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CONSTITUTIONAL LAW-FREEDOM OF SPEECH FOR LABOR ORGANIZERS-REGISTRATION REQUIREMENT INVALID

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH FOR LABOR ORGANIZERS—REGISTRATION REQUIREMENT INVALID—*Collins v. Thomas*[1] decided by the Supreme Court in January is a decision of great practical importance in that it falls at a point where three recently developed constitutional doctrines enmesh or intersect with one another. The case makes it necessary that the Court integrate these doctrines and distinguish the areas in which they are respectively applicable.

I. *Modern Constitutional Doctrines and Labor's Rights*

The first of these doctrines is that of the *Thornhill* case[2] which, viewed in its widest aspect, supports the proposition that labor may present its cause to the public in forms embracing very wide areas of activity. Although applied to picketing, the principle of the case is equally applicable to a speech by a labor organizer advocating the formation of a union and soliciting membership. This was the situation in the *Thomas* case. Hence in deciding that a speech by a labor organizer soliciting union membership is within the scope of constitutionally protected free speech the Court linked its decision to the *Thornhill* doctrine,[3] for the net effect of the case is that such activity is within

[1] (U.S., 1945) 65 S. Ct. 315.

[2] Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736 (1940).

[3] The Court has applied and extended the Thornhill principle in several instances. Carlson v. California, 310 U.S. 106, 60 S. Ct. 746 (1940), a companion case, also invalidated a state anti-picketing statute. These two cases marked the Court's first outright acceptance of the dicta of Mr. Justice Brandeis in Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S. Ct. 857 (1929) that peaceful picketing was a lawful means of conveying information to the public in a labor dispute and was a federal protected right. Pushing the Thornhill doctrine to its logical conclusion the Court decided in American Federation of Labor v. Swing, 312 U.S. 321, 61 S. Ct. 568 (1941) that this right to publicize included picketing by persons not in a past or present employee relationship with the person picketed. On the other hand, Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 522 (1941) was an express pronouncement of a limitation implicitly contained in the earlier cases that picketing, in itself peaceful, could become unlawful when so involved in a context of violence—that the "momentum of fear generated by

that area of protection enjoyed by labor in presenting its case to the public.

The second doctrine is to the effect that freedom of speech can be limited by federal or state legislation only in instances of clear and present danger to interests which the legislature may regulate. That freedom of speech does not mean absolute freedom has been expressly recognized in the past and in the very picketing and labor cases already mentioned. However, freedom to speak cannot be restricted merely if the legislature thinks it desirable to do so, or even if it has a reasonable basis for doing so. The doctrine's most recent expression was in the *Thomas* case: "Whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[4] That this is a real limit on the restrictions which legislatures can impose on speech is undoubted, and it has been strongly emphasized in recent cases—especially those involving the expression of religious views.[5] The point in these cases is that restraint is exceptional; liberty is the rule. This is the purport of Mr. Justice Rutledge's statement in the present case involving free speech that it is "in our tradition to allow the widest room for discussion, the narrowest range for its restriction."[6] The legislative action of Texas in requiring an identification card by a labor organizer before giving a speech ad-

past violence" might so pervade a continuation of the picketing as to render the whole objectionable. Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters v. Wohl, 315 U. S. 769, 62 S. Ct. 816 (1942) invalidated a state enactment prohibiting picketing of manufacturers and upheld unionizing efforts of a drivers' union in picketing a manufacturer who sold bakery goods to non-union competitors of the drivers' local. But Carpenters and Joiners Union of America, Local 213 v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807 (1942), decided at the time of the Wohl case, upheld a Texas statute localizing the sphere of picketing to the "area of industry within which a labor dispute arises." Picketing of a restaurant by building workers was outside the scope of the dispute where the controversy concerned the erection of a building by the restaurant owner at a different location and for a different purpose. In Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S. Ct. 126 (1943), the Court upheld picketing carried on in an effort to unionize an establishment conducted by proprietors without the aid of employees.

[4] 65 S. Ct. 315 at 323 (1945).

[5] See footnotes 17-21, infra.

