EMPLOYER FREE SPEECH

A COMPARATIVE ANALYSIS*

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I

WHAT constitutes freedom of expression has become more and more difficult to determine since the first World War. If words or expressions were only a method of stating or constituted merely an indication of opinion and nothing more, the problem would be relatively simple. The difficulty is that words also constitute "acts" and that the manner of presentation or the person presenting them may have weight or bearing of much greater significance than the expression—i.e., often a coercive effect.

While a purported rationale or doctrine, the so-called "clear and present danger" rule, has been enunciated, the decisions of the Supreme Court are far from consistent. It is not the purpose of this article to trace or analyze all of the free speech cases but rather to try to point out the conflicting results arrived at in analogous situations and then to refer particularly to the relation between the National Labor Relations Act and free speech. It is hoped that the way toward a clearer policy may then be seen. In the *Schenck* case following the first World War, Mr. Justice Holmes for the first time enunciated what is now known as the "clear and present danger" rule when he said that there must be "clear and present danger that they [the words used] will bring about the substantive evils that Congress has a right to prevent."¹ While this was not adhered to by the Court in the *Abrams* or the *Gitlow* cases,² it has since been re-enunci-

* This article was written prior to the passage of the Labor-Management Relations Act of 1947 [the Taft-Hartley Act]. Section 8(c) of this Act provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." While the main thesis of this article is not affected thereby, this provision should be kept in mind insofar as a change in congressional intent may be indicated in the case of employer speech.

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¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

² *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925).

ated in numerous cases³ and is generally considered to be the rule applicable to free-speech cases. The Court recently stated in *Thomas v. Collins*:⁴

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, 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.

However, the Hatch Act case, *United Public Workers v. Mitchell*,⁵ which is more fully discussed hereafter, raises considerable doubt as to the extent of the present application of this rule. It was originally applied to clear and present danger to the government, since the *Schenck* case arose under the Espionage Act of 1917. It has more recently been considered to apply to clear and present danger to a "substantial interest" of the government. The theory involved, as indicated by the quotation from the *Thomas* case, is the difference between clear and present danger and a mere tendency to endanger the government or a "substantial interest of government" or a "clear public interest."

The doctrine involves the highly emotional word "danger" and a construction of "clear public interest," "paramount interest," or "substantial interest." It requires the Supreme Court to determine whether (1) clear danger exists, (2) to a paramount public interest, thereby substituting the judgment of the Court for that of Congress in both respects. This standard, as has been pointed out, is exactly contrary to the Court's recent attitude in respect to social legislation which has been upheld if deemed rational and not arbitrary.⁶ This seems to be explained on the ground that while due process, property rights, etc., are important, free speech is vital to both their preservation and the existence of our form of government.

II

Consideration of a few situations will indicate the problems and difficulties arising from a "clear and present danger" test. Section 8(1) of the National Labor Relations Act⁷ provides: "It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees

³ *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); *Craig v. Harney*, 67 S. Ct. 1249 (1947).

⁴ 323 U.S. 516, 530 (1945).

⁵ 67 S. Ct. 556 (1947).

⁶ Chaffee, *Free Speech in the United States* 359-61 (1944).

⁷ 49 Stat. 449 (1935), 29 U.S.C.A. § 158(1) (1942).

in the exercise of the rights guaranteed in Section 7."⁸ When the National Labor Relations Board first commenced enforcement of the act it took the position that an employer had to be completely neutral. He could not inject himself into a union organizational campaign by speech or otherwise.⁹ This was generally coupled with an assertion that his very speech by itself was coercive.¹⁰ Both ideas were current in the board's thinking until the Supreme Court's decision in the *Virginia Electric & Power* case,¹¹ and the subsequent decision of the Second Circuit Court of Appeals in the *NLRB v. American Tube Bending Company*.¹² There was present a duality of argument which seemed to treat interference, restraint, and coercion as one, and the Supreme Court in the *Virginia Electric & Power* case appeared to take the same view when it said: "... the mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done."¹³ It should be noted that the Court has used the conjunctive "and" whereas the act uses the correlative "or." Interference by words themselves in the sense of violation of neutrality appears to have been completely ignored. The Court thought that coercion in the form of a complex of acts and words was prohibited.¹⁴ There is

⁸ National Labor Relations Act § 7, 49 Stat. 449 (1935), 29 U.S.C.A. § 157 (1942), provides: "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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

⁹ See the board's statement in *Matter of American Tube Bending Co.*, 44 N.L.R.B. 121, 129 (1942): "The Act, however, contemplates selection by employees of their bargaining representatives free from employer interference. . . . Such freedom on the part of employees imports a correlative duty on the part of employers to maintain neutrality with respect to an election to ascertain bargaining representatives."

