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MACHINISTS V. STREET: STATUTORY INTERPRETATION AND THE AVOIDANCE OF CONSTITUTIONAL ISSUES

On the last day of the October Term, 1960, the Supreme Court's two senior Justices took a majority of their brethren to task for reading the union shop provision of the Railway Labor Act[1] in a sharply restrictive and, consequently, plainly constitutional manner. Said Mr. Justice Black:[2]

> I think the Court is once more "carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme." In fact, I think the Court is actually rewriting [the statute] to make it mean exactly what Congress refused to make it mean. The very legislative history relied on by the Court appears to me to prove that its interpretation . . . is without justification. . . . I think Congress has a right to a determination of the constitutionality of the statute it passed, rather than to have the Court rewrite the statute in the name of avoiding decision of constitutional questions.

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[1] Railway Labor Act, § 2 Eleventh, added by, 64 Stat. 1238 (1951), 45 U.S.C. § 152 Eleventh (1958). See text *infra*, at note 32.

[2] Machinists v. Street, 367 U.S. 740, 784–85 (1961), quoting Clay v. Sun Insurance Office, 363 U.S. 207, 213 (1960) (dissenting opinion).

Mr. Justice Frankfurter reminded the majority of what Mr. Justice Cardozo once had enunciated for the whole Court:[3]

> [A]voidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.

Were these observations, each contained in a dissenting opinion in *Machinists v. Street*,[4] justified? In its effort to avoid constitutional issues, how free should the Court have been with the Railway Labor Act's language and history? These two related questions are the principal concern of this paper.[5] Similar questions could be asked about a number of relatively recent Supreme Court cases.[6] The avoidance of constitutional decision by statutory interpretation is an important and persistent doctrine; yet its practice has often brought forth angry, sometimes bitter, dissents.[7] A close look at the avoidance doctrine as practiced in *Machinists v. Street* may illuminate some of the strengths and stresses of this method of decision.

I. Background: Factual, Judicial, and Legislative

S. B. Street had no choice. If he wanted to keep his job, he had to join the International Association of Machinists, the union that represented him in collective bargaining. His employer was a carrier in the Southern Railway System. Southern and the Ma-

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[3] *Id.* at 799, quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

[4] 367 U.S. 740 (1961).

[5] *Street* raises many additional questions of a provocative nature. For example, its relation to the Court's performance in the "integrated bar case," Lathrop v. Donohue, 367 U.S. 820 (1961), would make a fascinating study. Inquiry into whether the remedies suggested by the Court in *Street* would effectuate the policies that the Court found in § 2 Eleventh of the Railway Labor Act, *supra* note 1, would be profitable. And examination of the case's learning as to class actions would be a worthwhile effort. I have been forced to eschew these intriguing problems because of an inflexible publishing deadline.

[6] See, *e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Greene v. McElroy, 360 U.S. 474 (1959). *Cf.* Peters v. Hobby, 349 U.S. 331 (1955).

[7] See, *e.g.*, the dissent of Mr. Justice Clark in Greene v. McElroy, 360 U.S. 474, 510 (1959). The Justice's estimate of the Court's performance is captured in one short sentence of his opinion: "This sleight of hand is too much for me." *Id.* at 511.

chinists had a union shop contract, privately negotiated against a background of Section 2, Eleventh of the Railway Labor Act, the federal statute permitting such an arrangement.[8] Street probably did not want to join the Machinists at all. He clearly objected to the union using his dues to support legislation and legislators he opposed. He complained to the union; then he went to court to stop the practice.

It is doubtful that many informed lawyers thought Street's chances in court were very good.[9] In the first place, there was no express restriction in agreement or statute prohibiting the union from using dues to engage in politics. Moreover, neither agreement nor statute was readily susceptible to an interpretation prohibiting such a use.[10] In the second place, unions had been in politics for a long time, spending money to support a legislator here, a governor there, and legislation deemed favorable to labor's cause everywhere.[11] Most important, however, was the unanimous judgment of the Court in 1956 in *Railway Employes' Dep't v. Hanson.*[12] Like Street, Hanson had worked for a railroad and had been represented by a union with a contract calling for membership. He had resisted joining the union, arguing that the requirement of compulsory membership contravened the First and Fifth Amendments of the Constitution. His theory was that such a requirement interfered with "the right to work, which the court has frequently included in the concept of 'liberty' within the meaning of the Due Process Clauses,"[13]

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[8] *Supra* note 1.

[9] See, *e.g.*, Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L. J. 39, 63 (1961): "Stripped of all its disguises, the *Street* case . . . emerges as simply another attack on the validity of the union shop; and the issues it raises are neither novel nor particularly significant."

[10] The relevant agreement is reproduced in Record, pp. 205–17. The relevant statute is Railway Labor Act, § 2 Eleventh, added by 64 Stat. 1238 (1951), 45 U.S.C. § 152 Eleventh (1958). See text *infra*, at note 32.

[11] The amicus brief for the AFL-CIO contains a good, short, and uncontroverted historical survey of the political and legislative activities of American labor from its colonial beginnings. See Brief for the AFL-CIO as Amicus Curiae, pp. 14–28. "A look at the history of union political action supplies abundant proof that labor's interest in politics is as old as its interest in the closed shop or the union shop." *Id.* at 14.

[12] 351 U.S. 225 (1956).