[6] 65 S. Ct. 315 at 323 (1945). Prior to 1937 the so-called "conservative" majority on the Supreme Court, in expressing itself in relation to legislation affecting property and contract, used the type of statement expressed by Mr. Justice Butler in Advance-Rumely Thresher Co., Inc. v. Jackson, 287 U.S. 283 at 288, 53 S. Ct. 133 (1932) where he said:"freedom of contract is the general rule and restraint the exception." While this attitude toward restraint still holds in regard to restraints on speech, it no longer holds in regard to restraints on property and contract rights. (See note 7, infra).

vocating unionism and soliciting membership brought this second doctrine into the case, for the Court was unable to find any clear or present danger to any interest which the legislature had a right to protect.

The third doctrine which the case touches upon is that the economic activity of individuals may be controlled in the interests of the general good. It is a modern development of the constitutional provision concerning the taking of property without due process of law. That one cannot be deprived of property rights, and the opportunity of acquiring property, without due process of law is fundamental. However, this limitation means no more than that such rights and opportunities must not be interfered with unless there is an adequate social reason for such interference. The burden is upon one attacking the legislation to show a lack of reasonable foundation for the control imposed by the legislature.[7] Conversely, this burden is expressed as a presumption in favor of the validity of the legislative act. It was the claim of Texas that this doctrine should govern the case at hand, but the Court decided otherwise.

The successful integration of these three broad and important doctrines necessitates clear analysis and careful distinctions by the Court in arriving at the basis of the decision—and in this case these qualities were not too evident. It is unfortunate that in dealing with these recent cases the Court has fallen into an elliptic manner of expression. In its interpretation of the Fourteenth Amendment as embracing the guarantees of the First Amendment[8] the Court has occasioned confusion by an almost constant reference to the First Amendment and the practical exclusion and subordination of the Four-

[7] O'Gorman and Young Inc. v. Hartford Fire Insurance Co., 282 U.S. 251 at 257, 51 S. Ct. 130 (1931); United States v. Carolene Products Co., 304 U.S. 144 at 152, note 4, 58 S. Ct. 778 (1938); Carolene Products Co. v. United States, 323 U.S. 18, 65 S. Ct. 18, note 16 (1944); and see 40 COL. L. REV. 531 (1940) and items therein cited.

[8] A few typical statements of this interpretation follow. "The fundamental concept of liberty embodied in that Amendment [the Fourteenth] embraces the liberties guaranteed by the First Amendment." Cantwell v. Connecticut, 310 U.S. 296 at 303, 60 S. Ct. 900 (1940); "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action," Lovell v. City of Griffin, 303 U.S. 444 at 450, 58 S. Ct. 666 (1938). For the outstanding historical and critical discussion of this modern interpretation see: Charles Warren, "The New 'Liberty' Under The Fourteenth Amendment," 39 HARV. L. REV. 431 (1925). But aside from the now firmly established doctrine itself, a new criticism arises as to its application in a manner which blurs all distinction between the application of the First Amendment and the application of the Fourteenth Amendment.

teenth.[9] And where there is no clear analysis of the fundamental basis for the decision the result will be a muddled theoretical foundation. There are three different foundations upon which liberty may be grounded in these cases. The first is the guarantee of the First Amendment against abridgments by the Federal Government. The second is the guarantee of the Fourteenth Amendment against abridgments by the states. And the third basis for freedom of speech or action is one resulting from Congressional legislation based on the power to regulate commerce. It is upon this last ground, as will be noted later, that the liberty of an employee in labor matters is protected in positive terms under the National Labor Relations Act.[10] The Court in this case has not only failed to carefully distinguish upon which of these three grounds it has based its decision, but its language telescoping the First and Fourteenth Amendments adds to the confusion. Mr. Justice Rutledge himself made it clear in the *Prince* case that the issue therein involved turned on a freedom guaranteed by the First Amendment as applied by the Fourteenth Amendment to the states,[11] but there is here no clear indication that it is the Fourteenth Amendment which is immediately applicable to the states' action.