¹⁰ *Ibid.* For similar judicial expressions, see *Int. Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940), where the Supreme Court said: "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." See also *NLRB v. Federbush Co.*, 121 F. 2d 954 (C.C.A. 2d, 1941). The court that decided the Federbush case overruled that decision in *NLRB v. American Tube Bending Co.*, 134 F. 2d 993 (C.C.A. 2d, 1943), following *Virginia Electric & Power Co. v. NLRB*, 314 U.S. 469 (1941), discussed above. For a discussion of the coercive character of employer speech, see Rosenfarb, *The National Labor Policy* 77-83 (1940), and an excellent note on *Matter of Clark Bros.*, 70 N.L.R.B. 802 (1946), in 14 *Univ. Chi. L. Rev.* 104 (1946).

¹¹ *Virginia Electric & Power Co. v. NLRB*, 314 U.S. 469 (1941).

¹² 134 F. 2d 993 (C.C.A. 2d, 1943); notes 9 and 10 *supra*.

¹³ *Virginia Electric & Power Co. v. NLRB*, 314 U.S. 469, 478 (1941).

¹⁴ Words in themselves have also been held to be coercive, such as a threat of discharge for joining a union or to close the plant if it became unionized. See *NLRB v. Winona Textile Mills*, 19 Lab. Rel. Ref. Man. 2417, 2422 (C.C.A. 8th, 1947); *Wadesboro Full Fashioned Hosiery Mills*, 19 Lab. Rel. Ref. Man. 1251 (1947).

no discussion of clear and present danger in the *Virginia Electric & Power* case but the result, if this doctrine be applied, is apparently that "coercion" constitutes a clear danger to a paramount public interest but that mere interference would not. Actually, the Second Circuit Court of Appeals in the *American Tube Bending* case thought that the Supreme Court had gone so far as to find either that no paramount interest was involved subject to regulation or that even some coercion might not constitute a clear danger. Judge Learned Hand said (referring to the *Virginia Electric & Power* case):

In spite of a little ambiguity thrown upon the reasoning by the words last quoted, the conclusion seems inevitable that the court did not believe that the bulletin and the speech would alone support a finding of coercion. *Possibly it so concluded because they could not have in fact coerced the employees; but we do not so understand it:* the employer had raised his privilege and we read the decision as sustaining it.¹⁵

This decision of the court in the *American Tube Bending* case should be contrasted with the decision of the same court prior to the *Virginia Electric & Power* decision in the *Federbush* case¹⁶ where it had expressed the view that the board could properly find employer speech to "have a force independent of persuasion" or in effect per se coercive and concluded that the board could prevent such speech without violating the First Amendment. However, board orders where speech was involved have subsequently been upheld usually on the complex theory that the speech was coercive because coupled with other acts or a pattern of conduct.¹⁷ In *NLRB v. M. E. Blatt Co.*¹⁸ the Third Circuit Court of Appeals said with reference to Judge Hand's opinion in the *American Tube Bending* case:

But referring to the *Virginia Electric & Power Co.* case, Judge Learned Hand pointed out that the employer had specifically claimed the privilege of freedom of speech guaranteed by the First Amendment. He concluded, therefore, that the Supreme Court in the *Virginia Electric & Power Co.* case had sustained that privilege as absolute.

¹⁵ *NLRB v. American Tube Bending Co.*, 134 F. 2d 993, 995 (C.C.A. 2d, 1943). Italics added.

¹⁶ *NLRB v. Federbush Co.*, 121 F. 2d 954 (C.C.A. 2d, 1941).

