ENGLISH LAW (1923) 478; 8 ibid. at 382; 3 Stephen, CRIMINAL LAW OF ENGLAND (1883) 209.
gerous to the Publique." Similar expressions could be quoted from philosophers as different as Rousseau and Burke.

These currents of opinion flowing from English teachings as well as from the Greeks, the Romans, the Mediaevalists and the religious controversialists, played, as I have already said, a decisive part in forming the intellectual climate of the eighteenth century in America. They contributed to a once widely held American article of faith that grave danger to the public interest is presented by the existence of powerful private political or economic associations.

But the hostile attitude which characterized the Founding Fathers has gradually changed as our nation experienced the full force of modern technology, transportation and communication.

The attitude of the community toward business organizations was among the first aspects of our society to respond with significant changes. Originally, as we all recall, it required a special legislative act to create a corporation. Thus there could be no association that had limited liability unless the state gave its specific license. But by the end of the nineteenth century it was customary for a state to have on its statute books a general incorporation law, the terms of which could readily be met by almost any group of men engaged in commerce or industry. And so liberty of business association became the rule, except where there was restraint of trade.

Labor achieved a similar emancipation less through statutory than through judicial development. The right of workingmen to form their own associations without a special license from the state was declared in 1842 in a memorable opinion by Chief Justice Shaw. And this right was soon widely recognized, as Chief Justice Taft stated in *American Steel Foundries v. Tri-City Central Trades Council*.

Accompanying these economic developments there was a widespread increase in secret social organizations. Thus the Masonic organizations—which had existed in England at least since 1717 and which were familiar in Franklin's day—became more important in

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51 *Commonwealth v. Hunt* (1842) 45 Mass. (4 Metc.) 111.

52 (1921) 257 U. S. 184, 209.
the United States in the nineteenth century.\textsuperscript{53} And, following the lead of the Masons, the Independent Order of Odd Fellows was introduced into the United States in 1819. Thereafter, secret societies proliferated in abundance.\textsuperscript{54} Indeed “between 1890 and 1901 no less than 490 different fraternal organizations were founded”.\textsuperscript{55} These diverse developments made acute foreign observers aware even before we ourselves recognized the drift, that we were becoming more favorable than our ancestors to freedom of organization. In his famous book, \textit{Democracy In America}, published between 1835 and 1840, the Frenchman De Tocqueville devoted a whole chapter to what seemed to him to be the good “use which the Americans make of public associations in civil life”.\textsuperscript{56} And a like favorable attitude was displayed by the German-born Columbia professor, Francis Lieber, who sought to teach the tens of thousands of readers of his books that all civil liberty in America depended upon what he called “institutional liberty”.\textsuperscript{57} By the time that James Bryce came to write his \textit{American Commonwealth}\textsuperscript{58} and Gunnar Myrdal, his \textit{An American Dilemma},\textsuperscript{59} freedom of association was considered a deeply rooted characteristic of American society.\textsuperscript{60}