II. *Registration and Other Restraints on Free Speech*

Directing attention now more particularly on the *Thomas* case, the five-four decision[12] held that the constitutional guarantees of freedom of speech and freedom of assembly constituted a barrier against registration requirements by a state as a prerequisite to public solicitation of membership in a labor union by a paid organizer.[13] In the majority opinion, Mr. Justice Rutledge, after pointing out that the question of

[9] Except in the single instance of stating appellant's claim, there was no reference whatever to the Fourteenth Amendment in the main opinion. There were, on the other hand, ten references to the First Amendment.

[10] N.L.R.B. v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 56 S. Ct. 59 (1937).

[11] Prince v. Massachusetts, 321 U.S. 158 at 164, 64 S. Ct. 438 (1944).

[12] Mr. Justice Rutledge delivered the opinion of the Court; separate opinions by Justice Douglas—concurred in by Justices Black and Murphy, and a separate opinion by Mr. Justice Jackson. Mr. Justice Roberts, dissenting, was joined by Chief Justice Stone and Justices Reed and Frankfurter.

[13] Tex. Gen. and Spec. Laws, 1943, c. 104, Tex. Civ. Stat. Ann. (Vernon, 1925) art. 5154a.

§ 5. "All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full; (b) his labor union affiliation, if any; (c) describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such application being filed, the Secretary of State shall issue to the applicant a card. . . . Such organizer shall at all times, when solicit-

the lengths to which a state can go in requiring previous identification by those undertaking to exercise the rights secured by the First Amendment is largely undetermined, then goes on to distinguish the present case from a previous line of decisions wherein the Court had also considered to some extent the issue of state regulations requiring identification by persons engaged in the dissemination of information on political or religious views by means of handbills, booklets, door-to-door visitations and by word of mouth. While the fact situations in some of these cases are distinct from the facts in the *Thomas* case, it is not too simple a task to appreciate the distinctions in principle. *Lovell v. City of Griffin*,[14] *Schneider v. Town of Irvington*,[15] *Hague v. Committee for Industrial Organization*,[16] *Cantwell v. Connecticut*,[17] and *Largent v. Texas*[18] all declared invalid state legislative requirements which in effect established a prior administrative censorship inimical to the constitutional guarantees of freedom of religion, speech or assembly. But in the *Cantwell* case, while frowning upon the prior censorship feature, the Court strongly intimated in dictum that a rea-

ing members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership."

§ 2(e) " 'labor organizer' shall mean any person who for a pecuniary or financial consideration solicits membership in a labor union or members for a labor union." Interpreting this, the Secretary of State ruled: "Any person who solicits membership for a union and receives remuneration thereof will be considered a "labor organizer"; "solicitation of membership as an incident to other duties for which a salary is paid will be considered solicitation for remuneration." See footnote, 65 S. Ct. 315 at 318 (1945).

[14] 303 U.S. 444, 58 S. Ct. 666 (1938). There an ordinance prohibiting the distribution of literature of any kind irrespective of time, place or manner, whether sold or given free, except with the previous written consent of the city manager, who had discretionary power as to its being granted, was held invalid.

[15] 308 U.S. 147, 60 S. Ct. 146 (1939). Here the appellant had been convicted for house-to-house canvassing without having first secured a permit as required by law. Here, too, the permit was to be given at the discretion of a city official, and here, too, such discretion rendered it invalid.

[16] 307 U.S. 496, 59 S. Ct. 954 (1939). A Jersey City ordinance forbidding public assembly in the city's streets or parks without a permit from the Director of Public Safety who had discretionary power to refuse to issue the permit, if such refusal is "for the purpose of preventing riots, disturbances or disorderly assemblage," was held invalid on its face.

[17] 310 U.S. 296 at 307, 60 S. Ct. 900 (1940). An ordinance prohibiting soliciting for religious or charitable causes without first obtaining the approval of the secretary of the public welfare council, who was authorized to determine when the solicitation was in fact religious or charitable was held invalid as a "forbidden burden upon the exercise of liberty protected by the Constitution."

