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"INSTITUTIONAL" THEORY AND A NEW PRIVATE "CLUB": COURT ENFORCEMENT OF UNION FINES

Albert Broderick*

In England and in the United States the association of working men in labor unions has been traditionally legally analyzed in terms of "contract." The hypothesis considered here is that recent developments in American labor law make it timely for purposes of administrative law, at least, to discard the legal analysis of the labor association as a "contract" among members, and to substitute a theory of "institution" as more in accord with the existing facts. The adoption of such an analysis would open up a new field of administrative law, one that sociologists (more frequently than lawyers) have referred to as "private government."

The concept of "institution" has been widely used for thirty years or more in sociology without any demonstrable precision as to its meaning. It was first introduced as a legal "category" with some specificity sixty years ago by Maurice Hauriou, the leading voice among a group of French jurists who have come to be known as "institutionalists."1 It is in the sense refined by Hauriou that we take up its relevance to the present situation of the labor union in American law.2

The decision of the Supreme Court last term in Allis-Chalmers v. NLRB3 presents a sharp focus for considering the relevance of a legal theory of "institution." The Court divided 5-4 in ruling that

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1 Maurice Hauriou (1856-1929) was Dean of the Faculty of Law of the University of Toulouse from 1906 to 1929. His writings include twelve editions of a classic work on droit administratif, two editions of a volume on public law, and two editions of a work on constitutional law.
2 His most concise presentation of his institutional theory is La théorie de l'institution et de la fondation, 4, Cahiers de la Nouvelle Journée (1925) [hereinafter cited as La théorie de l'institution]. This essay together with other selections from Hauriou and his "institutionalist" followers, Georges Renard (of Nancy), Joseph T. Delos (of Lille), and Jean Bréthe de la Grassaye (of Bordeaux), law professors all, will appear in the first English translation of the writings of the French Institutionalists, which is being published by the Harvard University Press in the Twentieth Century Legal Philosophy Series in 1968. Current revival of interest in Hauriou is further indicated by an international colloquium which was held at the University of Toulouse, March 11-14, 1968, at which papers on Hauriou were read by jurists from France, Latin America, Spain, Germany, and the United States.
3 388 U.S. 175 (1967).
it was not an "unfair labor practice" under existing labor legislation for a union to impose fines upon recalcitrant members and to seek to enforce its internal fines by court action. Ten opinions were written in the administrative body (NLRB) and appellate courts (Court of Appeals for the 7th Circuit and Supreme Court); most of these opinions treated the case as merely a complex exercise in statutory interpretation. Only two of the opinions (those of Circuit Judges Hastings and Kiley) gave intimation of any ingredients of an "institutional" theory, although Justice Brennan's prevailing opinion took official note of a decline in regard for the "contract" theory of association as applied to labor unions. In this article we shall, after recalling some central themes of Hauriou, review the background legislation, give consideration to the various opinions filed, and search out the analytical power of Hauriou's theory of the institution in solving the problem of enforcement of union fines as presented by the Allis-Chalmers case. From this study in depth hopefully some conclusions may be tentatively proposed as to the general utility to administrative law of a legal analysis of labor unions as "institutions" rather than as associations sounding in "contract."

I. SOME RELEVANT "INSTITUTIONAL" THEMES

Four sets of themes relating to Hauriou's special brand of institutional theory are worth recalling before we examine Allis-Chalmers: his fundamental distinction between the internal affairs of the "institution" or organized group and its external relations with other groups (including the state; the special aspects of the internal life of an institution—in what does its unity consist, what are its relations to its members; the special aspects of its external life, its relations with others, its standing with respect to the state law and legal system; and finally the implications of the "personalist" theme which Hauriou claimed, in his final work, sounded a central objective of institutional achievement.

A. THE DISTINCTION BETWEEN "INTERNAL" AND "EXTERNAL" AFFAIRS

Absolutely fundamental to Hauriou's theory of the institution as an instrument of legal or social analysis is his distinction between the institution, or group, looked at from within, and its external relations with the outside world. The United States of America as a national state has external relations with other nations and groups. Looked at by them it is a unit, a member of the international society of state units. Looked at from within by its members it is a set of ideas and understandings and centralized and decentralized

4 La théorie de l'institution, supra note 2, at 43.
governmental arrangements. Hauriou would carry over the analogy of the state to private groups.5

Hauriou distinguishes between two types of legal rules from the standpoint of their content: Themis and Dike.6 The Themis-type rules are those which bear upon the internal governmental life of the institution—both (a) the “disciplinary” power (droit disciplinaire) which embraces group-member or “governor-governed” directives, and (b) the legal restrictions upon the exercise of this power for which the members have won an acceptance (droit statutaire). The Dike type rules, on the other hand, focus on member-member relations. They have as their basic foundation, Hauriou contends, not state governmental power but the demands and understandings of human sociability.

B. INTERNAL AFFAIRS

Hauriou’s view of the internal “life” of an institution centers upon his concept that the “reality” of a group as distinct from its members is grasped in understanding an institution as a group of men (and perhaps of sub-groups of men) who have joined together to achieve the fulfillment of certain “leading ideas.” To fulfill these ideas certain arrangements are made—power is organized, laws are enacted, methods are established to resolve difficulties within the group.

Such an institution may be regarded from two aspects, or in accordance with two models, which we may imprecisely designate as the founding model and the pure development model. The founding model, whose characteristics were stressed in Hauriou’s classic 1925 essay,7 conceives a founder or group of founders as organizing a group of persons to achieve an idea or set of ideas concerning a project or enterprise to be undertaken. In this model, which is well exemplified by the launching of a business company, the “leading ideas” are present at the outset as objectives to be achieved. The founders may retain the direction for a time, but gradually the power of direction of the institution and the totality of its advantages may come to be shared with co-members or co-workers—they come to have “communion” in the “ideas” (which themselves may undergo a process of development). But there is another model for an “institution”: a group may have been in existence for some

5 La Théorie de l’institution, supra note 2, at 12, 14, 33, 35.
6 One chronic difficulty with Hauriou is his unfamiliar terminology. The Themis-Dike distinction is of great importance but cannot be done justice here. Roughly, it corresponds to Aristotle’s pairing into commutative justice and distributive justice.
7 La théorie de l’institution, supra note 2.
time without its members' reflecting upon any goals to be pursued, or it may be long under the domination of a single person or of an oligarchy. When there emerges an articulation of its goals and a greater participation by members in their achievement this type of group may fit, just as well as the founding model, Hauriou's notion of an "institution."

In the tensions recognized by Hauriou's theory of the institution are many of the conflicting themes which have been of great interest to recent political sociology. Particularly do they find responsive notes in the studies on bureaucracy dealing with cleavage and consensus.8

Hauriou's concept of an institution centered on the notion of "an idea" or "leading ideas," "idea-actions" of a work to be accomplished9—that of a state to govern a nation, or a business corporation to gain money for its shareholders by conduct of certain activities, or of a labor union to achieve economic and social benefits for its members.10 Hauriou conceives that some form of authority develops which is recognized by the members, certain explicitations of the ideas (order, liberty, justice, equality, democracy for the state; certain specific forms of business activity for the corporation; a certain type of economic and social advantage for the membership of a union)11 and a certain life rhythm. The ideas gradually come to be more than just goals or objectives. They take on life-styles (e.g. "more or less" democracy). Hauriou conceives that as (in the founding model) the ideas, first held by a few founders, an elite, become more and more "institutionalized," they come to be shared more and more by the individual members. To Hauriou these ideas shared

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8 See S. Lipset, Political Man (1st ed. 1960) and his essay Lipset, Political Sociology, Sociology Today (R. Merton ed. 1959).

9 Hauriou's final definition of an "institution" in a juridical sense was contained in his last published work. An institution is "A social organization that has become durable, that is, which preserves its specific form in spite of the constant renewal of the human matter that it contains when it is instituted. To be instituted means (1) that the directing idea which is in it from the moment of its foundation has been able to subordinate the power of government thanks to balances of organs and powers, and (2) that this system of ideas and balances of powers has been ratified, in its form, by the consent of the members of the institution as well as by that of the social milieu. Finally, the form of the institution, which is its durable element, consists in a system of balances and consents constructed around an idea." M. Hauriou, Précis de droit constitutional 172-74 (2nd ed. Paris 1929). It is clear, then, that to Hauriou not every organization is fully an "institution," some are in via.

10 Cf. La théorie de l'institution, supra note 2, at 12, 14.

11 For example, insurance or retirement plans.
by the members are the institution itself. The ideas also serve the function of giving direction to the legislative and executive, even "constitutional," decisions made on behalf of the institution. In a certain sense they are the rallying point for a continuing reaffirmation of the legitimacy of the institutional authority with respect to its members.