¹⁷ Cases cited note 14 supra; *M. E. Blatt v. NLRB*, 143 F. 2d 268 (C.C.A. 3d, 1944); *Reliance Mfg. Co. v. NLRB*, 143 F. 2d 761 (C.C.A. 7th, 1944); see also *Schweitzer v. NLRB*, 144 F. 2d 520 (App. D.C., 1944); cf. *NLRB v. Brandeis*, 145 F. 2d 556 (C.C.A. 8th, 1944), where the court refused to find coercion. The latter cases indicate a problem which has caused difficulty within the board itself—that is, when are statements per se coercive or when may they be found coercive by linking them to other conduct. See *Matter of Goodall Co.*, 68 N.L.R.B. 252 (1946), Board Member Reilly dissenting at 269; *Matter of Fisher Governor Co.*, 71 N.L.R.B. No. 206 (1946); *Matter of Bausch & Lomb*, 72 N.L.R.B. No. 21 (1947); *Matter of LaSalle Steel Co.*, 72 N.L.R.B. No. 78 (1947).

¹⁸ 143 F. 2d 268, 274 (C.C.A. 3d, 1944).

We do not so construe the Supreme Court's decision. We are of the opinion that the Supreme Court intended to indicate and did indicate that communications from the employer to the employee might amount to coercion, but that it was not clear that the Board had found the existence of coercion on sufficient evidence in the cited case.

The *Federbush* and other cases had assumed that Congress could constitutionally limit employer speech by the National Labor Relations Act. Apparently without ever discussing whether Congress considered, or whether in fact it could be of paramount public interest to interdict employer interference by speech with employee rights, or whether employer speech might be a serious danger to such paramount rights, the Supreme Court decided that employer speech unless "coercive" could not constitutionally be prevented. There seems little doubt that had Congress made unions compulsory and failure to have a union organization at a plant a criminal offense, that an employer who, in violation of such a law, told or sought to induce employees not to join could not claim the privilege of free speech. As Mr. Justice Holmes said in *Frohwerk v. United States*,¹⁹ "To make criminal the counselling of a murder" would not be a violation of free speech. In other words, inducing violation of law is not protected under the First Amendment. This is not to say that Congress intended any such result. Nor does the fact that Congress might, by creating a definite criminal offense, prevent the same kind of speech necessarily mean that such speech would be improper under the National Labor Relations Act. It does, however, indicate that Congress may act to limit speech under certain circumstances.

Of course, it is possible that the Court, even in the event Congress enacted such a criminal statute, might then attempt to apply the doctrine of the *Thomas* case²⁰ and substitute not only its judgment of the desirability of such a criminal statute and of whether clear danger exists, but also its impression of the reasons behind the legislation.

In the *Thomas* case the court had before it a Texas statute requiring registration of all labor organizers operating in that state before they could solicit membership. Thomas, who was president of a labor organization, did not register in accordance with the statute but made a public address urging persons to join his organization and also directly solicited one individual to join. The majority of the Court, in a five to four decision, found that the statute was an unconstitutional limitation on the right of free speech. This was true even though the courts had held that statutes

¹⁹ 249 U.S. 204, 206 (1919); see also *State v. Musser*, 175 P. 2d 724 (1946), cert. granted 15 L.W. 3401 (Apr. 29, 1947).

²⁰ *Thomas v. Collins*, 323 U.S. 516 (1945).

requiring registration of persons in given occupations and those soliciting money were or would be valid where administrative discretion was not involved.²¹ The key to the *Thomas* case appears to be found in the words of Mr. Justice Jackson: "I cannot escape the *impression* that the injunction sought before he [Thomas] had reached the state was an effort to *forestall him from speaking at all* and that the attempt is based in part at least on the fact that he did make a public labor speech."²²

In *United Public Workers v. Mitchell*,²³ the Court had before it the following statute which is partially quoted: "No employee . . . of the Federal Government . . . shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."²⁴

The court in the *Mitchell* case divided four to three (Justices Vinson, Reed, Burton, and Frankfurter for the majority, Justices Black, Rutledge, and Douglas dissenting, with Justices Jackson and Murphy not participating). While the case also involved a matter of declaratory judgment, we are here concerned with the application of the statute to a person named Poole who was a roller in the mint, which is a position that does not involve public relations. Poole was a ward committeeman, active politically on election day as a clerk and paymaster for the services of others. Mr. Justice Reed, speaking for the majority, which upheld the Hatch Act, took the position that while civil servants have a constitutional right to act politically, these rights were not absolute, and that Congress and the President were responsible for efficient government. He also expressed the view that all that was necessary was that the legislation be reasonable rather than that a clear and present danger be involved.²⁵

²¹ *Manchester v. Leiby*, 117 F. 2d 661 (C.C.A. 1st, 1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²² *Thomas v. Collins*, 323 U.S. 516, 548 (1946). Italics added.