[18] 318 U.S. 418, 63 S. Ct. 667 (1943), invalidated a municipal ordinance prohibiting soliciting orders for, or the sale of, books or other merchandise in a residential area without first securing a permit from the mayor who had authority to grant it if "he deem it proper or advisable," was held a case of "administrative censorship in an extreme form."

sonable and "narrowly drawn" registration requirement leaving no discretion to an official in granting a license, permit or identification card to all who fulfill the application requirements would be upheld.

> "Without a doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience."[19]

The majority of the Court in the *Thomas* case, if it was to reach a result unfavorable to the state regulation, necessarily had to distinguish this case from the prior decisions and avoid the effect of the dictum of the *Cantwell* and *Schneider* cases, for in the case at hand there was no issue of prior censorship involved.[20] The dissenting justices were unable to justify a limitation of the *Cantwell* dictum to solicitation of money, as the majority opinion said it was, and even if it were so restricted in meaning, the dissenting judges contended that it was therefore applicable to the case at hand. Moreover, the minority could not distinguish in principle between the Texas requirement of identification and that upheld in *Cox v. New Hampshire*[21] and that found acceptable in *City of Manchester v. Leiby*.[22] But the majority of the Court envisaged a registration requirement as a condition precedent to the making of a public speech "for any social, business, religious or political cause" as a serious threat of restraint[23] on constitutional liberties:

[19] 310 U.S. 296 at 306, 60 S. Ct. 900 (1940).

[20] Tex. Civ. Stat. Ann. (Vernon, 1925) art. 5154a § 5 merely provided that upon a proper filling out of an application, "the Secretary of State shall issue to the applicant a card. . . ." No attempt was made to outline an organizer's qualifications, nor limit the movement, activity or speech of an organizer, and the Texas courts had treated the issuing of a license as a purely ministerial act.

[21] 312 U.S. 569, 61 S. Ct. 762 (1941). The Court upheld an ordinance requiring a permit to stage a parade or demonstration, thus permitting reasonable regulation of such activity in the interest of public safety and order.

[22] 117 F. (2d) 661 (1941). An ordinance requiring an identification badge for purveyors of literature, no charge being made, was upheld.

[23] It might be remarked at this point that the Court seemed to have been favorably impressed by the zeal and speed exhibited by Texas authorities in safeguarding the statute and punishing its violation. Thomas, salaried president of the U.A.W. and a vice-president of the C.I.O., a resident of Detroit, came to Texas for the express purpose of addressing the meeting of refinery employees in an attempt to organize a C.I.O. local. Before his speech, Thomas was served with a temporary restraining order, issued ex parte, and immediately after the speech he was arrested, and released on bail. Two days later the temporary injunction was upheld and Thomas was found in contempt for violating the temporary restraining order and sentenced to three days in jail and a fine of $100 imposed. The state supreme court granted habeas corpus immediately.

> "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."[24]

The meeting addressed by Thomas was in connection with an approaching election for the selection of a collective bargaining agent. The election had been ordered by the N.L.R.B. Certainly the occasion was lawful; and in his speech Thomas outlined the advantages of membership in the union of which he was an official and issued a general invitation to non-members to become a part of the organization. Texas admitted that Thomas had a right to address a lawful assembly on the merits of a union or of unionism but that his invitation to membership[25] constituted solicitation, and, being outside of the realm of unrestrained free speech, was a violation of the statute requiring registration with which Thomas had not complied. The Court discarded this distinction as impractical and subtle, one which would place every labor speech under the threat of injunction and fear of punishment for the distinction in practice between laudatory remarks and solicitation is so slender as to put a speaker at the mercy of the interpretation of his hearers. The Court declared:

> "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end."[26]

And at another place, to the same effect:

> "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."[27]

The Texas court in sustaining the legislation had not sufficiently weighed the possible harm which the blanket effect of such a regulation would have upon public discussion by union officials. But even aside from the undesirable effects of the application of the statute, the Court held it was invalid on its face.[28]

[24] 65 S. Ct. 315 at 327 (1945).

[25] Thomas issued a general invitation to all present to join the C.I.O., and he also issued a specific invitation to one Pat O'Sullivan to sign an application blank.

[26] 65 S. Ct. 315 at 325 (1945).

[27] 65 S. Ct. 315 at 326 (1945).