This concept of an "institution" is far from the model of rationalized bureaucracy envisioned by Max Weber. Hauriou used for it the biological metaphor of organism and spoke of its "life" and "death." The institution exists for the benefit of its members, that they might share in the achievement of its "ideas" as they develop. This connotes an organization whose existence is sustained by internal balances and tensions, by conflicts among organs and among members, and by competing variations of suggested ways and means for achieving the ideas, and of suggested forms or styles of development of the basic ideas. There is consensus, communion in the basic ideas; there is cleavage resulting from the differences among the human beings who compose it. Hauriou fully anticipates the restlessness that field studies of bureaucracy would later indicate would result from the relentless, rationalized pursuit of bureaucratic goals. The ideas are, Hauriou insists, sets of basic "ends and means." The ideas are not rigid goals, but, as Renard would later style them, "themes for development." The authority is to some extent centralized, but decentralized also—the separation of organs. Society itself is a composite of different institutions, one serving as a counter-weight to another. The peace and happiness of the society is achieved somehow by a series of shifting balances of these institutions, rather than by a rigorous hierarchy among them.

Society is conceived by Hauriou as composed of individual persons and groups, many of these groups being organized or institutionalized. At the pinnacle, in a legal sense, is the state, the governmental institution or institutions. Like the others it proceeds in realization of certain ideas, and acts through organs in accordance with accepted procedures, which like the "leading ideas" are subject to development and creative growth. From this governmental model, Hauriou conceives the contagious development of other organizations of the society into "institutions." When they do develop in this way, they are entitled, almost as a matter of right, to

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12 See Weber, Zur Lage der burgerlichen Democratie in Russland, 22 Archiv fur Sozialwissenschaft und Sozialpolitik 234 (1906).
14 La théorie de l'institution, supra note 2. at 13.
15 G. Renard, La théorie de l'institution (Paris 1931).
be regarded as legal systems, and be given the needed stimulus from the state institution to maintain their existence and to seek their own fulfillment.

Within a particular institution, according to Hauriou’s theory, persons become members by a form of consent: this “consent” need not be completely voluntary. There may be an element of “involuntariness,” as for example in a citizen’s adherence in an existing state. But a sufficient element of voluntariness is necessary to make his enlistment more than the result of mere force (coactus volui, sed volui).16 The consent is given on “enrollment” to the total institution, including its arrangements for initiating changes in previously existing understandings by enactment or by creative development of “the ideas.”

The two characteristic forms of internal group law are the “droit disciplinaire” or governmental power, and the “droit statutaire,” the recognized limitations upon this power. Within droit disciplinaire, except as specifically restricted by droit statutaire, is included a power to sanction violations of intra-group law.17

C. External Affairs

Each institution is conceived as having an external life wherein the group, or someone designated to act on its behalf, engages in relations with other groups.18 For example, the most obvious reason for the existence of a labor union is to enter into collective bargaining arrangements with employers. The national state, through its authorized representatives, makes “contracts” (treaties) with other states, or conducts wars. One aspect of the external life of a private group-institution concerns its relation to the national state. In Hauriou’s view, even a group which is recognized as a “real” institutionalized person by the national society is subject to Themis-type regulation by the nation group. Like individual persons, the institutionalized group is a unit subject to whatever type of control the national institution is permitted, by its own institutional arrangements and “ideas,” to exercise, as “police power” (policy)19 over the individuals and groups. Hauriou’s own political views recognize areas in which state intervention would be salutary, but his own disposition (not a necessary aspect of his institutional theory) favors a light hand by

16 *La théorie de l’institution*, supra note 2, at 2.
17 See text accompanying note 6 supra.
18 *La théorie de l’institution*, supra note 2, at 43.
19 Hauriou uses the word policy in the broad, earlier sense. Cf. F. MAITLAND, JUSTICE AND POLICE (London 1885): “such part of social organization as is concerned immediately with the maintenance of good order . . . .”
the state on private affairs. His view is not that positive law ascribes to private groups the total extent of their activities, but rather that law prescribes limits upon their power and right to engage in specific activities. To Hauriou institutions, not rules of law, are the dynamic force in society.\footnote{Institutions "incarnate creative ideas of enterprise; legal rules only represent ideas of limitations." \textit{La théorie de l'institution}, supra note 2, at 127.}

**D. Personalist Implications**

Hauriou has a nuanced view of the complexities of the political and legal art, and a sociological commitment to a precise examination of facts of social life bearing on a specific political or legal decision. His conclusion that the role of law is to preserve social order, and beyond that to "institute" a society of "persons," therefore, does not give a ready principle for the solution of a complicated case. But it does suggest an orientation towards individual liberty when it is in tension with economic advance, and towards a form of state intervention directed towards private groups which is aimed chiefly at protecting individual members against internal abuses of power. While it is true that any state intervention, even of the sort which insists upon internal procedural guarantees, detracts from the autonomy of an institution, it is a step towards "instituting" a society that is a "social whole of personalities," in Hauriou's sense. Hauriou views pluralism and institutional autonomy not as ends in themselves, but as steps towards securing the maximal individual freedom consistent with insuring social order and reasonable human existence.

**II. THE LEGISLATIVE BACKGROUND**

The National Labor Relations Act of 1935\footnote{National Labor Relations Act of 1935, 49 Stat. 449 (1935).} was a key step in establishing legislative support in the United States for the existence of labor unions, and in protecting them against attack on such grounds as "conspiracy" or "restraint of trade." The Act was directed towards achieving stability in industrial relations by means of collective-bargaining contracts negotiated between employers and employees acting through a legally protected union. The Act recognized that a union which was elected as representative of a majority of the employees in a "bargaining unit" had power to bind all employees in that unit as to terms and conditions of employment. One permissible term of this "collective bargaining contract" was the so-called "closed shop" arrangement, that no one who was not already a member of the union which had been elected as bargaining representative could be hired, or retained in employment, by
an employer. The 1935 statute, in Section 7, specified certain activities as "rights" of employees:

The right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.22

A movement after World War II to curtail certain activities of labor organizations culminated in the Labor Management Relations (Taft-Hartley) Act of 1947.23 Three modifications introduced by the 1947 legislation are of interest to us here. (1) The "closed shop" was outlawed, and the union security provision was limited to a "union shop" clause, which might require an employee to join the union, which had been elected as bargaining agent for the unit, within thirty days of his being hired. (2) The "section 7 rights" were expanded to give employees the additional right "to refrain from any or all such activities" (as set out above). (3) The area of "unfair labor practices" was enlarged to permit a complaint to the National Labor Relations Board [hereinafter cited NLRB] by an employer as well as an employee, and give rise to a "cease and desist" order by the Board if the complaint was found justified. The clause which is of particular interest here is section 8 (b) (1) (A) of the 1947 Act which made it an unfair labor practice "to restrain or coerce employees in the exercise of rights guaranteed by section 7." To this clause in the course of Senate debate there was added a proviso: "Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The wide divergence of judicial views in Allis-Chalmers resulted from divergent judicial meanings given three provisions of the 1947 Act: (1) The amendment to section 7 (a); (2) the "coerce clause" (as we shall hereinafter designate 8 (b) (1) (A) considered apart from its proviso); and (3) the proviso itself of 8 (b) (1) (A).24

22 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title." 29 U.S.C.A. § 157.


24 Some of the judicial opinions treated the 1959 amendments to the Act [Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, § 1, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.)] as relevant to the interpretation of sections 7 (a) and 8 (b) (1) (A). The 1959 Act was the first federal statute which professed to deal
III. UNION FINES AND ALLIS-CHALMERS: BACKGROUND AND FACTS: THEORIES AND ISSUES

A. BACKGROUND ON UNION FINES

The practice of unions fining members for breach of internal union regulations was apparently well accepted at the time of the 1947 legislation. But the question whether a fine imposed for exercise of a section 7 right is a violation of the "coerce clause" of 8(b)(1)(A) was not squarely faced by the NLRB until Allis-Chalmers. And the further question whether a union's attempt to enforce its fines against its members by court action constitutes "coercion" did not come to the fore until the appellate phases of Allis-Chalmers.

B. ALLIS-CHALMERS: THE FACTS

The facts of the Allis-Chalmers case are simple and largely undisputed. A local strike is called in accordance with the constituted procedures of the union, receiving the required approval of two-thirds of its membership by secret vote. Certain members decline to honor the strike vote and cross the union picket lines. Their action is conceded in violation of provisions of the union constitutions which provide for alternatives of expulsion or fines as penalties for such action. Following the strike the recalcitrants are formally charged with these violations. After a union hearing in which the employees participate by counsel the union fines them sums ranging from $20 to $100. Some of the fined members refuse to pay the fines. In lieu of expelling these members for failure to pay the fines (a course that was thought concededly open to the union) the union sues to recover the fines by suit against the members in the state court. The employer, Allis-Chalmers, files a complaint against the union with the NLRB charging that the union's suit against the non-striking members was conduct "to restrain or expressly with the internal affairs of labor organizations. It contained an elaborate "bill of rights" setting forth requirements for union elections, procedures and standards of procedural "due process" to be accorded union members before they can be "fined, suspended, expelled, or otherwise disciplined." Labor and Management Reporting Act of 1959, SS101(a)(5), 73 Stat. 523.