[13] *Id.* at 234.

and that it "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[14]

Hanson was totally unsuccessful. The Court held "that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments."[15] The Court's opinion, however, did go on to say that if it were shown that "the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case";[16] and that if union assessments "are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented."[17]

It did not seem, however, that Street was able to tell the courts anything about the political activities of unions that Hanson had not already brought to their attention. Nor would one suppose from a reading of the complaint that Street had made his points in a significantly more persuasive way than his predecessor had contrived to do.[18] All in all, Mr. Justice Frankfurter certainly described what must have appeared to be the case to most trained observers:[19]

> The record before the Court in *Hanson* clearly indicated that dues would be used to further what are normally described as political and legislative ends. And it surely can be said that the Court was not ignorant of a fact that everyone else knew. Union constitutions were in evidence which authorized the use of union funds for political magazines, for support of lobbying groups, and for urging union members to vote for union approved candidates. The contention now raised by [Street] was succinctly stated by the *Hanson* plaintiffs in their brief. We indicated that we were deciding the merits of the complaint on all the allegations and proofs before us. "On the present record, there is no more an infringement or impairment of First Amend-

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[14] *Id.* at 236.

[15] *Id.* at 238.

[16] *Ibid.*

[17] *Id.* at 235.

[18] See Record, pp. 1–14, 17–31, 58–60, 71–84.

[19] 367 U.S. at 804–805.

ment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S., at page 238.

One would suppose that *Hanson's* reasoning disposed of the present suit. . . .

The state courts of Georgia, however, where Street initiated his litigation,[20] took the position that Street had demonstrated a use of dues by his union that constituted, in the language of *Hanson*, "a cover for forcing ideological conformity . . . in contravention of the First Amendment."[21] The Georgia courts relied on evidence that showed only that the defendant union had spent money for the usual union-supported political and legislative causes.[22] This the union had done openly.[23]

Hanson had complained about just those kinds of expenditures five years earlier.[24] But in the Supreme Court seven Justices apparently concurred[25] in that part of the Court's opinion which announced:[26]

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

[21] 351 U.S. at 238.

[22] See Record, pp. 165–205.

[23] "It will come as startling and fanciful news to the railroad unions and the whole labor movement that in using union funds for promoting and opposing legislative measures of concern to their members they were engaged in undercover operations." 367 U.S. at 805.

[24] See Brief for Appellee, pp. 16–17, 65, Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

[25] Mr. Justice Breunan delivered the opinion of the Court. On the meaning of *Hanson* and on the question of statutory interpretation, his opinion was joined by the Chief Justice and by Justices Clark, Whittaker, and Stewart. Justices Black and Douglas agreed with the Court's reading of *Hanson.* They disagreed with the Court's interpretation of the statute, as did Justices Frankfurter and Harlan.

The Court split differently on the question of the proper remedy. Mr. Justice Whittaker declined to go along with the Court's suggestions on this subject, which were as follows: "One remedy would be an injunction against expenditure for political causes opposed by the complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys

[26] *Id.* at 749.

> [A]ll that was held in *Hanson* was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give "financial support" to unions legally authorized to act as their collective bargaining agents. We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which "all employees shall become members of the labor organization representing their craft or class." We clearly passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees.

The seven agreed, too, that "the record in [*Street*] is adequate squarely to present constitutional questions reserved in *Hanson*."[27] Justices Black and Douglas confronted these constitutional questions. Said Mr. Justice Black:[28]

> In my views, § 2, Eleventh can constitutionally authorize no more than to make a worker pay dues to a union for the sole purpose of defraying the cost of acting as his bargaining agent. Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other.

And Mr. Justice Douglas was no less rigid:[29]

> It may be said that the election of a Franklin D. Roosevelt rather than a Calvin Coolidge might be the best possible way to serve the cause of collective bargaining. But even such a selective use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority. I do not see how that can be done, even though the objector retains his rights to campaign, to speak, to vote as he chooses. For

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exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. . . . A second remedy would be restitution to an individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." 367 U.S. at 774–75. To make a majority on the question of the remedy, Mr. Justice Douglas "concluded *dubitante* to agree. . . ." *Id.* at 779.

[27] *Ibid.* [28] *Id.* at 791. [29] *Id.* at 778.

> when union funds are used for that purpose, the individual is required to finance political projects against which he may be in rebellion.

With the previously noted disapproval of their two senior colleagues,[30] the Court's majority of five, however, avoided any constitutional issues through statutory interpretation.

Section 2, Eleventh, of the Railway Labor Act, the subject of this consideration, was enacted by Congress in 1951. It is similar in language, and seemingly in purpose, to its counterpart in the Taft-Hartley Act.[31] The major difference is that union shops in the railroad industry are permitted "[n]otwithstanding any . . . law . . . of any State." Union and carrier may negotiate an agreement:[32]

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

The task the majority set for itself was to construe this language to deny "the authority to a union, over the employee's objection, to spend his money for political causes which he opposes."[33] It set about performing this seemingly difficult task by a selective reading of "the legislative history of § 2, Eleventh in the context of the development of unionism in the railroad industry under the regulatory scheme created by the Railway Labor Act. . . ."[34] In examining this history, the majority was plainly impressed by several phenomena. First, it noted that railroad unions traditionally had not been especially interested, for philosophical and economic reasons,

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[30] See text *supra*, at notes 2 and 3.

[31] 61 Stat. 140, 141 (1947), as amended, 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1958).