[28] 65 S. Ct. 315 at 322 (1945). ". . . as the case is presented here, Texas apparently would rest the validity of the judgment exclusively upon the specific individual solicitation of O'Sullivan, and would throw out of account the general invitation, made at the same time to all non-union workers in the audience. However, the case cannot be disposed of on such a basis. The Texas Supreme Court made no distinction between the general and the specific invitations. . . . The judgment therefore must be affirmed as to both or as to neither . . . the statute as it was applied restrained

The decision should not, it seems to me, be taken to mean that the state is powerless to regulate the conditions of solicitation of individual members by paid union organizers; for the whole tenor of the majority opinion conveys the impression that had the statute been narrowly drawn to include only such solicitations, it would have been valid.[29]

> "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly."[30]

In his concurring opinion Mr. Justice Jackson also clearly stated that the modern state has the power to shield the public from members of a calling (bent in one way or another on receiving funds from the public) who are "untrustworthy," "irresponsible" or "unauthorized." So while a "State . . . may regulate one who makes a business or a livelihood of soliciting funds or membership for unions,"[31] the power to so regulate "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[32]

The conflict of views of the majority and minority in the Court as to the nature and effect of the identification requirement had its direct result in the corresponding difference in the test or standard to be applied in measuring the exercise of the states' police power. Viewing the case as involving the privileges of freedom of speech and of assembly, the majority applied the "clear and present danger" test which since Holmes' classic statement[33] has now become the accepted stand-

and punished Thomas for uttering, in the course of his address, the general as well as the specific." The use of the words "the statute as it was applied," etc., do not, however, mean that it was merely in application of the statute that free speech was violated. The statute itself, in imposing a prior restriction and penalty on free speech was invalid. The Court stating, at page 327, ". . . we think the requirement of registration, in the present circumstances, was itself an invalid restriction. . . ." Therefore, to say that "The majority did not treat the Texas statute as unconstitutional but only the action taken under it" is misleading. See 18 So. CAL. L. REV. 238 at 240 (1944).

[29] But the Court expressly refused to pass upon whether or not the statute would have been valid had it covered only individual solicitations. It also refused to declare whether section 5 required something beyond mere registration.

[30] 65 S. Ct. 315 at 323 (1945).

[31] 65 S. Ct. 315 at 329 (1945).

[32] Cantwell v. Connecticut, 310 U.S. 296 at 306, 60 S. Ct. 908 (1940).

[33] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47 at 52, 39 S. Ct. 247 (1919).

ard for measuring state intrusions into the field of free speech, free press, free assembly and religious freedom.[34] The minority, looking upon the case as simply an instance of regulating a public calling or business practice, applied the equally established "rational basis test" to the legislation. But once the Court found that the predominant issue centered around free speech, it became a simple case of applying the standard of "clear and present danger," for:

> "It is the character of the *right*, not of the *limitation*, which determines what standard governs the choice."[35]

It would not be enough, therefore, that the state show that its requirement was reasonable; to sustain it the state would have to show that its requirement was "justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[36]

The real issue then is primarily whether the statute adversely affected the exercise of the right of free speech and assembly, or whether the activity here was free speech plus something else which would subject it to regulation. Invoking the principle of *De Jonge v. Oregon*[37] the Court held that the state can not seize "upon mere

[34] In Bridges v. California, 314 U.S. 252, 62 S. Ct. 190 (1941) out-of-court criticism of a judge and of a decision—even while the matter was pending—held not punishable by contempt proceedings in the absence of a showing of clear and present danger of intimidation or of influencing the decision. "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." (Black, J., at page 263); Douglas v. City of Jeanette, 319 U.S. 157, 63 S. Ct. 877 (1943), where a license requirement for door-to-door canvassing and sale of religious literature containing violent attacks on the Catholic Church, and the playing of anti-Catholic recordings at the door of private homes was invalidated as prior censorship; Martin v. Struthers, 319 U.S. 141, 63 S. Ct. 862 (1943) an ordinance, drawn to protect privacy of homes and for the benefit of factory workers on night shifts, forbidding knocking at doors and ringing doorbells by solicitors in residential sections held invalid as an abridgment of a constitutional freedom in the solicitors. In Hartzel v. United States, 322 U.S. 680, 64 S. Ct. 1233 (1944) the Court, five-four, set aside a conviction under the Espionage Act of 1917. The defendant, both before and after our entry into the war in 1941 wrote and distributed articles against our participation, denounced the English, Jews and the President in vicious and unpatriotic language. The case went off partly on the ground of lack of specific statutory intent, and partly on the ground of no "clear and present danger." These few cases, selected out of a large field, all involving the application of the clear and present danger test, indicate the scope and vigor of that standard. While I agree with the test applied in these cases, the remark made by Mr. Justice Jackson in Hartzel v. United States, 320 U.S. 734, 64 S. Ct. 437 (1944) is nevertheless applicable: "The price of freedom of religion, or of the press or of speech is that we must put up with, and even pay for, a good deal of rubbish."