\textsuperscript{53} 10 \textit{ENCYC. Soc. Sci.} (1933) 177.
\textsuperscript{54} 6 \textit{ibid.} (1931) 423.
\textsuperscript{55} \textit{SCHLESINGER, POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES} (1933) 251.
\textsuperscript{56} \textit{DE TOCQUEVILLE, DEMOCRACY IN AMERICA} (1840) Pt. II, Bk. 2, c. 5.
\textsuperscript{58} 2 \textit{BRYCE, AMERICAN COMMONWEALTH} (1924) 282.
\textsuperscript{59} 2 \textit{MYRDAL, AN AMERICAN DILEMMA} (1944) 952.
\textsuperscript{60} I have made no reference to the repercussions in the United States of the European movements of associationism. See 1 \textit{COMMONS et al., HISTORY OF LABOR IN THE UNITED STATES} (1918) 493; \textit{CURTI, ROOTS OF AMERICAN LOYALTY} (1946) 177. From the Continent came in the nineteenth century four important currents of thinking which favored freedom of association. The first originated with Saint-Simon and furnished some of the groundwork for Mazzini and Marx. See 13 \textit{ENCYC. Soc. Sci.} (1934) 509. Its classic exposition is in \textit{MAZZINI, DUTIES OF MAN} (Everyman ed. 1912) 90. Cf. \textit{CROCE, HISTORY OF EUROPE IN THE NINETEENTH CENTURY} (1934) 118, 141. The second current flowed from Fourier and was popularized in the United States by Brisbane and was exemplified here by Brook Farm. See \textit{COMMONS et al., supra}; 6 \textit{ENCYC. Soc. Sci.} (1931) 402. The third principal current derives from Hegel. See, for example, \textit{HEGEL, PHILOSOPHY OF RIGHT} (Knox ann. transl. 1942) 6, 152-155, 273 (pars. 250-256). Hegel’s influence on prominent Americans such as Commissioner of Education William T. Harris is well-known. See \textit{CURTI, GROWTH OF AMERICAN THOUGHT} (1943) 640; \textit{CURTI, supra}. See \textit{COHEN, LATER PHILOSOPHY} in 3 \textit{CAMBRIDGE HISTORY OF AMERICAN LITERATURE} (1921) 226. A fourth European current which is in some respects analogous to associationism is pluralism, which though advocated by Duguit and Laski has watered principally ac-
What were the values offered by freedom of association that appealed so to these discerning foreign observers? Why did they regard that freedom as characteristic of a modern democracy? And why did the American Law Institute include in its 1945 Statement of Essential Human Rights a declaration favorable to "Freedom To Form Associations"?

First, associations and groups give men a chance to realize their potential qualities as human beings. Man, as Aristotle told us, is essentially a political animal—an essentially political not in the sense that he must vote or hold office, but in the sense that he needs group activity to fulfill himself. In a world that would otherwise emphasize the solitariness which is at the core of every man, association brings the joy of companionship. And under the pleasant form of fellowship it encourages each man to assume a leadership that he finds it difficult to achieve directly in states and cities of the vast dimensions of modern times. Far from being swallowed up by the association, his activity within its bounds gives him chance to grow in moral stature.

Second, these voluntary associations are the indispensable instruments of the progress of civilization. We so regularly and so properly emphasize that the individual and not the group is the unit of spiritual significance and therefore the repository of ultimate religious and philosophical value, that we tend to minimize the role of the group as the decisive unit of intellectual advance. And yet the history of ideas, in short, the history of man's progress is largely the history of group action. The first great Greek thinkers were members of an Academy. President Conant of Harvard reminds us that the critical point in the rate of scientific advance was reached in the seventeenth century with the founding of scientific societies. These groups were the precursors of the great university and industrial laboratories and even of the teams of scientists led by Mr. Conant himself and by Mr. Bush in World War II.

Indeed the function of coteries and groups has counted for much even in literature and the arts as was magnificently illustrated in the

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61 Politcs, Bk. I.2. Cf. statement of St. Thomas Aquinas that man is a "social and political animal". De Regimine Principum, lib. 1, cap. 1, quoted in McILwain, The Growth of Political Thought (1932) 5.

62 Hegel, op. cit. supra note 60, at 278 (par. 255 addition 151); Watson, Democracy In A Collectivistic Age in Foundations of Democracy (1947) 166-176, especially at 175.

63 Conant, On Understanding Science (1947) 7, 60.
Italian Renaissance and in the Impressionist and Symbolist movements of France at the start of this century. The members of these groups do more than stimulate one another. Though we seldom realize it, members of the group act cooperatively, one building on the work of another. Listen to what the poet Valery has written about originality in his own métier: “It takes two to invent anything. The one makes up combinations; the other one chooses, recognizes what he wishes and what is important to him in the mass of things which the former has imparted to him. What we call genius is much less the work of the first one than the readiness of the second one to grasp the value of what has been laid before him and to choose it.”