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

[33] 367 U.S. at 750. [34] *Ibid.*

in union security. Accordingly, these unions had not insisted upon the union or closed-shop contract in negotiating with carriers. Second, the Court observed that Congress in 1934 had prohibited union security contracts on the railroads and that this flat prohibition had continued until the passage of Section 2, Eleventh in 1951.[35] These facts afforded the Court its point of departure for assessing what Congress had done and what it had not done when it reversed its 1934 position. As the Court put it:[36]

> The appellant unions, in insisting that § 2, Eleventh contemplates their use of exacted funds to support political causes objected to by the employee, would have us hold that Congress sanctioned an expansion of historical practices in the political area by the rail unions. . . . Both by tradition and, from 1934 to 1951, by force of law, the rail unions did not rely upon the compulsion of union security agreements to exact money to support the political activities in which they engage.

The Court discovered that in 1950–51 the unions had called to the attention of Congress: (1) that the union's obligation under the Railway Labor Act was to represent all employees, non-union as well as union;[37] (2) that under the Railway Labor Act and in the railroad industry this was an expensive business; and (3) that this expense should be shared by all employees.[38] The Court said:[39]

> The conclusion to which this history clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.

This may be true. It is, of course, also true that "one looks in vain" for language in Section 2, Eleventh[40] prohibiting unions from

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[35] This portion of the Court's opinion appears under the heading "The Rail Unions and Union Security." *Ibid.*

[36] *Id.* at 770.

[37] The union's obligation under the statute is to represent fairly all employees—members and non-members, dissenters and advocates—in the bargaining unit. See Steele v. Louisville & N. R. R., 323 U.S. 192 (1944).

[38] 367 U.S. at 762–63. [39] *Id.* at 763–64. [40] See text *supra*, at note 32.

forcing employees "to support political causes which they oppose." And in 1950–51, even as today, it was not a secret, or at least not a well-kept secret, that unions used money obtained from employees for political as well as economic activities. The Court took notice of this:[41]

> We may assume that Congress was . . . fully conversant with the long history of intensive involvement of the railroad unions in political activities. But it does not follow that §2, Eleventh places no restriction on the use of an employee's money, over his objection, to support political causes he opposes merely because Congress did not enact a comprehensive regulatory scheme covering expenditures. For it is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent. Congress was aware of the conflicting interests involved in the question of the union shop and sought to achieve their accommodation.

The difficulty with this conclusion is that an examination of the language of Section 2, Eleventh indicates that, although a congressional accommodation of the "conflicting interests involved in the question of the union shop" was indeed achieved, the resulting accommodation imposed no restrictions on union expenditures. Rather, it appears that Congress followed closely the accommodations worked out in 1947 after an extensive review of the union security problems that had emerged subsequent to enactment of the Wagner Act.[42] The background of these accommodations is legislative history that the Court chose to iguore.

In the Waguer Act, Congress had placed no prohibitions on the negotiation and enforcement of union security agreements.[43] Un-

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[41] 367 U.S. at 767.

[42] 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

[43] "Under [the Wagner Act] a proviso to section 8(3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made." S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947).

ions and employers could make a closed-shop contract,[44] and where such a contract was made, an applicant for work had to be a member of the union to qualify for employment. Furthermore, under a closed shop, or indeed, a "common-law" union shop, an employee had to remain in good standing in his union in order to keep his job. Expulsion from the union for any reason, such as a disagreement with the leadership, meant loss of employment.[45]

The unions that were regulated by the Wagner Act, unlike the railroad unions, were intensely interested in union security.[46] They bargained for the closed shop, frequently with success.[47] Sometimes their success meant that the dissenting employee lost his job. This penalty placed upon dissent led to changes embodied in the Taft-Hartley Act.[48] Taft-Hartley goes far to separate job security from union membership. Under a statutory union shop all an employee need do to protect his job is "tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining [union] membership. . . ."[49] The employee need not maintain good standing in the union. And, of course, he need not be a member of the union at the time of his employment.[50]

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[44] This was true at least where state law did not prohibit such contracts. "When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8(3) was not intended to override State laws regulating the closed-shop." *Ibid.*

[45] "Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade, or calling, for purely capricious reasons. In one instance a union member was subpoenaed to appear in court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a closed-shop contract." *Id.* at 7.

[46] See Golden & Ruttenberg, *The Union Shop Is Democratic and Necessary*, in BAKKE & KERR, UNIONS, MANAGEMENT AND THE PUBLIC 129 (1948).

[47] "Until the beginning of the war only a relatively small minority of employees (less than 20 per-cent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 per-cent now contain some form of compulsion." S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947).

[48] 61 Stat. 140, 141 (1947), as amended, 29 U.S.C. §§ 158(a)(3), 158(b)(5) (1958). See H.R. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947).

[49] 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958).

[50] "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely

The congressional hearings that led to the Taft-Hartley changes focused on these job control problems.[51] While there was some discussion in Congress about the use of funds obtained under a union shop for political purposes, it was neither extensive nor systematic.[52] The question of the use of funds for political purposes received almost no attention when Congress in 1951 reversed itself and permitted the union shop on the railroads.[53] Congress accomplished this by enacting Section 2, Eleventh in the same language as the Taft-Hartley union-shop provisions. The statutes are twins.[54] Is it not fair then to surmise that Congress, when it enacted Section 2, Eleventh, was attempting to do no more than roughly to conform the law of union security in the railroad industry to that in

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exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership 'was not available to the employee on the same terms and conditions generally applicable to other members' or if 'membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.'" Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 40 (1954).