[35] 65 S. Ct. 315 at 322 (1945); italics added for emphasis.

[36] 65 S. Ct. 315 at 323 (1945).

[37] 299 U.S. 353, 365, 57 S. Ct. 15 (1937) ". . . peaceable assembly for lawful discussion cannot be made a crime . . . . Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relation of the speakers,

participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."[38] The occasion was undoubtedly protected and to refuse protection to the speech which was an integral part of it would be to vitiate the very meaning of assembly. No one needs a license to make a speech.

As previously indicated, the majority also clearly recognized that if a speaker engages in conduct involving *more* than free discussion "as when he undertakes the collection of funds or securing subscriptions"[39] he is subject to reasonable registration or identification requirements for that would be free speech plus activities which the Court had indicated in the *Schneider*[40] and *Cantwell*[41] cases were subject to regulation.

In evaluating the decision's effect on the whole area of social activities, the Court was not unaware that restriction in the field of labor organizing would soon have its counterpart in other fields of activity.

> "If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause."[42]

Analysis or criticism[43] of the clear and present danger theory is not here involved, but this writer subscribes to Mr. Justice Murphy's comment in the *Opelika* case:

> "If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."[44]

III. *Employers' Freedom*

That the degree of free speech permissible to an employer in labor relations is not as extensive as that enjoyed by labor in the same area of industrial conflict has, since the *Thornhill* decision, been frequently asserted. And the assertion, in the past at least, has not been without some foundation. The *Thomas* case once again brings this assertion to the fore for Mr. Justice Jackson, who was with the majority, specifically stated in a separate opinion that the decision favored labor

but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." There an Oregon political and industrial syndicalism statute invoked against one presiding over a meeting of the Communist party was held invalid as applicable to an orderly assembly for a lawful purpose.

[38] 65 S. Ct. 315 at 327 (1945).

[39] 65 S. Ct. 315 at 327 (1945).

[40] Schneider v. Town of Irvington, 308 U.S. 147, 60 S. Ct. 146 (1939).

[41] Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940).

[42] 65 S. Ct. 315 at 327 (1945).

[43] For such a criticism see 18 So. CAL. L. REV. 238 (1944).

[44] Jones v. Opelika, 316 U.S. 584 at 623, 62 S. Ct. 1231 (1942).

with a privilege not enjoyed by employers in a corresponding degree under the National Labor Relations Act.[45] On the other hand, Mr. Justice Douglas, who was also a part of the majority, asserted in a separate opinion that the "intimation that the principle announced in this case serves labor alone" was not justified, for employers were as free to speak as was the union official in this case, that the employer is restrained only when he is doing something more than exercising his freedom to speak, stating:

> "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment." [46]