²³ 67 S. Ct. 556 (1947).

²⁴ 56 Stat. 181 (1942), 18 U.S.C.A. § 61h (Supp. 1946).

²⁵ The following quotations indicate Mr. Justice Reed's views: "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection. . . . It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success. . . . For regulation of employees it is not necessary that the act regulated be anything more than *an act reasonably deemed* by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 67 S. Ct. 556, 569, 570 (1947). Italics added.

Mr. Justice Douglas based his dissent primarily on the ground that Poole was but a roller in the mint with no public contact while Justices Black and Rutledge took the view that the Hatch Act could not constitutionally interfere with freedom of expression and certain political activities. Mr. Justice Douglas emphasized that Poole's work was as remote from public relations or policy making as that of a charwoman, that the fact that he was a government employee did not mean that his political activities could be curtailed to any greater extent than those of anyone else, and that the test to be applied should be whether there was a "clear and present danger to a substantial interest of government."²⁶

Mr. Justice Black, who was joined by Mr. Justice Rutledge, took the position that it made no difference what Poole's employment was, and that the fundamental rights of government civil servants to express their views and to participate in political activities could not be impaired in the absence of a showing of clear and present danger. He pointed out the fundamental contradiction between stating that these employees "may express their opinions on all political subjects and activities" and stating that they may "not take any active part in political campaigns." Mr. Justice Black emphasized that any opinions government employees may express are at their peril and may cost them their jobs.²⁷ He further ar-

²⁶ Mr. Justice Douglas stated: "But Poole, being an industrial worker, is as remote from contact with the public or from policy-making or from the functioning of the administrative process as a charwoman. *The fact that he is in the classified civil service is not, I think, relevant to the question of the degree to which his political activities may be curtailed.* . . . In other situations where the balance was between constitutional rights of individuals and a community interest which sought to qualify those rights, we have insisted that the statute be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of government. *Cantwell v. Connecticut.* . . . *Murdock v. Pennsylvania.* . . . *Thornhill v. Alabama.* . . . If those rights are to be qualified by the larger requirements of modern democratic government, the restriction should be narrowly and selectively drawn to define and punish the specific conduct which constitutes a clear and present danger to the operations of government." *Ibid.*, at 581, 582, 583. Italics added.

²⁷ The following quotations from Mr. Justice Black's dissent indicate more emphatically the position taken by him: "Along with the vague and uncertain prior prohibitions of the Commission, are these things which the Commission had clearly prohibited: . . . publicly expressing political views at a party caucus or political gathering for or against any candidate or cause identified with a party; . . . writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction: . . .

"In view of these prohibitions, it is little consolation to employees that the Act contradictorily says that they may 'express their opinions on all political subjects and candidates.' For this permission to 'express their opinion,' is, the Commission has rightly said, 'subject to the prohibition that employees may not take any active part in . . . political campaigns.' The hopeless contradiction between this privilege of an employee to talk and the prohibition against his talking stands out in the Commission's further warning to all employees that they can express their opinions publicly, but 'Public expression of opinion in such way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited.' Thus, whatever opinions employees may dare to express, even secretly, must be

gued that it is not right to muzzle millions because some abuses occur and asked whether we could justifiably curtail expression by still other millions because they, too, might corrupt the political process.

The varying opinions in this case have been discussed and quoted at some length because of the rather complete discussion by the Justices indicating the divergent viewpoints and also because the result is quite contrary to the Court's position with respect to the National Labor Relations Act. It may be contended that the *Mitchell* case is distinguishable from other free speech cases on the ground that it merely involves regulation by the government of its own employees. However, since the Court stated it recognizes their constitutional rights, this would lead to an incongruous result unless the Court intended to create a second class constitutional right. While the majority does not discuss this possibility, it is clear from the minority opinion, and particularly from that of Mr. Justice Douglas, that being a civil servant is not "relevant to the question of the degree to which his political activities may be curtailed." It is quite obvious that a paraphrasing of the majority opinion, if applied to the National Labor Relations Act, would probably make any employer speech improper as constituting interference. For instance: to paraphrase Mr. Justice Reed, "Congress and the President are responsible for the maintenance of interstate commerce. If in their judgment this may best be obtained by prohibiting employer interference with employee organization we see no constitutional objection. It is only employer interference that is interdicted. It is active participation in opposition to employee organization. Expressions public or private on public affairs, personalities and matters of public interest not an objective of opposition to employee organization are unrestrained by law so long as the employer does not direct his activities toward interference with employee organization." Obviously the use of a test of reasonable legislation, if applied to the National Labor Relations Act and employer speech or to almost any other legislation, will cause a different result from the use of the "clear and present danger" test. One other point in connection with the comparison of the application of the Hatch Act and the National Labor Relations Act is worthy of note; that is the penalty attached. The employee who is found guilty of violating the Hatch Act *loses his job* while the employer who is found guilty of