25 See Summers, Legal Limitations on Union Discipline, 64 HARY. L. REV. 1049 (1951). The proviso recognized the control over admission to and expulsion from membership already allowed unions by existing court decisions. As Cox points out, the courts worked out limitations on the exercise of this power in much the same terms later included in the "bill of rights" of the 1959 legislation (see note 24). See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, Mich. L. REV. 819, 835-36 (1960).
coerce" employees in the exercise of their section 7 right to "refrain from" concerted activities, and therefore was an "unfair labor practice".

C. IN THE ADMINISTRATIVE TRIBUNAL: NLRB PROCEEDINGS

The trial examiner, and the majority of the NLRB which affirmed his decision,26 considered as crucial only the question whether these particular fines were permissible as within the scope of the "expulsion" proviso. The Board had previously ruled that the proviso did not permit expulsion of members for every reason. In Skura27 and Wellman-Lord,28 the Board had refused to permit either expulsion or fines where the union had penalized members for resorting to the Board's processes. In Allis-Chalmers, the Board found that expulsion would be justifiable as a penalty for crossing picket lines, and upheld the imposition of fines as a lesser penalty. No significance was given to the additional feature of attempted court enforcement of the fines by the union. Allis-Chalmers appealed the Board decision to the Court of Appeals for the Seventh Circuit.

D. IN THE COURTS

In the 7th Circuit Court of Appeals: First Decision

A three-judge panel of the Court of Appeals for the Seventh Circuit affirmed the NLRB.

Before the court of appeals panel the Allis-Chalmers case took on a new focus. The company conceded that expulsion would have been justifiable by virtue of the proviso. But, it argued, fines enforceable by court action constituted "coercion" within the intent of the section 8 (b) (1) (A). A unanimous panel analyzed the legislative history and found that this section was not designed by Congress to ban court-collected fines. It added that in any event no section 7 right was violated by the fines, since upon entering a union, "members must take not only the benefits but the burdens also. ... Implicit in the section 7 right to organize is the duty, once that right has been exercised, to support the organization."29 The case was thus resolved without reliance on the proviso.

26 Before the NLRB the Allis Chalmers case was known as Local 248, UAW, 149 N.L.R.B. 67 (1964).
In the 7th Circuit Court of Appeals: Final Decision (en banc)

On the rehearing en banc the court withdrew the panel opinion and reversed the NLRB, four to three.\(^{30}\) Three dissenting judges each filed a separate opinion.

(1). Circuit Judge Knoch (majority opinion)

Writing for the majority, Judge Knoch accepted the issue as framed in the panel opinion,\(^{31}\) and, recited the common ground of the litigants.\(^{32}\) In the court's present view, wrote Judge Knoch, "The statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification."\(^{33}\) Section 7 specifically gave certain rights to employees;

- to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing,...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and...to refrain from any or all of such activities.

To this "right to refrain" the 1947 statute made but one single exception: the provision of section 8(a)(3) permitting "an agreement requiring membership in a labor union as a condition of employment." Section 8(b)(1)(A) made it an "unfair labor practice" for a labor organization or its agents "to restrain or coerce employees in the exercise of rights guaranteed by section 7."

The court conceded that the union was free to expel members for violations of its rules. However, by section 7, "Congress has seen fit...to diminish the authority and power of the union to police its members by coercion...." The union's "authority is based on voluntary association rather than coercion"; its coercive potential is only "fortified with the weapons Congress has deemed advisable," i.e. the power to expel a union member. Congress did not give

\(^{30}\) 358 F.2d 656 (7th Cir. 1966).

\(^{31}\) "...whether a union which imposes fines upon its members for crossing a picket line of the union and seeks to secure payment of the fines by suing or by threat of suit is guilty of violating the prohibition, in Section 8(b)(1)(A)...against union action restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act." Id. at 658.

\(^{32}\) "The parties agreed that generally employees have the right not to strike and that the Union may expel its members for any reason authorized by its rules, but that the Union may not demand the discharge of an employee or other adverse change of his employment status except for non-payment of uniform initiation fee and dues." Id. at 658.

\(^{33}\) Id. at 660.
unions power to make "coercive threats to take away his wages by imposition of fines."\(^{34}\)

The court cited;

expressed Congressional policy of protecting the union member ... [as being] particularly apt where, a sin the case before us, membership is the result not of individual voluntary choice but of the insertion of a union security provision in the contract under which a substantial minority of the employees may have been forced into membership.\(^{35}\)

(2). Chief Judge Hastings (dissenting)

The three dissenting judges all concurred in the dissent of Chief Judge Hastings, although Judges Kiley and Swygert added supplemental analyses of their own.

Chief Judge Hastings saw no infringement of section 7 rights in the union's action here. In his view section 7 grants to an "employee" the right of self organization "and to refrain from concerted activities, including an economic strike." But he

cannot believe the Congress intended ... [that] an employee who is a union member [italics his] may claim the right of self-organization for collective bargaining purposes and at the same time claim the right to belong to the labor organization on his own terms.

Once employees "elect to belong to a union...I find no prohibition in section 7 to prevent a union from disciplining those members who decline to honor an authorized strike."\(^{36}\) In this case there was a true election to assume union membership: "the strikebreaking employees had a choice." They renounced the alternative of assum-

\(^{34}\) The court noted that the fines here were confined to $20 to $100 in total for each recalcitrant member, but added that the union constitution provided for maximum fines of $100 for each crossing of the picket line, which might have "run into thousands of dollars creating a far greater burden on the working man than expulsion from his labor organization or even loss of job." Id. at 658.

\(^{35}\) Id at 660. Judge Knoch then states as the accepted interpretation of the union security provision (section 8(a) (3)) that "such membership properly incurs an obligation to pay dues and fees but may not be extended to include liability to submit to fines for indulging in a protected activity." Id. The union conceded on argument before the court that an employee who elected merely to comply with the minimum requirement of paying union dues (a condition of employment under a union shop) might not be subjected to union fines. See Note, 8(b) (1) (a) Limitations Upon the Right of a Union to Fine Its Members, 115 U. Pa. L. Rev. 47, 62 (1966).

\(^{36}\) Chief Judge Hastings here recalls that: "It has never been disputed that a union may discipline its members for engaging in an unauthorized strike." He finds no "congressional purpose to distinguish between wildcat strikers and strikebreakers." 358 F.2d at 662.
ing the mere "dues-paying" membership required by the union shop agreement, an alternative which would have left them (as the union conceded) "beyond the reach of union discipline." Once an employee chose "full membership" he incurred "obligations to his union as the reciprocal counterpart of his rights within the organization." In the 1947 legislation Congress placed only one limitation on the power of the union to regulate its internal affairs. It was specifically enjoined from attempting to enforce its internal regulations by affecting the members' employment status.37

Congress did not address the prohibition in 8(b) (1) (A) of the 1947 Act "to intra-union regulation but rather to coercive acts of violence, intimidation or job discrimination." Judge Hastings found (and here he cited both excerpts from the 1947 legislative history and the text of the 1959 Act) that the fines against dissident members was not the "type of restraint or coercion proscribed as an unfair labor practice in Section 8 (b) (1) (A)."38

In an apparent dependence on the "expulsion" proviso of 8 (b) (1) (A)39 (and perhaps on the provisions of the 1959 Act),40 Judge Hastings further concluded that the "...imposition of the fines in question are not only free from proscribed restraint and coercion but are within the protected area of permissible internal union regulation."41

(3). Kiley, Cir. J. (dissenting)

Judge Kiley, who had written the prevailing opinion for the three-judge panel, found three distinct series of objections to the

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37 To buttress his conclusion that Section 7 had not been violated, Chief Judge Hastings cited the explicit provisions of the 1959 statute (which had placed strong procedural safeguards upon the conduct of internal union business affecting individual members): "That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the institution . . . ." (Section 101 (a) (2) 73 Stat. 522), and that a union has a right "to discipline by fine, suspension and expulsion." (Section 101 (a) (5) 73 Stat. 523).

38 The opinion here recalled N.L.R.B. v. Drivers Local Union, 362 U.S. 274 (1960), a 7th Circuit decision on upholding a union's threat to withhold insurance coverage from members who had refused to pay disciplinary fines. 358 F.2d at 664.

39 "[T]his paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158 (1964).

40 See Note 24 supra.

41 358 F.2d at 665. The opinion here argued that unions should "in all fairness" be given "the same freedom of internal control" of its business affairs as employers enjoy "as a proper prerogative of management."
present majority's decision that imposition and court enforcement of fines was an "unfair labor practice."

(1) He read the legislative history of the 1947 Act\textsuperscript{42} as evidencing that section 8(b) (1) (A) ("with or without the acquisition or retention of membership proviso") was directed against "...specific evils of force, violence, and threats thereof, mass picketing, and economic reprisals in the form of inducing an employer to discriminate against an employee in his job rights... [and not to] fines collectible by legal process."