The State of Texas in this case failed in its attempt to bring free speech within its police power by associating it with "solicitation" or with a "business activity"; yet the speech of an employer otherwise outside of the restraining power of the Federal government is brought within the suppressive control of the N.L.R.B. by associating it with "coercion" or "domination" or some unfair labor practice under section 8(1) of the act. The observation of Mr. Justice Jackson seems to me to have foundation. The clear and present danger standard, applied in the *Thomas* case to labor, and generally applied in all recent cases of freedom of speech in the expression of religious, economic or political views is not applied with the same breadth to speech by an employer, for as far as his speech is concerned, the policy of the National Labor Relations Act, by its very nature, has a strong tendency toward restriction. The dominant purpose of the Wagner Act is the right of employees to organize for mutual aid without employer interference. "This is the principle of labor relations which the Board is to foster." [47] With such a policy in mind it is not strange that in determining the existence of coercion, or some other unfair labor practice under Sec. 8(1), the board should have a strong tendency to give an employer's speech a very limited extension; and even where the speech itself is unobjectionable, it is possible—and a frequent actuality—to offset it by linking it with an anti-union course of conduct. And as courts ordinarily will not weigh the "imponderable subtleties" which may alter the meaning of an employer's words, it is not strange that the board should so frequently be upheld in its finding of coercion. There is a

[45] "But I must admit that in overriding the findings of the Texas court we are applying to Thomas a rule the benefit of which in all its breadth and vigor this Court denies to employers in National Labor Relations Board cases." 65 S. Ct. 315 at 330 (1945).

[46] 65 S. Ct. 315 at 329 (1945).

[47] N.L.R.B. v. Le Tourneau Co., 13 U.S. LAW WEEK 4367 (1945).

strong tendency toward liberalization in the late decisions, however, which indicates that the adjustment between the employer's free speech and the danger of its constituting coercion has finally reached a status where the employer's statements in relation to Sec. 8(1) of the act correspond in a general way with the picketer's right of free speech. As even peaceful picketing may be restrained if linked to a general context of violence, so may the speech of the employer be found to be coercive where the statements—though unobjectionable in se—are uttered against a background of anti-union conduct. As far as the language of decisions is concerned, the courts have always accorded in full to the employer his right of free speech,[48] but the complaint has been that there has been too great a gap between statement and actuality.[49]

[48] "Free speech on both sides and for every faction any side of the labor relation is . . . a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men." Jackson, J., Thomas v. Collins, 65 S. Ct. 315 at 330 (1945).

Compare the policy of the board. "In passing upon the legality of the employer's conduct the Board considers not only the contents of the letter and speech, but also the context in which they are uttered. Statements which are unobjectionable per se may acquire a coercive stature when considered in the context of a course of anti-union conduct." NINTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 37 (1944).

[49] Both the First and Fourteenth Amendments are purely negative in form and restrain legislative interference with freedom of speech. But the positive protection given employees' speech by virtue of the policy of the National Labor Relations Act can have its basis only in a governmental power which will support the imposition of positive burdens. The issue involved in a claim of infringement of an employer's speech is how far the government can go in restraining free speech under the First or Fourteenth Amendments; but where the issue involves claims of infringement of employees' speech, it is not a question of how far it can be restrained within the limits of the First or Fourteenth Amendments, but rather a question of how far it will be secured by positive rather than by negative governmental action. The discrepancy alleged by Mr. Justice Jackson between the freedom of speech enjoyed by labor and that enjoyed by an employer cannot be explained or justified in terms of the negative guarantees of the First or Fourteenth Amendments. The positive securing of the employee's freedom in labor relations can be explained and supported by connecting it with the policy of the National Labor Relations Act which rests upon Congress' control over interstate commerce and under which it can legitimately impose positive provisions protecting and securing labor's activity. Instead of distinguishing the diverse foundations for employer and employee rights in this regard, and thereby distinguishing the differing standards which are to be respectively applied to each in determining these rights, the Court simply denied that there are differences in the degree of freedom respectively enjoyed by each. The Court's language in the more recent case of N.L.R.B. v. Le Tourneau Co. (see footnote 47) was more realistic. There the Court upheld the board's decision that the distribution of union literature in the employer's parking lot was an essential avenue of communication despite a long standing rule of the company against the distribution of handbills or soliciting in the parking lot. The company rule long ante-dated the controversy and was enacted as a

Moreover, the social necessity for a most rigorous protection of labor against even color of coercive remarks is now largely past. Before the Labor Relations Act an employer could take effective legal measures to prevent or discourage the formation of labor organizations in his plant and during this same era organized labor's efforts were hampered by tort liability, anti-trust acts and the ever-threatening injunction.[50] Today, due in part to the effectiveness of the Labor Relations Board, the favorable decisions of the courts in the long line of labor cases, and to the increased development of unionism itself, labor and employer are on a more equal footing.