at their peril. They cannot know what particular expression may be reported to the Commission and held by it to be a sufficient political activity *to cost them their jobs*. . . . Certainly laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public." *Ibid.*, at 573, 574. Italics added.

violating the National Labor Relations Act is merely told *not to do it again*. There is accordingly quite a difference in treatment of first offenders and a resultant different practical restriction of freedom of speech.

But even more pertinent, assume legislation is adopted outlawing secondary boycotts. Suppose a prominent labor leader merely says, "In my opinion no one should buy from any firm that does not hire union help." He then adds that certain named firms do not have union help or that they are "unfair." He is thereby expressing an opinion which influences a considerable number of people because of his position. Similarly, what an employer says influences a considerable number of people because he is their "boss." Is the union leader indulging in free speech? The Supreme Court did not think so in *Gompers v. Buck Stove & Range Co.*²³ decided in 1911. It may be noted that this was before the "clear and present danger" rule enunciated by Mr. Justice Holmes in the *Schenck* case. However, Mr. Justice Holmes himself in discussing the *Gompers* case in the *Schenck* case evidently considered that the result in the *Gompers* case met the "clear and present danger test."²⁹ The *Gompers* case involved a charge of conspiracy and a finding that the speech was a part of this conspiracy and the words were verbal acts. To quote the Court:

Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of working men to unite and to invite others to join their ranks, thereby making available the strength, influence and power that comes from association. By virtue of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words "Unfair," "we don't patronize," or similar expressions, a force not inhering in the words themselves and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they

²³ 221 U.S. 418 (1911).

²⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. *It does not even protect a man from an injunction against uttering words that may have all the effect of force.* 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 Congress has a right to prevent. It is a question of proximity and degree." Italics added.

become what have been called "verbal acts," and as much subject to injunction as the use of any other force whereby property is unlawfully damaged.³⁰

Just as it is pointed out by Mr. Justice LaMar in his decision that the individual employer may be helpless because of union strength, so may the individual employee be helpless because of the employer's power, and so also employer statements or expressions to employees can have a "force not inherent in the words themselves and therefore exceeding any possible right of free speech which a single individual might have." This is due to the employer's position rather than to the numbers involved. Since the coercive effect is substantially similar it appears inconsistent to find the words in the *Gompers* case coercive and not so find the usual statements of an employer. The remainder of the statement "that under such circumstances they become what might have been called verbal acts and as much subject to injunction as the use of any other force whereby property is unlawfully damaged" is also clearly applicable to many employer statements to employees.

It is quite doubtful whether any different result would occur today in the situation involved in the *Gompers* case because there is something mystical about conspiracy. Speech or expression in connection with any combination or association of persons is likely to be treated as part of a conspiracy rather than free speech. There is not as much difficulty apparently in such situations of finding paramount public interests, clear dangers, etc. Accordingly, under the Sherman Act the Supreme Court has upheld or directed injunctions based primarily on concerted dissemination of information as to costs, sales, prices, production, market conditions, etc., even in the absence of actual or clear agreement to fix prices, although in subsequent cases the Court indicated an unwillingness to draw inferences of conspiracy from mere joint dissemination of information.³¹ In

³⁰ *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 439 (1911).