(2) He stressed that in the case as presented by the parties there had been no issue of "non-voluntariness" of the union membership.\textsuperscript{43} The union constitution made specific provision for a mere dues-paying status; and the union itself had conceded that ".if the men before us had no obligation to the union beyond paying dues and fees, they would not be subject to the union 'requirement of obedience to the common cause'..."\textsuperscript{44}

(3) Judge Kiley insisted that the majority opinion implied irrationality (in the sense of incoherence and inconsistency) in the labor legislation under consideration. "A union member may express agreement or disagreement with union rules or policies, but he cannot simultaneously be a member and also have whatever advantages there might be in non-membership...."\textsuperscript{45} "We have not been persuaded... [he concluded], that this absurdity was in the contemplation of Congress."\textsuperscript{46} Furthermore, in the 1959 legislation Congress had specifically recognized that "[A] union is a form of industrial government and the rights and duties of a member are similar to those of citizens in a democratic society."\textsuperscript{47} Judge Kiley argued that Congress "would have been inconsistent... [in the 1959 Act if}

\textsuperscript{42} Judge Kiley rejected the majority's suggestion that "the statutes in question present no ambiguities whatsoever," citing the Supreme Court's statement in N.L.R.B. v. Drivers Local Union, 362 U.S. 274 (1960), that "restrain or coerce" in section 8(b) were non-specific, indeed vague words." 358 F.2d at 670.

\textsuperscript{43} The majority opinion had stated that "[I]n the case before us, membership is the result not of individual voluntary choice but of the insertion of a union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F.2d at 660.

\textsuperscript{44} \textit{Id.} at 669.

\textsuperscript{45} \textit{Id.} at 667.

\textsuperscript{46} \textit{Id.} at 668.

\textsuperscript{47} The 1959 act, after enumerating a "bill of rights" of union members, specified that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."
it had been already (in section 8 (b) (1) (A) of the 1947 Act) forbidden unions to fine members who cross picket lines, for what greater responsibility could a union member have to the union as an institution than to support a lawful strike called by the majority?"\(^{48}\)

He countered the majority's assertion that a union has only such powers as are affirmatively granted it by statute ("that unions, as associations of men, had no rightful prestatute existence")\(^{49}\) with the Supreme Court's holding that "[t]he Constitution presupposes and gives protection to the right of association."\(^{50}\) The majority's dictum that unions were largely the creatures of statute merely connotes "that the Wagner [1935] Act and subsequent legislation gave unions status as institutions." Congress' recognition of the employees "right to organize" implicitly recognized "the duty, once that right has been exercised, to support the organization":

> It would be difficult to accept the proposition that a union should be the one secular society in our nation which one may enter without being bound by majority rule and without submission to some limitations on rights for the common good.\(^{51}\)

(4). \textit{Swygart, Cir. J.} (dissenting)

In his dissent, Judge Swygert dwelt chiefly upon three contentions of the majority: (1) that "this case involves employees who are involuntary members of the union"; (2) that a union victory here would lead to "the possibility that the union might exact crippling and unreasonable fines"; and (3) that "there is no occasion for resorting to legislative history" in applying sections 7 and 8 (b) (1) (A) to the facts of this case.

Even if legislative history were ignored, "a mechanical application of the statute" does not provide an answer to the problem in this case. Judge Swygert here returns to Judge Kiley's suggestion of the inconsistency in saying that "a union member may make an independent, ad hoc determination to cross a union-imposed picket line without subjecting himself to reasonable internal discipline." This is simply to say "that an employee-member may simultaneously engage in protected activity and refrain from [so] engaging." He then brings the majority's handling of the "retention of membership" proviso of Section 8 (b) (1) (A) to rational inquiry. This provision had been introduced into the statute to satisfy those legis-

\(^{48}\) 358 F.2d at 667.

\(^{49}\) The precise statement of Judge Knoch was: "An analogy was drawn between an industrial union and a democratic society where the majority vote rules, forgetting that a union is largely the creation of statute...." 358 F.2d 656, 659 (7th Cir. 1967).


\(^{51}\) 358 F.2d 656, 668 (7th Cir. 1967).
lators who wanted reassurance that the full section would not be applied to internal union affairs. To limit the union's disciplinary action under the proviso to expulsion and not to include a power to impose fines is "not only to make undue restriction of the words 'retention of membership' but also to apply the proviso in a way not intended and which diminishes a power which would exist entirely apart from the proviso." For Judge Swygert concludes, like his co-dissenters, that:

Section 8(b) (1) (A) by its terms is directed at union conduct vis-a-vis employees, not at union conduct vis-a-vis union members.\(^{52}\)

(1) \textit{Brennan, J. (Prevailing opinion)}

Justice Brennan cites the "extraordinary results" which a "literal interpretation" stripping unions of the power to fine members for strikebreaking (and to enforce the fines by court action) would visit upon "a coherent national labor policy." This policy "extinguishes the individual employee's power to order his own relations with his employer and creates in the union a power to act in the interests of all employees":

Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom he represents...\(^{54}\)

Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when members engage in strikes. Provisions in union constitutions and by-laws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley 1947 amendments.\(^{55}\)

To read the statutory language "literally" in the sense of the court below would attribute to Congress an even more pervasive regulation of internal affairs of unions in 1947 than those effected in 1959 by the Landrum-Griffin amendments,\(^{56}\) "an intent at war with the understanding of the union-membership relation which has been at the heart of its [Congress'] effort 'to fashion a coherent labor policy'"; namely to imply a design to limit unions "in the powers necessary to the discharge of their role as exclusive statutory agents

\(^{52}\) Id. at 672.

\(^{53}\) 388 U.S. 175 (1967).

\(^{54}\) Id. at 180.

\(^{55}\) Id. at 181-82.

\(^{56}\) See note 24 supra.
by impairing the usefulness of labor’s cherished strike weapon.” In the latter connection Justice Brennan agrees that expulsion may be an adequate, and more severe, weapon than fines in the hands of a strong union. But without an effective power to fine recalcitrants, a weak union “faced with further depletion of its ranks may have no real choice except to condone the member’s disobedience.” Before accepting a literal interpretation of language which leads to such results “we should determine whether this meaning is confirmed in the legislative history of the section.”

After an unusually full and candid resume of the legislative history of Section 8(b) (1) (A) Justice Brennan concludes that (even apart from the “membership” proviso) there is not one word directing the application of the “coerce or restrict” language in the body of that section to internal union affairs, and a number of assurances by sponsors of the amendment to the contrary. In addition, Justice Brennan finds in the “membership” proviso “cogent support” for his conclusion that the body of 8 (b) (1) (A) does not reach “the imposition of fines and attempts at court enforcement.” He concludes: (1) the proviso “at the very least” preserves the right of unions to impose those fines which carry “the explicit or implicit threat of expulsion for non-payment”; (2) therefore, “the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for nonpayment would not be an unfair labor practice.”

But what justification is given for the court enforcement of the fines? Here Justice Brennan finds it unnecessary to reach the question whether the proviso can be read “to authorize court enforcement of fines.” It is enough that there is no design in the body of 8 (b) (1) (A) to ban the imposition of fines. Justice Brennan suggests two “anomalies” which he finds in making a distinction between court enforcement of fines and expulsion. (1) Congress in 1947 “was operating within the context of the ‘contract theory’ of the union-member relationship which prevailed widely at that time.” But a contract is made efficacious precisely by its legal enforceability by lawsuits. (2) A distinction admitting expulsion and banning court-enforced fines would bear more severely upon the members of a strong union, and impair the bargaining facility of a weak union.

Justice Brennan reinforces his conclusion that the court below had over-extended the reach of 8(b) (1) (A) by reference to the

57 To detect such a design to ban would be to attribute to Congress a particular concern “in banning court enforcement of such fines.” Yet “there is not one word of the legislative history evidencing such congressional concern.”
provisions of the 1959 legislation. He cites its provisions specifically permitting membership fines, and disclaiming any intent to impair the right of any labor organization to adopt and enforce reasonable rules as to "the responsibility of every member toward the organization as an institution." Why should Justice Brennan find significance in this later act for the interpretation of the 1947 act?

"To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration." Congress' respect in 1959 for union rights re fines and internal regulations is to be viewed as consistent with, and not contradictory of, the earlier legislation. In the absence of a clear disclaimer, like Judge Kiley, Justice Brennan sees need to construe the total national labor legislation as a coherent corpus.

From his examination of the legislative history Justice Brennan concludes that the 1947 prohibitions against "restrain or coercion" of an employee (Section 8 (b) (1) (A) does not include "a prohibition against the imposition of fines on members who decline to honor an authorized strike and against attempts to collect such fines."