A more subtle social contribution of these associations is their effect in guarding against the dangers of a powerful centralized government. The Founding Fathers, though they lived in an age when there was no immediate prospect of a strong central government, were aware of the risks inherent in such Leviathans. They supposed, as did Lord Acton a century later, that the constitution which they drafted eliminated the dangers of central despotism and belligerence not merely by a formal arrangement of checks and balances but by the fundamental division of power between the nation and the states. The Fathers were sound in their objective, but they were overly optimistic in the means on which they counted to achieve their goal. The reliance they placed on territorial federalism has been of an ever diminishing importance since the Civil War. If we were today faced with a militant threat of totalitarianism few would look exclusively to the state governments to rescue us from tyranny or despotism or a war of aggrandizement. The vigilance to see the danger and the power to arouse effective opposition must both be found at least in part in other groups of vitality and cohesion.

But we may be told that groups strong enough to hold the state in check are themselves a menace because they cultivate a double loyalty in our people. Is it not appropriate to reply that the very meaning and purpose of a federal democracy as opposed to a totalitarian state is that the citizens shall be bound, and the state shall be held in check, 64 Quoted by Hadamard, *The Psychology of Invention in the Mathematical Field* (1945) 30. I doubt whether Einstein challenges this viewpoint in his description of himself as showing a “marked lack of desire for direct association with men and women. I am a horse for single harness, not cut out for tandem or teamwork. I have never belonged wholeheartedly to any country or state, to my circle of friends, or even to my own family”. Quoted by Franck, *Einstein—His Life and Times* (1947) at 49. These seem to be observations as to personal loyalty rather than as to the conditions of intellectual stimulation.

65 *Acton, History of Freedom and Other Essays* (1909), particularly at 20, 86, 98.
by multiple though secondary loyalties? Liberty recognizes that its cause owes its principal advances to and will be best preserved by men who have always denied the omnipotence of any one terrestrial power.

While you may concede that groups give many of their members opportunities for self-development, for intellectual adventure and for counterbalancing the power of the modern state, you may contend that there remains the risk that such groups will oppress those who remain outside their inner circles. In short, you may argue that the liberty of the few is purchased at the expense of the many.

If we had only the political and legal techniques which were known to the Court of the Areopagus or the Court of Star Chamber or the Court of John Marshall, the danger that groups presented to those not in their inner circles would be a real danger. But in modern times we have learned that in handling bodies corporate the state has other choices than either to suppress them or to allow them to thrive unchecked. We are now familiar with a hundred regulatory devices which require organized groups to do their business in public, to conform to specified standards of external and internal conduct and to make their terms of admission and exclusion consistent with the purposes for which the groups were formed. You will recall as recent vivid instances—the requirement of the New York Legislature that the Ku Klux Klan should make public its list of officers and members, its rules and its financial accounts; the similar obligations of disclosure imposed upon many labor unions first by some state legislatures and this year by Congress; the Supreme Court’s decree that the Associated Press must open its membership to newspapers prepared to conform to objective standards; and the same tribunal’s determination that a statutory collective bargaining status should be accorded to a labor union only if it admitted workers regardless of the color of their skin.

From these examples can we not divine the future of the principle of freedom of association? Will not the symbols of its future evolution be the open window and the open door? Through the window not...
only the government but indeed any merely curious outsider may see
the character of the organization. Through that door may enter any
one who subscribes in good faith to the announced purposes of the
organization and who seeks to maintain its hospitality. And through
that door those who so desire may freely leave.

I agree that what I see as symbols of the future are not character-
istic of the prevailing thought in many quarters today. Some there are
who would have associations treated as private preserves immune
from scrutiny and supervision. They want their activities, finances,
systems of election and contracts hidden behind a curtain. To them
I would repeat the maxim of one of the greatest historians of liberty,
Lord Acton: “Everything secret degenerates; nothing is safe that
does not show how it can bear discussion and publicity.”

A few there are who want the right to enter every association,
even those whose principles they deny. The answer is that for them
the principle of freedom of association means the right to form their
own dissenting group. The open door is open only to those who meet
relevant standards of admission.