[51] See S. Rep. No. 105, 80th Cong., 1st Sess. (1947).

[52] See, *e.g.*, Hearings on S. 55 before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 796–808, 1004, 1425, 1687, 2145 (1947); Hearings on H.R. 8 before the House Committee on Education and Labor, 80th Cong., 1st Sess. 305 (1947).

[53] See, *e.g.*, S. Rep. No. 2262, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 2811, 81st Cong., 2d Sess. (1950). But see 96 CONG. REC. 17049–50 (1951).

[54] "[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." Taft-Hartley Act, 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958).

"[No union shop] agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms . . . as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." Railway Labor Act § 2, Eleventh, added by, 64 Stat. 1238 (1951), 45 U.S.C. § 152 Eleventh (1958).

industries regulated by the Taft-Hartley Act? This was possible in 1950–51, if not earlier, because of the disappearance of the company union. As the Senate Report recognized:[55]

> The present prohibitions against all forms of union security agreements . . . were made part of the Railway Labor Act in 1934. They were enacted into law against the background of employer use of these agreements as devices for establishing and maintaining company unions, thus effectively depriving a substantial number of employees of their right to bargain collectively. . . . Since the enactment of the 1934 Amendments company unions have practically disappeared.

When the text of Section 2, Eleventh and its particular history is projected against this background of the language and history of the Taft-Hartley Act's union security provisions, it is not easy to read Section 2, Eleventh the way the *Street* majority did. It is not, however, impossible to do so. And, for reasons now to be discussed, it might be thought that the canon of statutory interpretation, that counsels that a statute be read to avoid a serious constitutional question,[56] required just the reading that the *Street* majority settled upon.

II. Justification for Avoidance of the Constitutional Question

No matter what the reasons for the 1934 congressional prohibition upon railroad union-shop contracts, there seems to be little

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[55] S. Rep. No. 2262, 81st Cong., 2d Sess. 2–3 (1950).

[56] The canon is easy to explain where, in its absence, a court could, with equal plausibility, interpret a statute in either of two ways. "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U.S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U.S. 407." United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 407–408 (1909). See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States 486 (Wolfson & Kurland ed. 1951).

question that such contracts were in fact effectively prohibited until 1951.[57] This absence of the union shop afforded maximum freedom to the dissenting railroad employee.[58] When Congress changed the law in 1951 and removed the legal restrictions it earlier had placed upon the union shop, one could have predicted that the result would be a diminution of the dissenting employee's freedom. In determining how much of a diminution Congress meant to allow, should not the presumption be: not one bit more than is clearly provided for in the statute?

It is to be remembered that, in the absence of escape through statutory interpretation, the Court believed that its duty lay in deciding the constitutionality of the union's use, for political purposes, of dues obtained from protesting employees under compulsion of law.[59] This constitutional decision would have to be made in a situation where it was fairly clear that Congress itself had not confronted the question whether it was necessary to restrict individual freedom to this extent.[60] Congress had not said unequivocally: we, the people's representatives, believe that such a restriction on individual freedom is necessary in this situation. Congress should have a chance to do this—or to decline to do this—before it is taken to have done it. How can the Court defer to Congress on a constitutional issue when it is not clear that Congress has made a judgment to be deferred to? In the alternative, how can the Court justify the exercise of its extraordinary and ultimate power, namely, to make a declaration of unconstitutionality, when it is not clear that congressional action has compelled a decision on the constitutional issue?

Consider the case of *Kent v. Dulles*[61] as an analogous statutory

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[57] "The union shop provision of the Railway Labor Act was written into the law in 1951. Prior to that date the Railway Labor Act prohibited union shop agreements. 48 Stat. 1186, 45 U.S.C. § 152 Fourth and Fifth; 40 Op. Atty. Gen. 254." Railway Employes' Dep't v. Hanson, 351 U.S. 225, 231 (1956).

[58] This is just to say that the employee who disagreed with the policies of the union was free not to join the union. He was not free, however, of union representation. He could not, for example, effect his own wage-bargain with his employer. See Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944). *Cf.* J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944).

[59] "The record in this case is adequate squarely to present constitutional questions reserved in *Hanson*." 367 U.S. at 749.

[60] See text *supra*, at notes 51–53.

[61] 357 U.S. 116 (1958).

interpretation dictated by a desire to avoid a constitutional confrontation. The Court there limited the seemingly unrestricted power over passports delegated to the Secretary of State by Congress. The Secretary, in denying a passport to a citizen because of his alleged beliefs and associations, had acted as if the delegation were in fact an unrestricted one. To be sure, Congress had not specifically said that the Secretary could deny passports and restrict travel to the extent that he had. But just as surely the Secretary was not unreasonable in interpreting the delegation as an authorization of his actions. Yet, if the Court had read the enabling statute to cover the Secretary's actions, it would have had to subject those actions to close scrutiny in order to ascertain whether they transgressed the Fifth Amendment's protection of the right to travel. The Court would have had to hold either that the Secretary had been authorized to act and indeed had acted unconstitutionally or that authorized governmental action, drastically restricting an individual's freedom to travel, was constitutional, even though Congress had not itself clearly determined that such restriction was necessary.[62]

Surely the Court's holding that the Secretary's actions were unauthorized was preferable to either of these alternatives.[63] Before governmental restriction upon individual freedom is held to be either unconstitutional or constitutional, it should be absolutely clear to a majority of the Supreme Court that Congress has faced the issue squarely and determined clearly that in its judgment it was necessary to impose the restriction.[64] It is one thing for the Court,

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[62] "To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." *Id.* at 130.