Having (1) found need to consult the legislative history, and (2) concluded from the history that the 1947 Act did not brand the union action per se coercive, in the third part of his opinion Justice Brennan considers the question of "voluntariness" of membership in the context of this case. Noting that Allis-Chalmers' collective bargaining agreements with the respondent local unions incorporated union security clauses, Justice Brennan seems to accept the distinction between "full" membership entailing subjection to union discipline, and mere "dues paying" membership. He takes the evidence in this case as conclusive that the members concerned had by their actions become members for all purposes. But Justice Brennan reads the opinion of the majority en banc below as contending that even full membership in many cases is the result not of "individual voluntary choice but of the insertion of a union security provision in the contract...." He reads this contention as suggesting that the union members' freedom in adopting full membership was in fact illusory, for "a substantial minority of the employees may have been forced into membership." Justice Brennan rejects the relevance of this supposed "fact" to these proceedings, for (1) "...the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley [1947] amendments

58 See note 24 supra.
prohibited disciplinary measures against a full member who crossed his union's picket line." (2) "It is clear that the fined employees in these cases enjoyed full union membership."^60

(2). White, J. (concurring opinion)

In a terse concurring opinion which supplied the swing vote in the Court's 5-4 decision, Mr. Justice White found the proviso decisive. He found it unnecessary to pass upon the question whether a union member had a right protected by Section 7 to cross the union's picket lines after declaration of an authorized strike. He therefore did not deal with the distinction between "full membership" and "mere dues-paying membership." His starting point was that Section 8(b) (1) (A)—except as limited by the "acquisition and retention of membership" proviso—made it an unfair labor practice for a union to coerce or restrain employees in the exercise of Section 7 rights. He claimed that the majority and dissent agreed both on "the validity of the union rule against its members crossing picket lines during a properly called strike," and on the propriety of expulsion to enforce the rule. Although this union rule was "coercive" and "in derogation of Section 7 rights," it was "enforceable at least by expulsion" solely because of the proviso. But was the proviso broad enough to justify the union's resort to court enforcement of fines for violation of the rule? His answer to this question was an unargued "Yes."

In Justice White's view the dissent questions whether fines for violation of union rules are enforceable at all—either by expulsion or by court enforcement—but finds that court enforcement "at least" is an unfair labor practice because "more coercive" than fines internally collected. He notes that Justice Brennan's opinion regards enforcement of fines by court action as less coercive than enforcement by expulsion and finds "no basis for thinking that Congress... intended to bar enforcement by this less coercive method." On Justice White's agreement with this point he bases his crucial vote.

(3). Black, J. (dissenting opinion)

Justice Black's dissent first considers the basis for the Court's holding with respect to the body of 8(b) (1) (A), i.e. entirely apart from the proviso. He subsequently deals with the Court's reliance upon the proviso.

^60 Somewhat oddly, the opinion viewed as "not before us," and would "intimate no view on," the question whether the Taft-Hartley [1947] prohibitions would apply if the unions had applied fines to "mere dues paying members."
Justice Black doubts that the words "restrain or coerce" are sufficiently ambiguous to justify resort to legislative history. But he does not disagree with the "three significant things" which the Court found in this history: (1) "not a single word" to indicate 8(b) (1) (A) was intended to apply to "traditional internal union discipline in general, or disciplinary fines in particular"; (2) the "repeated refrain" in the debates that Congress did not intend to place limits on the "internal affairs of unions"; (3) that senatorial supporters of 8(b) (1) (A) were chiefly concerned with "union coercion during organizational drives" and with "union violence in general." To Justice Black these "three observations about the legislative history of 8(b) (1) (A) do not justify "disregarding the plain meaning of the section." He goes further: "It seems perfectly clear to me that the Court does not think so either."61 Black cannot agree with "the Court's unarticulated premise that the Court has power to add a new weapon to the union's economic arsenal.... That is a job for Congress, not this Court."

Justice Black then deals with three assumptions of the Court with respect to the "retention of membership" proviso to 8(b) (1) (A):

Assumption No. 2: that the proviso "at the very least" permits the union to expel members "for the express purpose of discouraging them from going to work." Black: "I am not at all sure" that the union may do this by a fine for breach of a union rule "even though the fine is only enforceable by expulsion from membership."

Assumption No. 2: that the proviso "at the very least" permits the union to impose fines (as a lesser remedy than expulsion). Black: "Contrary to the court I am not at all certain" that a union's right to make rules for the retention of membership "includes the right to restrain a member from working." And Justice Black's reservation applies "even though the fine is only enforceable by expulsion from membership."

Assumption No. 3: the Court's ultimate holding "that Congress could not have meant to preclude unions from the alternative of judicially enforcing fines." Black: Even if we assume arguendo that the first two assumptions are correct "the fundamental error of the Court's opinion is its failure to recognize the practical and theoretical difference between a court-enforced fine, as here, and a fine enforced by expulsion or less drastic intra-union means." It is not

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61 "The real reason for the court's decision is its policy judgment that unions, especially weak ones, need the power to impose fines on strike-breakers and to enforce those fines in court." 388 U.S. 175, 201 (1967).
realistic merely to say that the fines here were minimal, for "it is not difficult to imagine a case where they will be so large that the threat of their imposition will absolutely restrain employees from going to work during a strike." The distinction between fines enforceable merely by internal means and fines enforceable by court action is glaring in such a case, for

Although an employee might be willing to work even if it meant the loss of union membership, he would have to be well paid indeed to work at the risk that he would have to pay his union $100 a day for each day worked.\(^6^2\)

Justice Black next deals with the effort of the Court to bring "reasonable court-enforced fines within the ambit of 'internal union affairs.'" He assails the Court's notion that once internal union fines are upheld the allowance of "court-enforcement of fines" necessarily follows as a consequence of the "contract theory" of the union-member relationship. This contention, he says, has no basis in history, or in logic. Even the Court's authorities fail to suggest that court-enforced fines were "commonplace or traditional in 1947." In fact, "until recently unions rarely resorted to court-enforcement of fines." The Court's purported justification of court-enforcement of fines by analogy to judicial enforcement of an ordinary commercial contract "is simply 'a legal fabrication.'"\(^6^3\)

The contractual theory of union membership, at least until recently, was a fiction used by the courts to justify judicial intervention into union affairs to protect employees, not to help unions.\(^6^4\) Justice Black "cannot believe" the Court's suggestion that Congress "intended the effectiveness of 8(b) (1) (A) to be impaired by such fiction."

In the final sections of his dissent, Mr. Justice Black rejects the Court's displacement of "the plain meaning" of 8(b) (1) (A) on the basis of "the inconclusive legislative history it points to,"\(^6^5\) and

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\(^6^2\) Id. at 204.

\(^6^3\) Id. at 207. Justice Black borrows this phrase from Summers, upon whom the Court had greatly relied: "The contract of membership is... a legal fabrication.... What are the terms of the contract? The constitutional provisions, particularly those governing discipline, are so notoriously vague that they fall short of the certainty ordinarily required of a contract. The member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Even then, the union is not bound, for it retains the unlimited power to amend any terms at any time.... In short, membership is a special relationship. It is as far removed from the main channel of contract law as the relationship created by marriage...." Summers, LEGAL LIMITATIONS ON UNION DISCIPLINE, 64 HARV. L. REV. 1049, 1055-56 (1951).

\(^6^4\) 388 U.S. 175, 207 (1967).

\(^6^5\) Id. at 208.
he calls unrealistic the Court's distinction between "full" and "mere dues-paying membership." He reaffirms his view that Congress' policy in Sections 7 and 8 (of the 1947 legislation) was "to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage." To Justice Black the Court has here striven diligently "to defeat this unequivocally declared purpose of Congress." And it has done so "merely because the Court believes that too much freedom of choice for workers will impair the effective power of unions." In his view the Court "has ignored the literal language of 8(b) (1) (A) in order to give unions a power which the Court, but not Congress, thinks they need."

Four distinct sets of questions with respect to the 1947 amendments were thus raised by the various opinions.

1. Did the new (1947) Section 7(a) "right to refrain" apply to those employees who had joined a union, in the sense that they too were free to oppose by conduct the membership's decision to strike?

2. (a) Was the anti-coercion clause of Section 8(b) (1) (A) violated by imposition of internal fines upon members for opposition that took the form of crossing their union's picket lines? (b) If not, did resort to the external forum of the courts to collect these fines constitute the prohibited "coercion"?

3. (a) Even if these clauses of 7(a) and 8(b) (1) (A) read alone would constitute prohibited "coercion" from exercising a "right to refrain," was the union's internal assessment of such fines saved by the "acquisition or retention of membership proviso" [to 8(b) (1) (A)]? (b) Was the union's resort to court collection similarly protected?

4. (a) Should the answers to these three question be different in a "union shop" situation, that is, where membership in the union elected as bargaining agent was a condition of retaining employment? (b) If so, was a relevant distinction to be made here between "members" who merely paid union dues (the minimum required by 8(b) (3) and those who availed themselves of "full membership participation and privileges?"

We now summarize the answers given to these four questions in the various opinions:

A. In the NLRB: Only question 3(a) was explicitly considered. The fines, which were viewed as "internal" lesser penalties than expulsion, were implicitly included within right to expel and "excepted" from the "coerce" clause by the explicit terms of the "membership" Proviso. Court enforcement was not viewed as a separate problem.
B. In the Court of Appeals: Majority (Knoch, Cir. J.): A "Yes" answer to questions 1 and 2(a), was dictated by the plain language of the 1947 legislation itself. Judge Knoch found additional support for the court's conclusion in a "compulsory membership" situation (cf. question 4(a)).

Dissents: Hastings, C. J. Answered "No" to questions 1 and 2(a) (showing no interest in 2(b)). He found a "Yes" answer to 3(a) easy, but unnecessary (and no interest in 3(b) or 4).