Still others there are—and some in high place—who are not con-
tent with a program that allows every majority and every minority—
except the criminal and treasonable—a right to form their own asso-
ciations, and that exacts as the only obligation a duty to submit to
public scrutiny and public supervision. These critics want, in addi-
tion, the power to suppress completely any group, whose members do
not believe in all the implications of civil liberty according to the
democratic creed. There is a certain plausibility in that argument,
for it is based on a kind of sporting notion that before you can play
you must accept the rules of the game. And yet I venture to believe
that the argument is unsound.

I first note that the argument proves too much. It would, for ex-
ample, end religious toleration. It would revive John Locke’s absurd

(1942) 171. The issue of the “open shop” turns on the right of men in particular em-
ployments not to join an organization. Despite verbal similarities, “the right not to join”
is not the precise practical converse of “the right to join”. And the history and implica-
tions as well as the values of the two asserted rights are best considered separately.

71 Nichols, Lord Acton (1947) 1 UNIVERSITY OBSERVER 14.

72 STATEMENT OF ESSENTIAL HUMAN RIGHTS (Am. L. Inst.) comment to art. 5;
United Nations Economic and Social Council, Documented Outline, United Kingdom
Draft International Bill of Human Rights, especially at 6-9. But see contra Dickinson,
Political Subversives: An Appraisal of Recent Experience and Forecast of Things to
Come (Unpublished address before the Lawyers Club of San Francisco, June 10, 1947)
at 7; Riesman, Civil Liberties In A Period of Transition in 3 PUBLIC POLICY (1942) 33,
especially at 52-58. See also CARE, THE SOVIET IMPACT ON THE WESTERN WORLD (1947) 14.
argument\textsuperscript{73} that we should deny religious toleration to Catholics on the ground that were they "an overwhelming majority" they would deny to others the rights they themselves sought.\textsuperscript{74}

Next, I observe that the argument proceeds on the assumption that the state can effectively suppress a group for holding opinions or engaging in conduct for which the individuals can not be tried under the criminal law of the land. I doubt whether the assumption ever has been or can be proved to be correct. Particular groups may, of course, be disbanded. But by hypothesis, the members remain free individually to entertain, to express and to effectuate the same ideas. And in such a situation the normal consequence is that the individuals will form new but secret combinations, about whose character the authorities are ignorant. That was the history of the attempts directly to suppress left-wing labor groups at the end of World War I. And it seems almost inevitable that suppression of groups which are subversive but not criminal will always work in that manner and will be less effective than governmental scrutiny and supervision of these same groups.

Finally, if an exception of the sort suggested were made to the general principle of freedom of association some of its chief advantages would be lost. For the heart of the principle of freedom of association is our confidence that by the stimulus of fellowship men will not only realize their full potentialities but will bring to the surface and to fulfillment the new adventurous ideas which the mass has not yet discerned but on which their future progress may be built.\textsuperscript{75} Freedom of association like the other basic freedoms looks at all conflicts of opinion and of doctrine \textit{sub specie aeternitatis}. And it is ever mindful of the profound wisdom of Heraclitus' gnome, "That which opposes, fits. From different tones comes the finest tune."\textsuperscript{76}

\textsuperscript{73} Locke, \textit{op. cit. supra} note 50, at 211-214.

\textsuperscript{74} We are authoritatively told that today, as many centuries ago, the official Catholic position requires the suppression of other religions if the nation is Catholic by an overwhelming majority. See the Encyclical \textit{Immortale Dei} of Pope Leo XIII, and Ryan and Boland, \textit{Catholic Principles of Politics} (1940) 314, both quoted in 2 Niesburg, \textit{The Nature and Destiny of Man} (1943) 230. Note, however, an excellent statement favoring freedom of association by Jacques Maritain, the Catholic philosopher in \textit{The Rights of Man} (1943) 53, 55, 57, 61.

\textsuperscript{75} Cf. Laski, \textit{Freedom of Association} in \textit{Encyc. Soc. Sci.} (1931) 447, which has an interesting bibliography.

\textsuperscript{76} \textit{Frag. 8.} (Quoted in 1 Jaeger, \textit{Paideia} (1939) 181, and Aristotle, \textit{Nicomachean Ethics}, Bk. VIII.1.)