[63] For an analogous case, see Greene v. McElroy, 360 U.S. 474 (1959).

[64] In both Kent v. Dulles, 357 U.S. 116 (1958), and Greene v. McElroy, 360 U.S. 474 (1959), the Court was strongly influenced by a delegation problem closely related to the avoidance doctrine. "In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. . . . But this case does not present that situation. We deal here with substantial restraints on employment opportunities of numerous persons

largely in deference to a clear determination of necessity by the governmental institution closest to the people, to hold constitutional a previously questionable action. It is quite another thing for the Court to hold action constitutional where the people's representatives have not themselves declared in clear language that individual freedom must be curtailed because of an overriding national need. Is not this canon of statutory interpretation really a corollary of the doctrine of judicial self-restraint in constitutional adjudication?[65]

In the *Street* case, moreover, there may be an additional, if somewhat related, justification for the Court to avoid constitutional decision by interpreting the statute as it did. It had been assumed that if the Court faced the constitutional question in *Street*, it would have been forced either to validate or to invalidate all of the un-

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imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically bas decided that the imposed procedures are necessary and warranted and has authorized their use. Such decisions . . . must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." Greene v. McElroy, 360 U.S. 474, 506–507 (1959).

This delegation problem is present in *Street* in a somewhat different, but closely related form. The union stands in the position of the administrator, and makes "decisions of great constitutional import and effect." It might well be argued that power to make these decisions must be delegated to uuions explicitly, for the same reasons that power must be delegated explicitly to administrators.

[65] *Cf.* Harlan, J., concurring in *Greene:* "Unlike my brother CLARK who finds this case 'both clear and simple,' I consider the constitutional issue it presents most difficult and far-reaching. . . . For present purposes no more need be said than that we should not be drawn into deciding the constitutionality of the security-clearance revocation procedures employed in this case until the use of such procedures in matters of this kind has been deliberately considered and expressly authorized by the Congress or the President who alone are in a position to evaluate in the first instance the totality of factors bearing upon the necessity for their use. That much the courts are entitled to before they are asked to express a constitutional judgment upon an issue fraught with such important consequences both to the Government and the citizen." *Id.* at 509.

ion's political expenditures made from dues obtained from protesting employees. This, however, would seem to be an erroneous assumption. Unless one is quite absolute about First Amendment problems, one cannot tell whether a dissenting employee's First Amendment rights have been abridged without considering the needs of the union. This entails taking a close look at the particular expenditures and the particular union making the expenditures.[66]

Union political activity may be a substitute for action on the economic front. The union that is economically weak may decide to use its money to press for legislation that will shore up its bargaining position. It may do this, for example, by supporting candidates publicly committed to work for the liberalization of statutory restrictions on the use of secondary boycotts. If the tactic is successful, other unions will be better able to aid the weak union when next it engages in economic combat. Thus a weak union may be able to demonstrate a greater need to participate in politics than a strong union. The need of any one union to engage in political activity is likely to keep pace with changes in the relevant law of collective bargaining, the national and international economic climate, the employer's economic strength, and the acceleration or diminution of employer political activities. Furthermore, this need may vary depending on the object of the expenditure. In *Street:*[67]

> [N]umerous union activities and expenditures of different kinds [were] drawn in question. They range from testimony by union officials before legislative committees, and solicitation at union meetings of voluntary contributions to political organizations, to the use of union funds for political campaigns; from the endorsement of political candidates by unions and their periodicals, to "interpretive" and "non-objective" news articles by such journals; from union support of legislation concerning wages, hours, and working conditions to support of legislation pertaining to housing, farm programs and foreign aid; and from legislative activities and expenditures by the local lodge, to legislative and political activities and expenditures by the AFL-CIO. . . . These different kinds of expenditures and activities . . . may well involve differing considerations. For instance, support of legislation concerning wages and hours might be considered more "germane" to collective bar-

[66] See Brief for the United States, pp. 23–31.

[67] *Id.* at 18.

> gaining than support of legislation involving farm programs; and the majority of the union members may have an interest in associating together to publish their views in a newspaper, which interest may be entitled to greater protection than their interest in having the union render financial support to the campaign of a particular political candidate.

It is against ever changing, ever different union needs, perhaps considered in conjunction with other factors, such as the extent of internal democracy within the union, that the Court must test the impact of union action upon a dissenting employee, if it is to decide whether and when the employee's First Amendment rights have been transgressed.[68]

How well qualified is the Court as an institution to assess the union's need to act in the way that it does in these different situations? Why should we expect the Court to be able to do a good job when it reviews a union's judgments on the question whether union action is necessary? Where will the judge find applicable standards? Must he not either turn to his own predilections or abjure judgment and approve the union action?