Kiley, Cir. J. stressed a "No" to questions 2(a) and (b) and 3(a) and (b) ("lesser discipline of fines") and a resounding "Yes" to 4(b).

Swygert, Cir. J. found a clear "No" in the legislative history for questions 1 and 2(a), and a "Yes" to 3(a).

And so, neither in the NLRB nor in the Court of Appeals was any interest shown (save for a brief reference by Judge Kiley) in 2(b) or 3(b), these special question raised by court-enforcement of the fines.

C. In the Supreme Court:

Majority (Brennan, J.):
1. No.
2(a). No (not applicable to internal union affairs, and so not to fines).
   (b). No (implicit in "contract" theory).
3(a). Qualified yes—(at least where fines carried threat of expulsion)—and as "lesser penalty" than expulsion.
   (b). Yes (Because even if proviso did not authorize court enforcement, neither did it forbid it).
4(a). (b). Although he refuses to say a different decision would be reached if less than "full" (i.e., mere "dues-paying") membership were involved, Justice Brennan stresses that "the fined members in these cases enjoyed full union membership."

White, J., (concurring):
1. Yes.
2(a). Yes.
3(a). Yes; (b) yes.
4(a). No; (b) no interest.

Dissent (Black, J.):
1. Yes.
2(a). Yes.
3(a). No.
   (b). No (a fortiori), but court enforcement is more severe.
4(a) No (but Justice Black finds the result "particularly" offensive in a union shop situation, and judicial enforcement obviously unavailable where recalcitrants are not "full members" of the union).
We shall now look at the opinions in the perspective of their authors' views of the fundamentals of the union-membership relation, and of judicial method.

1. The 7th Circuit Court of Appeals en banc
   (a) Majority opinion (Judge Knoch)
      (i) Union-membership relation.

      To Judge Knoch the union is "primarily the creature of statute." It has only those powers expressly given it by statute: Congress did give the union (in the proviso) the power to enforce internal rules by expulsion; Congress did not give it the power to enforce them by fines. Therefore the union did not have power to fine recalcitrant members. The powers given by Congress must themselves be particularly narrowly scrutinized in a situation where a union is the beneficiary of the support of a union security provision in the collective bargaining contract. For this undercut, the "voluntary" ingredient that is essential in the union-member relation. Judge Knoch does not specifically refer to the "contract" theory of association but it is implicit in his argumentation.

      (ii) Judicial method.

      This opinion is replete with expressions of policy preferences which we do not trouble to repeat. Judge Knoch is reluctant to resort to legislative history when the "plain meaning" of the statutory words have "no ambiguities whatsoever" and, incidentally, are in accord with the generalized policies which he finds congenial to Congress and to the Court. The underlying philosophy of Judge Knoch's judicial methodology may be characterized as "positivist," "voluntarist" and "nominalist". The limitations on individual action are restricted to those specifically set out in the statute; the statutory language is to be taken "as is" without any judicial responsibility to evaluate it in the light of an assumed rationality or coherence of law itself, or of legislative intent differently discovered; the union is a collection of discrete individuals except as specific legislative language has clothed the group with specific ingredients of collective power.

   (b) Dissent (Chief Judge Hastings)
      (i) Union-membership relation.

      Unlike the majority, Chief Judge Hastings views the union as a social group with "disciplinary" power; it is in receipt of obligations from its members which are the counterpart of their "rights." He finds here no violation of Section 7 rights, because these rights
(e.g. not to take part in concerted activities) are not absolute, but must be considered in the context of the obligations undertaken by members incident to joining the union as a social group. This view assumes that ordinary disciplinary power is possessed by the institutional group unless it is specifically withdrawn by the legislator. The sole limitation placed by Congress with respect to union discipline enforcing its membership rules is that it should not affect the members’ employment status [8(b)(3)]. There is no objection in statute or in law, then, to union enforcement of its rules by fines, even fines enforced by court action. The aspect of voluntariness of membership is sufficiently satisfied when the employee elects to take “full” membership in the union, as distinguished from the mere “dues paying” membership which is imposed upon him by statute as a condition of the union security clause in the collective bargaining agreement. Judge Hastings considers the union as a species of the type social institution: Broad freedom is given business corporation management in the conduct of internal affairs; comparable freedom (clear statutory language apart) is likewise an incident of the powers of a labor union as a social organization.

(ii) Judicial method.

Chief Judge Hastings uses an analytical rather than a legislative history approach to the statutory language. This entails consideration of the full array of choices (or “rights”) provided by Section 7 of the Act—the right to organize and to engage in concerted activities as well as the right to refrain from such activities. The only limitation, he reasons, which Congress has placed on this range of choice is the permissive clause permitting the union security arrangement. But, without using language of “waiver,” Judge Hastings conceives that an employee choosing the alternative of entering (with “full membership”) a labor organization must bear consequences of this choice: “an ensuing obligation of union solidarity.”

This normal consequence of the concept of “membership” in an organization must, he argues, follow unless Congress has indicated a design to depart from it. He does not find in the statute any general design of Congress to deal with “internal union affairs,” much less a specific intent “to interfere with or prohibit the right of the union to discipline its members for the violation of reasonable rules.”

66 “... except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.” 29 U.S.C.A. § 157.
Thus, given a voluntary adherence in a labor organization founded for a given purpose, rational construction of a statute affecting it requires that the legislature be assumed to have contemplated that the labor organization has an inherent power "to discipline its members for the violation of reasonable rules or policies it could legitimately expect its members to observe." This analysis borders remarkably closely on Hauriou's theory of the institution. Judge Hastings' judicial method not only presupposes a theory of a social organization which imposes internal obligations on members, but it presupposes that Congress has acted in support of "the right to self-organization" with such a theory in mind.

Even if such a theory of institution be accepted, the question remains whether or not it solves the central problem in this case: Does court enforcement of fines constitute an aspect of "internal affairs" of the union? Is it not "external" to the union and "internal" only with respect to the over-all political society? This question, which was not faced up to by Judge Hastings, is put aside for later consideration after our present scrutiny of the various judicial opinions.

(c) Dissent (Judge Kiley)

(i) Union-membership relation.

More explicitly dealing with theoretical notions, but essentially proceeding along the same lines as Chief Judge Hastings, Judge Kiley accepts an institutional notion of social organization as applicable to the government of a "democratic society," both public and private, and specifically to a labor union. Men may not enter a "secular society in our nation without being bound by majority rule and without submission to some limitation on rights for the common good."

(ii) Judicial method.

Judge Kiley takes the above view of the union-membership relation as the premise for the congressional amendments of 1947. He finds nothing in the legislative history to qualify this view with respect to labor unions, and he finds explicit support for the premise in the provisions of the 1959 legislation.67

Like Chief Judge Hastings he proceeds from this institutional premise, without further discussion, to the conclusion that the 1947 legislation left intact the union's right, as an aspect of its internal affairs, to have its punitive "fines collectible by legal process."

67 "That nothing herein shall impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . . ." 29 U.S.C.A. § 411(a) (2).
(d) Dissent (Judge Swygert)

(i) Union-membership relation.

Like his co-dissenters Judge Swygert stresses what voluntarily joining a union (that is, taking "full membership" in "exercise of his Section 7 rights") legally entails. The consequence of an employee's voluntarily associating himself with a union (and Judge Swygert sees "no issue in this case concerning compulsory union membership") is that he "may not join on his own terms, abiding only by those rules with which he is in personal agreement." On the contrary, he thereby subjects himself to "reasonable internal union discipline."

(ii) Judicial method.

Judge Swygert, like Chief Judge Hastings, uses an analytical approach to the "rights" enumerated in Section 7. It is unreasonable to attribute to Congress the notion that "an employee-member may simultaneously engage in protected activity and refrain from so engaging." He therefore concludes that Section 8 (b) (1) (A) "by its terms is directed at union conduct vis-a-vis employees, not at union conduct vis-a-vis union members." Like his co-dissenters, however, Judge Swygert finds a premise that Congress had elected in 1947 to leave conduct of internal union affairs to the unions themselves; and he makes no specific attempt to justify court collection of fines as a necessary corollary of this premise.

2. The United States Supreme Court

(a) Majority opinion (Mr. Justice Brennan)

(i) Union-membership relation.

The interweaving references in Justice Brennan's opinion to union "self-government," "internal affairs of unions" and the "contract theory" of the union-member relationship may most satisfactorily be resolved in this way: Justice Brennan three times refers to the "contract theory" as being presupposed by both Congress and the courts in 1947, when the Taft-Hartley amendments were passed. His emphasis on the words "at that time" (i.e. 1947), and the repeated references to union self-government, internal affairs of unions, and citation of the 1959 Landrum-Griffin "organization as an institution" provision, suggest that both Congress and the Court have swung over to an institutional conception of the union-membership relation.