³¹ See *American Column & Lumber Co. v. United States*, 257 U.S. 377, 399 (1921); see also *United States v. American Linseed Oil Co.*, 262 U.S. 371, (1923). The Linseed case involved mutual dissemination of information plus a detailed agreement which included provision for information as to unsuccessful offerings or quotations to buyers. The Court said: "We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted activity through combination presents a wholly different problem and is forbidden when the *necessary tendency* is to destroy the kind of competition to which the public has long looked for protection." *Ibid.*, at 390, italics added. How does this compare with the necessary tendency of expressed employer hostility to destroy or restrict employee organization? The Lumber and Linseed cases should be compared with the later cases of *Maple Flooring Ass'n v. United States*, 268 U.S. 563 (1925) and *Cement Mfrs. Ass'n v. United States*, 268 U.S. 588 (1925). The Court stated in the *Maple Flooring* case at 584: "We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate

these cases there appears to have been little or no discussion of the constitutional privilege of free speech although Mr. Justice Holmes hints at it in a dissent.³²

In this connection the recent decision of the Utah Supreme Court in *State v. Musser*, in which certiorari has been granted, should be noted. The court there held an agreement to advocate, teach, counsel, advise, and urge others to practice polygamy and unlawful cohabitation is an agreement to commit acts injurious to public morals within the scope of the Utah conspiracy statute.³³

On May 19, 1947, the Supreme Court in *Craig v. Harney*³⁴ rendered its latest free speech decision. Involved was the question of whether certain newspaper articles and editorials constituted contempt of court by virtue of the nature of their comment concerning a pending case. The court in a six to three opinion (Justices Jackson, Frankfurter, and Vinson dissenting) reversed a conviction for contempt finding that the statements were constitutionally privileged. Both the majority and minority ostensibly applied the clear and present danger test to the determination of the ques-

information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses. . . ." The Court distinguished the earlier cases on the basis that the character of the information gathered and the use which was made of it led irresistibly to the conclusion that there had resulted or would necessarily result a concerted effort by the defendants to curtail production or raise prices. The Court said the information gathered in the more recent cases did not lead to any such necessary inference. It added: "But in the absence of proof of such agreement or concerted action having been actually reached or actually attempted, under the present plan of operation of defendants we can find no basis in the gathering and dissemination of such information by them or in their activities under their present organization for the inference that such concerted action will necessarily result within the rule laid down in those cases [the *Lumber* and *Linseed* cases]." A minority of Chief Justice Taft and Justices Sanford and McReynolds thought the evidence brought both the *Maple Flooring* and *Cement* cases within the boundaries of the *Lumber* and *Linseed* cases. *Ibid.*, at 586.

³² "I must add that the decree as it stands seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable." *American Column & Lumber Co. v. United States*, 257 U.S. 377, 413 (1921).

³³ 175 P. 2d 724 (1946), cert. granted 15 L.W. 3401 (Apr. 29, 1947).

³⁴ *Craig v. Harney*, 67 S. Ct. 1249 (1947). A trial judge, a layman elected to office, had directed a verdict which the jury twice refused to return and apparently brought in the verdict only after the lawyer for the party against whom the verdict was directed told the jury it would have to obey the judge's instruction. Thereafter a motion for a new trial was made. While this motion was pending, the defendants published newspaper articles and editorials about the trial. To some extent these publications misrepresented the facts, and further stated that the judge's ruling was arbitrary, a travesty on justice, that it would bring down the wrath of public opinion on the judge's head, and that people were aroused because a serviceman "seems to be getting a raw deal." The publications further deplored the fact that a layman sat as judge and that there could be no appeal to a court "familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel." It was also stated that the "first rule of justice"—hearing both sides—had been repudiated. *Ibid.*, at 1254-55.

tion of whether the expressions were such as to "unconstitutionally" interfere with or influence the determination by the trial court of a case then pending before it. The majority, although finding the statements intemperate, took the view that "freedom of speech and of the press should not be impaired . . . unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice."³⁵ They stated that mere vehemence of language was not the measure of the power to punish for contempt and that "the danger must not be remote or even probable; it must immediately imperil."³⁶ Mr. Justice Frankfurter (joined by Mr. Chief Justice Vinson) expressed the view that the majority had so construed the clear and present danger rule as to permit of any comment concerning the trial court. Mr. Justice Jackson, however, was particularly vigorous in his contention that the articles constituted a flagrant interference with and attempt to influence the administration of justice. The interesting point in this connection is his concern for noninterference with the administration of justice by the courts in contrast with his views expressed in *Thomas v. Collins* with respect to employer interference with employee selection of a bargaining agent, which he considered permissible. Admittedly there is something of an aura about an independent judiciary³⁷ but so also is it recognized that democratic government requires free criticism of the government, including judges. The comments in the *Craig* case, while intemperate, do not appear to call for the curtailment sought by the minority.