To be sanguine about the Court's ability to perform this task satisfactorily requires one to expunge from memory many events that make up an important part of the history of labor relations and the law. For the question of the propriety of union expenditures may not be very different from one that asks whether a union is privileged to use a particular kind of concerted economic activity, *e.g.*, picketing, to achieve a desired economic goal—a union shop.[69] In many courts, the question of privilege has turned on a judge's assessment of the union's needs and the legitimacy of the union's in-

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[68] "No extensive discussion is necessary to show that the issues raised by the parties are of great constitutional importance, and, at least in some instances, involve a delicate balancing of legitimate but conflicting interests. On the one side are the interests of the dissenting minority employees, required by the union shop agreement to join the union at the price of continued employment, not to have their money used to advance candidates and causes which they abhor, and to be free of undue influence. . . . On the other side are the Congressional policy . . . that the expenses of the collective bargaining agency, which represents and brings benefits to all of the employees of a given craft or classification, should be borne by all, and the interests of the majority of the employees to associate together to take lawful action they deem appropriate to advance their organizational goals." *Id.* at 28–29.

[69] See Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

terest.[70] But the union's needs, as a judge saw them, often were based—and necessarily so—upon his personal predilections.[71] There were few objective standards for a judge to employ when assessing the legitimacy of union conduct.[72] And so, as the record demonstrates, this method of resolving labor problems failed.[73] The courts were the wrong institution to do the required job.[74]

On the basis of this analogy, must not the prognosis be that the Court is likely to do a poor job if it undertakes to determine which union political expenditures are constitutional? Is it not important

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[70] Compare the majority and dissenting opinions in Vegelahn v. Guntner, 167 Mass. 92 (1896), and Plant v. Woods, 176 Mass. 492 (1900). See, *e.g.*, Wilson v. Hacker, 101 N.Y.S.2d 461 (Sup. Ct. Erie Co., 1950).

[71] "The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges wtih different economic sympathies might not decide such a case differently when brought face to face with the issue." Holmes, *supra* note 69, at 8.

[72] "But it does seem futile not to admit that the making of such choices is essentially a function of our political life. If it is, then such choices are not for our courts to make. They are, rather, matters for our legislatures to handle, within the framework of our state and federal constitutions." GREGORY, LABOR AND THE LAW 85 (1946).

[73] See generally FRANKFURTER & GREEN, THE LABOR INJUNCTION (1930).

[74] In these cases, the courts tried to second-guess unions and to determine whether the needs of the union made the union's use of economic activity privileged.

In contrast, consider the behavior of courts in the "fair-representation" area. The union has a duty to represent all employees fairly. Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944). When a union discriminates on the basis of race it is easy for a court to test the discrimination by using the equal protection clause —by analogy—as a standard. Where the discrimination is economic, the courts have used the same standard. Very few economic distinctions taken by a union in collective bargaining can be said to be unreasonable. Accordingly, union conduct in the non-racial area is almost never upset. Query if a reasonableness test adequately protects minority groups in bargaining units? Query if it does not mean that the courts have really abdicated, and declined to exercise any meaningful role as a reviewing tribunal? The reason courts have acted this way is easy to explain: they do not have standards by which to judge union conduct. The situation is unhappy, if you believe, as I do, that the reasonableness standard is not adequate to the task. But the courts are not at fault. See generally Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1339–43 (1958).

The "privilege" cases and the "fair-representation" cases show the alternatives available to judges in the absence of objective standards. Neither solution is a happy one.

then that the Court—if language permits—read the statute to avoid such a misallocation of institutional responsibility within the government?[75]

The combination of considerations just examined tends to lead to the conclusion that the Court in *Machinists v. Street* was correct after all in its narrow interpretation of Section 2, Eleventh of the Railway Labor Act. But several additional factors must be weighed. And they must be placed on the other side of the scales.

III. Reasons To Answer the Constitutional Question

It is quite possible that the Court has, by its action in *Street*, prohibited unions from using money obtained from dissenting employees for purposes that realistically cannot be said to raise serious constitutional difficulties. No matter how economically strong the union, its expenditures in support of legislation dealing directly with collective bargaining would seem to present such a situation.[76] After all, it must be remembered that in collective bargaining matters the union, by law long deemed constitutional, represents dis-

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[75] Consider, as a further example of this proposition, litigation under the provision of the Taft-Hartley Act allowing suit in a federal district court by a union or employer for breach of a collective bargaining contract. Taft-Hartley Act, § 301, 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185 (1958). Taft-Hartley gives few guides as to the rules courts should apply in litigation under this provision. Accordingly, it might well be thought that the task Congress seemed to be imposing on its courts—developing from scratch a full-blown code for collective bargaining agreements—was a task that institutionally they could not perform well. Mr. Justice Frankfurter was of this view: "judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes. . . ." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 463 (1957) (dissenting opinion).