The leading case in the field of free speech for the employer is *N.L.R.B. v. Virginia Electric and Power Company*[51] where the employer, through the use of bulletins and speeches had urged employees to bargain directly with the firm through their own representatives rather than through an "outside" union. The board found that the employer's conduct amounted to restraint, interference and coercion, but the Court was unable to find anything of that nature in the contents of the speech or bulletin considered by themselves. However, the Court remanded the case as it could not determine whether the board had based its findings on the speech issue alone or had considered it in conjunction with a background of anti-union practices. The decision was in reality an approval of the board's policy of finding even unobjectionable speech coercive where there existed an unfavorable attitude toward unionism. Previously the Court had denied certiorari in *N.L.R.B. v. Ford Motor Co.*[52] where the Circuit Court of Appeals had refused to enforce an order of the board against Ford's distribution of material to his workers which expressed his views on unionism, contained no threats or intimidating remarks and were not set against a background of anti-union conduct. Later the Court refused certiorari in *N.L.R.B. v. American Tube Bending Company, Inc.*[53] where the Circuit Court, applying the principle of the *Virginia Electric and Power Company* case, refused to uphold the board in branding as coercive a letter distributed by an employer to his employees, and an address delivered on the eve of an election which expressed a preference for no union. As there was no anti-union conduct other than this the Court did not remand the case. The fact that the Court permitted

protection of employees' cars against theft and pilfering. There was no mention of free speech in the decision, which was based on an unfair labor practice under sec. 8(1) of the National Labor Relations Act.

[50] See Van Dusen, "Freedom of Speech and the N.L.R. Act," 35 ILL. L. REV. 409 (1940), for good survey; see also, FRANKFURTER AND GREEN, THE LABOR INJUNCTION (1930); 27 VA. L. REV. 359 (1941).

[51] 314 U.S. 469, 62 S. Ct. 344 (1941).

[52] (C.C.A. 6th, 1940) 114 F (2d) 905.

[53] (C.C.A. 2d, 1943) 134 F (2d) 993, certiorari denied, 320 U.S. 768, 64 S. Ct. 84 (1943).

the employer's remarks to stand was considered as an employer "victory" as they contained a strong but temperate argument for a non-union vote. In a quite recent case, *N.L.R.B. v. Brandeis & Son*,[54] the Circuit Court Court of Appeals for the Eighth Circuit, in refusing to enforce a board order, summed up the present state of the question in very clear language which should prove helpful:

> "While the teaching of some of the earlier decisions appears to sustain the contention that an employer must be neutral in his attitude in all labor matters and must refrain from expressing his opinion, we think the case of *N.L.R.B. v. Virginia Electric and Power Company* . . . marks a definite departure from that view, and the trend of judicial decision since the *Virginia Power Company* case supports the view that an employer may disseminate facts within the area of dispute, may even express his opinion on the merits of the controversy even though it involves labor organizations, may indicate a preference for individual dealings with employees, may state his policy with reference to labor matters, and may express hostility to a union or its representatives . . . It is only the use of the right of free speech in labor matters under such circumstances and conditions as to coerce the will of employees that is forbidden."

This case should have the effect of giving clarity and authority to claims of free speech of employers, and such certainly are necessary as a practical matter today for the board in its last report indicated that cases involving this issue are on the increase.[55]

A clarification of the employer's rights in regard to speech will probably be an outcome of the discussion of this incidental feature in the *Thomas* case. The case on the whole might be viewed as sustaining and extending labor's rights in the use of free speech, yet it does not go so far as to say that the state cannot regulate labor unions nor require identification of a union organizer in particular instances. It merely held that the Texas statute involved was too broad—that its requirement of an identification card to make a public speech was a violation of free speech guaranteed by the Federal Constitution.

Francis Powers

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[54] N.L.R.B. v. J. L. Brandeis & Sons, 145 F. (2d) 556 at 563, 564.

[55] NINTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 18 (1944).