Yet Justice Brennan makes use of the "contract theory" to rationalize what proved to be the key aspect of the case as developed

68 See note 67 supra.
in the Supreme Court: whether “court-enforcement” of union fines was a legitimate aspect of “internal union affairs.” His reference to the “contract theory” as the dominant theory in 1947 is designed to test Congress’ intent with respect to the scope of its words “restrain or coerce” in 8(b)(1)(A). Did Congress intend to ban court enforcement of fines? He was unwilling to attribute to Congress “a narrow and discrete interest in banning court enforcement of such fines” for “[t]he efficacy of a contract [i.e. of union membership] is precisely its legal enforcement. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled.” Again, while he could not assert that court enforcement of fines was customary at the time of the Taft-Hartley amendments, Justice Brennan sought to bolster his argument that the 1947 legislation harbored no intent to bar them by citing (1) the then prevalent custom of internal union fines, plus (2) the general jurisprudential notion that “this contractual conception of the relation between a member and his union widely prevails in this country.”

We shall later question the persuasive power of this argument.

May we not conclude that Mr. Justice Brennan regards an “institutional” concept of the union-member relationship as controlling today both in the legislation and in, at least, his court. He finds that the decision of the court below would wreak “extraordinary results” upon the institutional aspects of the “coherent national labor policy.”

Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.

(ii) Judicial method.

Treating the national labor policy as a coherent whole, and measuring a given discrete textual interpretation by the consequences it would have for that policy, Justice Brennan found it necessary to consult the legislative history of the Taft-Hartley amendments. This history, he concedes, does not specifically authorize court enforcement of fines. But more significantly, to him, neither does any language or evident intent forbid court enforcement. And he upholds such court enforcement as an obvious aspect

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69 The court quotes this statement from Machinists v. Gonzalez, 356 U.S. 617, 618 (1958). Justice Brennan faces up to the contention that fines and expulsions under union constitutions in 1947 “did not explicitly call for court enforcement.” He answered this objection: “However, the potentiality of resort to courts for enforcement is implicit in any binding obligation.” 388 U.S. 175, 182 (1967).

70 Id. at 181.
of the internal affairs of unions, management of which Congress was careful to leave, in 1947, to the unions themselves.

The key to Justice Brennan's mode of interpretation is the search for the dominant policy of the relevant body of legislation; the pertinent statutory language is considered in the light of what he conceives as that policy—at least to the extent of forcing a careful examination of statutory history to see if Congress clearly intended to depart in some significant regard from the "coherent national labor policy." More important, perhaps, for our present interest, Justice Brennan resolves that the labor "institution" has been established. He reads the labor statutes together as integral whole (as one must in his view), and this reading connotes certain implied disciplinary powers developed by custom and rationally inferrable—unless Congress has explicitly restricted them in some specific way.

(b) Dissenting opinion (Mr. Justice Black)

(i) Union-membership relation.

Mr. Justice Black's penetrating opinion presents a view of the union-membership relation similar to that advanced by the majority opinion below. The union is a creature of statute whose total power and arsenal of weapons against its members is constituted in powers specifically given it by Congress, and not in implications drawn by the Court from the "nature" of the labor institution.

(ii) Judicial method.

Justice Black's positivist and analytical approach finds him unwilling to consciously propose theories of his own. But he is swift to pounce on theoretical bases that others tender to justify what he deems "policy" results. Referring to Justice Brennan's odd employment of the quondam "contract theory" of the union membership relationship,\(^71\) Black cites (only dialectically, it seems) the clear "institutional" statement of Summers that "membership is a special relationship... as far removed from the main channel of contract law as the relationship caused by marriage."\(^72\)

3. The Holding of the *Allis-Chalmers* case

Surely Mr. Justice Black is correct that the Court's decision in *Allis-Chalmers* is not entailed by the reasons given for it by Mr.

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\(^{71}\) Which Justice Black denounces as a "legal fabrication." See note 61 supra.

Justice Brennan. Surely the outcome—approval of court enforcememt of union fines—was not expressly provided by Congress in 1947, nor impliedly intended (whatever that may mean) as a continuation of an already accepted practice, nor as a logical consequence of legal arrangements familiar in the area of commercial contracts, i.e., enforcement by suit. By 1947 the union had already been launched as a social institution, and protected by the 1935 legislation. The 1947 legislation gave clear recognition to this fact; and ample legislative history was reviewed by the Court to affirm that unions had been left to manage their internal affairs prior to 1947, and that the Taft-Hartley amendments had left unchanged this internal direction including the union's right to make internal disciplinary arrangements. This existing "right" of the union as an institution to manage its internal affairs was not impaired by the 1959 amendments, save as to the specific procedural guarantees with which the 1959 legislation was concerned. All these points were made by the Court in Allis-Chalmers. The incompleteness of the Court's analysis lay in its attempt to resurrect (and misapply) an outdated "contract theory" of the union-membership relation to support the union's resort to "court enforcement."

IV. Hauriou's Approach to the Problem of Allis-Chalmers v. NLRB

We have considered the various opinions in Allis-Chalmers in great detail because the problem presented by that case, and by the various judicial attempts to solve it, affords a microcosm for testing the applicability to a private group of Hauriou's institutional theory of law and judicial methodology. We shall now examine the results which his analysis would yield in this case. What help would it be in criticizing what was done by the Court, in putting the true issues in focus, in furnishing criteria for dealing with aspects of policy, and in evaluating the effectiveness of other approaches to the solution of the problem presented?

A. Criticism of What Was Done by the Court

Justice Brennan's technique for justifying the court enforcement of union fines, as we have seen, was to postulate a "contract" theory of labor association and then to assimilate the resort to courts for enforcement of fines to the ordinary process of an action for money damages for breach of contract. On Hauriou's analysis the rules within a group that bear upon the governmental aspects of the group's internal life (Themis), are of a radically different type from the rules founded in human sociability (Dike)\textsuperscript{73} which are

\textsuperscript{73} See note 6 supra.
well exemplified by commercial contracts and their enforcement by courts in an action between the two units who are parties to the contract. Different considerations are raised when a court (external to the group)\(^7\) is called upon to enforce a Themis-founded (intra-group) claim than when it settles a commercial dispute between two parties who stand before the court as independent member units of the external state society of which the enforcing court is an organ. This distinction does not solve this case, but it raises the question whether Justice Brennan has blurred a consideration of some moment.

In his opinion, Justice Brennan took pains to stress that the national labor legislation (including the 1959 legislation,\(^7\) which followed by some 12 years the date of enactment of the specific statutory provisions under consideration)\(^7\) should be interpreted as a coherent whole. Hauriou's development view of legal ideas would have been hospitable to this avowed approach of Justice Brennan. Hauriou would have applied it so far as to invoke the concept of the labor union as an "institution" (which Justice Brennan seemed to agree was the present-day view) rather than to resurrect an assumed (and dated) theory of "contract" as a basis for justifying court collection of the fines. The inconsistency of Justice Brennan here puts one on notice that legal theory is being employed by him to screen an inarticulate policy determination by the court.

On the other hand, Hauriou would note in Justice Black's dissent an a priori assumption: that the union had only such powers as were specifically ascribed to it by statutory language, without consideration of general legal policy of the national society or without entertaining the possibility of a residual power in a group to discipline its members. This was, of course, the product of a particular general theory of law.

B. PUTTING THE "TRUE" ISSUES IN FOCUS

Hauriou would stress the fundamental analytical distinction between the union's disciplinary power to impose and sanction internally fines against its members, and its power to compel enforcement of these fines outside of the association itself in the external forum of the state courts. This would lead us to make a preliminary inquiry as to the legitimacy of the internal imposition and sanction of fines. Was there here a sufficient voluntariness in the adherence

\(^7\) In this case, the unions resort to a state court to collect internal union fines.

\(^7\) Re the 1959 legislation see note 24 supra.

\(^7\) I.e., § § 7(a), 8(b) (1) (A) of the 1947 act.
of members to the union in a union-shop situation for there to be true "membership" at all? Hauriou recognized the room for a certain element of involuntariness, but an enlistment in a union compelled by sheer political or economic pressure would not suffice to impose an "institutional" obligation (i.e. even within the union itself) to pay the fines. In the context of this case such a "compulsion" situation would fit comfortably within the statutory ban on "coercion," at least where the union member had not gone beyond the minimum dues payment requirement and assumed "full" membership.

Once adequate voluntariness was established to constitute membership, Hauriou's notion of droit disciplinaire would support the power of a union to internally sanction violations of policies and rules and votes taken in furtherance of the understood objectives of the group, provided these were established according to the processes fixed by the group, and provided that the fines were imposed according to the procedures which had been fixed. These last considerations relate, of course, to his notion of droit statutaire. Hauriou was sufficiently a jurist of positive law to recognize that the internal law of the group was subject to certain restrictions imposed by the positive law of the state. The law might not only establish minimum internal due process (as did the 1959 legislation) but also might restrict the power of a union in its internal discipline to use the sanction of fines. But Hauriou's concept of an "institutionalized" group was that it had implicit disciplinary powers (such as power to enforce reasonable sanctions internally), and that the positive law should be interpreted on the assumption that the legislature was aware of this incident of the "reality" of the group. This view

77 "Institutions are founded thanks to a power, but this power leaves room for a kind of consent; if the pressure exercised does not go as far as violence, the assent given by the subject is valid juridically; coactus voluit, sed voluit," La théorie de l'institution, supra note 2, at 2.