Assuming the courts are "ill-suited" to the task Congress has seemingly bestowed upon them in a statute, is it not appropriate for the Court to read such a statute, if it is at all possible for it to do so, in a way that narrows it drastically and minimizes the misallocation of institutional responsibilities within society? See Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957). This was the course a majority of the Supreme Court first embarked on, see Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), but later abandoned, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[76] "[O]pposition to proposed legislation, such as a wages and hours bill or a statute outlawing union shop agreements, which directly affects the strength and bargaining power of the union is *clearly* 'germane' to collective bargaining. . . ." Brief for the United States, p. 32. (Emphasis added.)

senting employees as well as consenting employees;[77] and that "[t]he individual [union] member may express his views in any public or private forum as freely as he could before the union collected his dues. Federal taxes also may diminish the vigor with which a citizen can give partisan support to a political belief, but as yet no one would place such an impediment to making one's views effective within the reach of constitutionally protected 'free speech.' "[78]

If the majority's interpretation of Section 2, Eleventh does in fact bar the union from using funds in ways that invoke no clear constitutional barrier, the justification for such restrictive interpretation of Section 2, Eleventh is surely not compelling. An interpretation of the statute that forces the Court to face up to insubstantial constitutional questions does not pose the many difficulties discussed earlier that are implicit in the assumption that the constitutional question was substantial.[79] By hypothesis the Court will not be called upon to exercise its ultimate power of declaring legislation unconstitutional. It may be called upon to validate a restriction on individual freedom, but one that is not very serious, at least by the standards of constitutional law.[80] This constitutional law is a part of the background against which Congress enacted Section 2, Eleventh. One might well argue that the natural implication of what Congress has said and done in such a case should prevail.[81] Looking at this another way, one can say that the Court's interpretation of Section 2, Eleventh to the extent that it is more restrictive of union power than is properly called for by serious constitutional doubt, is better characterized as the regulation of collective bar-

[77] Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944); and see J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944).

[78] 367 U.S. at 806. (Frankfurter, J., dissenting.)

[79] See text *supra*, at notes 56–65.

[80] And in this area are there any other relevant standards available to the Court?

[81] This is not advanced as a doctrine of universal application. One may well agree with its application to the problem in *Street* and still agree with the Court in *Greene v. McElroy* where it expressed its "concern that traditional forms of *fair procedure* not be restricted by implication or without the most explicit action by the Nation's law-makers, even in areas where it is possible that the Constitution presents no inhibitions." 360 U.S. at 508. (Emphasis added.) See also Bickel & Wellington, *supra* note 75, at 31–34.

gaining than as protection of individual freedom. Surely it need not be argued that the role of the Court in dealing with the regulation of collective bargaining should be as limited as possible.

It is not altogether clear, however, that the Court did construe Section 2, Eleventh to avoid insubstantial constitutional questions, *e.g.*, direct support of legislation dealing with collective bargaining, as well as to avoid substantial constitutional questions, *e.g.*, support of candidates for political office. The Court tells us only that:[82]

> We respect... congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. We are not called upon to delineate the precise limits of that power in this case. We have before us only the question whether the power is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes. Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.

But, of course, money spent in support of some legislation, *e.g.*, full crew laws, may make it unnecessary for the union to strike or spend money in support of a bargaining demand. One might think of the monetary expenditures as a collective bargaining activity by means of political action, even as one might think of picketing as a collective bargaining activity by means of "a form of speech."[83]

The point is that the Court's language is ambiguous. Nowhere did it undertake the task—perhaps because it is impossible—of distinguishing between political and collective bargaining activities. Thus, while it seems probable that the Court meant by "political" anything that has a political element in it, it is not absolutely clear that the Court went this far. Notice, however, that if the Court did

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[82] 367 U.S. at 768.

[83] "[I]s the union's choice of when to picket or to go out on strike unconstitutional? Picketing is still deemed also a form of speech, but surely the union's decision to strike under its statutory aegis as a bargaining unit is not an unconstitutional compulsion forced upon members who strongly oppose a strike, as minorities not infrequently do." *Id.* at 810 (Frankfurter, J., dissenting.)

not go so far, it failed to eliminate the institutional problem that, in part, justified its interpretation of Section 2, Eleventh. If in the future the Court must decide whether the expenditure of money by a union is for political or collective bargaining purposes, *i.e.*, in the language of *Hanson*, whether the money is used for purposes "germane to collective bargaining," the Court must measure union action in each case against nonexistent standards, in the same fashion that courts in the past tried to determine whether unions seeking various goals were privileged to use various types of concerted action.[84]

Thus, it seems that the Court, in *Street*, unhappily has contrived to entangle itself in legislating about collective bargaining; and to what end? One is forced to wonder whether the Court will escape for very long the constitutional confrontation it so strenuously worked to avoid. It is safe to predict that not many Terms will pass before all of the issues the Court thought it was avoiding will be before it again. It will not be long before a dissenting employee asserts that the Taft-Hartley's union shop is unconstitutional. When that happens it will be difficult indeed for the Court to read Taft-Hartley in the way in which it has read the Railway Labor Act. As we have seen, it cannot be said that in 1947 Congress was cutting back on a freedom it had earlier granted dissenting employees.[85] Nor can it be asserted that unions regulated by Taft-Hartley had traditionally been uninterested in union security.[86] These propositions were made by the *Street* majority about congressional performance in 1951,[87] and about unions regulated by the Railway Labor Act.[88] They were advanced by that majority as weighty reasons for its reading of Section 2, Eleventh.[89] They are not available as bases for reaching a like conclusion in a Taft-Hartley case. The constitutional questions left unresolved by *Street* will yet have to be resolved by the Court.

In view of these circumstances, the Court should have read Section 2, Eleventh in a straightforward manner and faced up to a constitutional decision. I further suggest that the proper constitutional

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[84] See text *supra*, at notes 65–75.

[85] See text *supra*, at notes 42–45.

[86] See text *supra*, at notes 46–47.

[87] 367 U.S. at 750–70.

[88] *Ibid.*

[89] *Ibid.*

decision—one which would have avoided the difficulties with constitutional decision noted earlier—would have been for the Court to decline to test union conduct by constitutional standards.

IV. The Proper Constitutional Decision

Mr. Justice Frankfurter spoke to the point in his dissent in *Street*:[90]

> But were we to assume, *arguendo*, that the plaintiffs have alleged a valid constitutional objection if Congress had specifically ordered the result, we must consider the difference between such compulsion and the absence of compulsion when Congress acts as platonically as it did, in a wholly non-coercive way. Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. Congress has only given leave to a bargaining representative, democratically elected by a majority of the workers, to enter into a particular contractual provision arrived at under the give-and-take of duly safeguarded bargaining procedures. . . . When we speak of the Government "acting" in permitting the union shop, the scope and force of what Congress has done must be heeded. There is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions. On the contrary, Congress expanded their freedom of action. Congress lifted limitations upon free action by parties bargaining at arm's length.

What Congress did in 1951 in Section 2, Eleventh was to permit private collective bargaining on the railroads to develop in its own way, according to traditions and customs and the play of economic power. Congress in Section 2, Eleventh removed governmental control, both federal and state, from an area where such control previously had existed. Private groups—labor unions and employers—obtained freedom of choice. The exercise of this choice, as frequently is the case with the exercise of all sorts of private choice, may have a substantial impact on non-consenting individuals. This is a powerful reason for governmental control of one sort or another. But why must the instrument of control be the First Amendment? Why should the validity of the exercise of union-employer

[90] 367 U.S. at 806–807.

choice, any more than the validity of any other similar exercise of private choice, be tested by constitutional standards?[91]

Three factors suggest that it should not be so tested. First, as we have seen, the Court would be likely to do a bad job if it were to test union action by constitutional standards.[92] The Court would have to determine the legitimacy of union action without any objective way of ascertaining the necessity for union action. Second, Congress, when it passed Section 2, Eleventh, did not think through the consequences of the private ordering it was permitting, as it would have had to think through the consequences of its action if it were itself directly setting conditions of employment for railroad workers. How could it? Congress in Section 2, Eleventh was expressing its faith in the superior ability of private groups to work out some of the industrial problems facing the railroads.[93] This suggests that the performance of Congress in 1951 gives no reason to assume that Congress will not respond to the problems now being revealed by experience under Section 2, Eleventh. To the contrary, experience suggests Congress is likely to be quite sensitive to the need for further legislation protecting the dissenting employee. In the past, as Congress became aware of similar problems, it has acted forcefully. This, in part, is the story behind the amendments to the union security provisions of Taft-Hartley.[94] In part, it is the story behind the Labor-Management Reporting and Disclosure Act of 1959.[95] Third, no existing legal doctrine compels the Court to test union action by constitutional standards. Rather, it would require an extension of existing doctrine, doctrine contained in the landmark cases of *Shelley v. Kraemer*,[96] *Smith v. All-*

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[91] For a more detailed discussion of unions and governmental action, see Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

[92] See text *supra*, at notes 65–75.

[93] See S. Rep. No. 2262, 81st Cong., 2d Sess. 2–3 (1950).

[94] See, *e.g.*, S. Rep. 105, 80th Cong., 1st Sess. 5–7 (1947).

[95] 73 Stat. 519 (1959), 29 U.S.C. §§ 153, 158, 159, 160, 164, 186, 187, 401, 402, 411–15, 431–40, 461–66, 481–83, 501–504, 521–31 (Supp. 1959). See S. Rep. No. 1417, 85th Cong., 2d Sess. (1958).

[96] 334 U.S. 1 (1948).

wright,[97] and *Terry v. Adams*,[98] to permit such a result.[99] While an extension of this doctrine to cover union action would not be an illogical development of constitutional law,[100] it would, if the above considerations are valid, be a plainly unwise development.

V. Conclusion

The two senior Justices, whose words concerning the avoidance of constitutional questions were quoted at the beginning of this paper,[101] were justified to this extent: the Court should not have interpreted Section 2, Eleventh in the sharply restrictive manner it did. That interpretation was unfortunate because in one way or another it constituted judicial legislation about collective bargaining. The courts have never done this well. Judges do not have standards by which to test union action. They cannot ascertain union needs. They act half in blindness, and the results are seldom happy. In *Street*, the Court had no legitimate alternative to constitutional decision. A proper constitutional decision would have disposed of the case by rejecting the contention that the validity of a union shop contract is to be tested by the requirements of the First Amendment. That decision, which was one that the Court was plainly competent to make,[102] would have spared us a slick but shallow performance in the delicate art of avoiding constitutional questions through statutory interpretation.

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[97] 321 U.S. 649 (1944).

[98] 345 U.S. 461 (1953).

[99] Railway Employes' Dept. v. Hanson 351 U.S. 225 (1956), suggests that where, absent § 2, Eleventh, state law would prohibit a union shop, governmental action is made out. *Id.* at 231–32. What this means is difficult to say, but it is surely beyond belief that it settles anything about unions and the constitution. See generally, Wellington, *supra* note 91, at 355–60.

[100] See Wellington, *supra* note 91, at 358–60.

[101] See text *supra*, at notes 2 and 3.

[102] Like any decision of a serious constitutional question, it would have forced the Court to work hard, because the problems the Court would have had to resolve are difficult ones indeed. But the avoidance doctrine, of course, has nothing to do with avoiding constitutional questions merely because they are hard.