78 The legal question, of course, is what degree of compulsion—economic, political, or merely psychological—will be required to constitute "coercion" in law. There will inevitably be borderline situations. The disagreement among the judges on this point suggests that Allis-Chalmers is such a case. See Comment, 115 U. Pa. L. Rev. 47 (1966).

79 See note 24 supra.

80 We use this term here in the sense of an organized group which had achieved a degree of internal organization and "communion" of its members in basic objectives ("ideas"). See not 9 supra.

81 Hauriou argued that an "institutionalized" group (unlike a mere occasional aggregate, or a group held together by force) has a "real" personality, as distinguished from a mere "fictional" personality. La théorie de l'institution, supra note 2, at 42-43. This theoretical debate has stirred up less interest among common lawyers than among continental jurists. But cf. F. W. Maitland, Moral Personality and Legal
leaves room for the possibility that some groups (unions) may not have a true "communion" in basic objectives among members, but may be mere aggregates held together by legislative or economic force. These last groups might well be viewed as so many individuals acting in a common group name, whose legal "personality," if any, was purely "fictional."

Given a "real" as distinguished from a "fictional" group, that is, an organized group of persons working together under accepted procedures to achieve group objectives, Hauriou viewed state legislation as "limits" upon its free activity, rather than as authorizations of its activities, or mere ascriptions to it of powers and rights. Given such a real group then, Hauriou would expect a clear statement from legislation before he would read it as depriving the group of customary internal disciplinary power which was keyed to achievement of group objectives. The imprecision of the "coerce" language of §(b) (1) (A) would hardly fill Hauriou's bill for restricting internal imposition and collection of union fines. To limit such a reasonable and traditional aspect of internal group life the legislative language would have to be more clear, and not otherwise satisfactorily explained.8

Different considerations arise when we turn from the internal imposition and collection of fines to the union's resort to public compulsion through the national and state courts. Hauriou would dismiss at once consideration of the "expulsion from membership" proviso; for collection in the courts goes beyond a union's internal affairs, and the proviso may be read as a mere reiteration of the union's obvious rights as an "institution"—to regulate its membership and internal affairs. The question remains whether external collection of fines is "coercion" within the statute. The union here goes outside its internal affairs, beyond the activity which is normal to the operation of a private group. No longer is the proper question: Did Congress clearly ban fines (as it was with respect to internal fines)?83 It may now fairly be put in this way: Was the

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8 Note the explanation of some of the judges in Allis-Chalmers that this language was directed to violence in organizing activities.

83 Justice Brennan asked this same question re both internal collection and court collection of fines. See text accompanying note 55 supra. Justice Black, on the other hand, asked another question (alike for internal and court collection): Did Congress give unions power to impose fines? See text accompanying note 59 supra.
union authorized to seek outside public help to bring its members to heel? It is hardly to be doubted that it could be so authorized (especially where such resort was not against the fixed internal arrangements which its members had stipulated to live under). Such authorization by the external national legislature might well be a Themis rule of the national society, imposed perhaps because of the national concern to strengthen the adhesiveness of labor unions. The question henceforth is not one of internal union law but of the existence of a national policy (whether in legislative rule or judicial decision) authorizing such external conduct. If there is such authorization, the activity of the union in following it by suing to collect fines in the courts is hardly "coercion," at least not coercion in law under 8 (b) (1) (A).

The two questions for determination in the Allis-Chalmers case are thus narrowed, on Hauriou's analysis, to these: (1) Is there a national policy authorizing such court enforcement? (2) Under the established arrangements of the national society who is to make this policy determination, the legislature or the courts?

C. Hauriou's Criteria for Dealing With the Question of Policy

The easy answer to the question whether there is a national policy authorizing unions to enforce their fines against members in the civil courts would be that the applicable legislation so provides. One of the few things in this case upon which all the judges agreed was that the National Labor Relations Act, as amended, did not expressly contain any such authorization. The judges resort to the broad policies of the national labor legislation led to conflicting generalizations: The legislation was calculated to strengthen the labor unions; the Taft-Hartley (1947) amendments were designed to protect the individual union member in his right to work. One broad policy would lead to supporting court enforcement, the other against it.

The precise import of the argument that upholding court enforcement of fines would advance the policy of assuring effective unions came to this: that in the situation of a weak union, expulsion would be an inadequate penalty for such a flagrant membership violation as strike-breaking. The argument is that this need, which

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84 See text accompanying note 6 supra.
85 As Judges Hastings and Kiley and Justice Brennan stressed.
86 Cf. Judge Knoch and Justice Black.
87 See text accompanying note 59 supra. The argument is that the member would prefer to leave a "weak" union rather than to pay a large fine, and the union could not afford to expel him because of the weak membership situation. The Allis-Chalmers case did not, in fact, involve a weak union (UAW locals).
had not been specifically foreseen by Congress, should be satisfied by the courts. Justice Brennan purported to do it by the analysis which we have criticized. Justice Black labelled the result a judicial manufacture of policy which properly belonged within the legislative competence. This leads us to the final question: Assuming that such a specific policy is desirable in the light of the broad national labor policy, should it be proclaimed by the courts or by the legislature?

Hauriou's inclination was against relying upon the equity of judges. He also recognized that a court active in public law had a role in development of policy which Hauriou called "jurisprudential politics." His answer to the question, legislature or court? came to this: it depends on the established arrangements of a particular system. It is clear he would distinguish the legitimate area of judicial policy intervention in broad-gauged general clauses of constitutional law, from "jurisprudential politics" in areas such as the labor field where Congress had entered with a fine-spun specificity.

The question in Allis-Chalmers would, then, be narrowed by Hauriou to this: Should either policy, that of union-strengthening, or that policy (akin to droit statutaire) of limiting further pressures upon union members, be presently furthered; and, if so, did the task fall to Congress or to the Court? It is likely Hauriou would find the answer, as did the judges we have studied here, a close one, ultimately the product of judicial "art."

Hauriou's analysis uncovers various other elements in the factual picture in Allis-Chalmers which must be taken into consideration in reaching an answer here. The decision permitting union fines elevates the "economic" value of strong unionism, at the expense of the "political" value of non-multiplication of the constraints of persons who are union members. Intervention by the court or the legislature on behalf of the union here does not advance, but rather retards, a vital pluralism in the society. For every time the state takes sides in a group-member controversy it limits the autonomy of the "institution" itself, sometimes, as here, tilting the internal balance against the membership minority. The notion of a policy

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88 He repeatedly makes this point, See, for example, Hauriou's "Note" to the celebrated case involving a special doctrine of "frustration" in droit administratif. M. HAURIOU, NOTES D'ARRETS, III, 578, 601 (1929), ("God save us from the equity of the courts.")

89 This was a frequent characterization which Hauriou made of the function of the Conseil d'etat as an administrative court. Id. at 601, for example.

90 Intervention here by the court would both benefit the minority (protesting) members, and impair to that extent the union's autonomy.
to further the standing of a “weak” union does not throw the emphasis where Hauriou desired, i.e., towards specially favoring those groups which had secured an effective membership consensus (communion of the members in the “leading ideas”). It rather favors those which had not.\footnote{Cf. the argument that the reason for permitting court collection of fines is to help a weak union. The strong unions are adequately protected by their power to expel members for non-payment of fines.}

D. Criticism of the Effectiveness of Other Approaches

At the outset of this study we noted elements in Hauriou’s theory that could be used for criticism of the Supreme Court’s prevailing opinion in \textit{Allis-Chalmers}. We may close by examining in the light of Hauriou’s thought other approaches to the solution of this problem. We have seen that Hauriou has no sympathy with Justice Black’s approach—merely searching the legislative language for positive ascriptions to the union of the capacity which it claimed (concerning imposition and collection of fines)—or with Justice Brennan’s insertion of policy veiled by the discredited fiction of “contract.” What of the two opinions we have seen which were closest to an institutional approach? Too generalized for Hauriou’s taste are Judge Kiley’s opting for the union on the grounds of “common good,”\footnote{See text accompanying note 51 \textit{supra}.} and Judge Hastings’ formula based on grounds of a necessary “union solidarity.”\footnote{See text preceding note 37 \textit{supra}.} The approach of “balance of interests” proposed in a Note\footnote{Recent Cases, 80 \textit{Harv. L. Rev.} 683, 687 (1967).} on the \textit{Allis-Chalmers} case would be closer to Hauriou’s. This view would “balance the interests” of “genuine strike morale among the bulk of membership [as] a factor crucial to the union’s ability to call a successful strike” against the “NLRA’s bias against coercion and in favor of persuasion as the technique of union cohesion.”\footnote{\textit{Id.}} Still, striking such a balance leaves much to judicial preference, and Hauriou was frank to avow his own ultimate preference in favor of freedom from constraint.

Hauriou’s institutional theory was developed in the course of his writings in his major field of professional concern, French administrative law (\textit{droit administratif}). The growing interest today in the internal government of private groups suggests that a legal theory of “institution” may have a usefulness in areas beyond the labor union situation which we have explored here as a type of organized social group brushing against our public administrative and judicial system.