Finally there is another situation in which "free speech" is not unlimited—that is in the picketing cases. In *Thornhill v. Alabama*³⁸ the Supreme Court for the first time found that picketing was a form of speech within the protection of the First and Fourteenth Amendments. However, in the *Ritter* case³⁹ it imposed a limitation on this form of expression. In that case Ritter owned a restaurant in which he hired union help and was also engaged, through a contractor, in erecting a building some distance from the restaurant on which non-union help was being employed. The union picketed his restaurant with signs that he was unfair. Under a

³⁵ *Ibid.*, at 1253.

³⁶ *Ibid.*, at 1255.

³⁷ This sacrosanct view of the judiciary also appears in Mr. Justice Frankfurter's opinion in *United States v. United Mine Workers of America*, 67 S. Ct. 677, 703 (1947), where he concurs with the Court that an injunction by a court without jurisdiction over the subject matter must be obeyed while the Court is considering whether it has jurisdiction. See Watt, *The Divine Right of Government by Judiciary*, 14 *Univ. Chi. L. Rev.* 409 (1947).

³⁸ 310 U.S. 88 (1940).

³⁹ *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1942).

Texas statute limiting picketing, an injunction was granted, and on appeal to the Supreme Court, upheld by a five to four vote, Mr. Justice Frankfurter, for the majority, took the view: "As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." He concluded, "It is not for us to assess the wisdom of the policy underlying the law of Texas."⁴⁰ The minority was quite vigorous in its dissent stating that if picketing was free speech, it could not be so limited. However, the view has been well expressed⁴¹ that picketing, while a form of expression, is more than free speech since it normally involves an element of physical or psychological coercion. This very same view has also been ably expressed as to speeches of an employer.⁴²

III

We have considered free speech in a number of cases and found that certain tests have been applied. Two questions occur: first, have the same stated tests been ostensibly applied by the Court in the different situa-

⁴⁰ *Ibid.*, at 728.

⁴¹ Teller, *Picketing and Free Speech*, 56 *Harv. L. Rev.* 180, 200 (1942); Gregory, *Labor and the Law* 334 (1946).

⁴² See Rosenfarb, *op. cit. supra* note 10, and note in 14 *Univ. Chi. L. Rev.* 104 (1946). See also the statement by the Second Circuit Court in *NLRB v. Federbush Co.*, 121 F. 2d 954, 957 (C.C.A. 2d, 1941) (before that court's reversal of position after the *Virginia Electric* decision, note 10 *supra*): "Language may serve to enlighten a hearer, though it also betrays the speaker's feeling and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of 'free speech' protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to the employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first." Note also the following statement of Judge Evans in *NLRB v. Falk Corp.*, 102 F. 2d 383, 389 (C.C.A. 7th, 1939): "On the other hand, the position of the employer is a most delicate one. Surely, he has the right to his views. And the right to entertain views is rather valueless if it be not accompanied by the right to express them. And this right to express his views is clearer when they are expressed in response to an interrogatory by one of his employees. And yet, the voice of authority may, by tone inflection, as well as by the substance of the words uttered, provoke fear and awe quite as readily as it may bespeak fatherly advice. The position of the employer, where, as here, there is present genuine and sincere respect and regard, carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist."

tions? Second, have the same standards been in fact applied? A related question is whether the situations being considered are in all cases analogous.

The Supreme Court has indicated in some of the sedition cases (*Schenck*, et al.), the boycott case (*Gompers*, through Mr. Justice Holmes in the later *Schenck* case), the administration of justice or judiciary case (*Craig*), and in the solicitation case (*Thomas*), that it was applying the clear and present danger test. It also appears that some such theory might be advanced for the decision in *Virginia Electric & Power Co.* with relation to the National Labor Relations Act, although this is not entirely clear. Under the Sherman Act, the later cases, while not discussing the matter, appear to lean closer toward clear and present danger while the earlier cases are closer to a reasonable tendency standard. The picketing cases (*Ritter*) are also not clear but seem to indicate a reasonable tendency attitude. However, the Hatch Act case (*Mitchell*) clearly and definitely departs from clear and present danger to the reasonable tendency view. The difficulty in determining the tests theoretically being applied is that except where the Court says it is applying a particular test it is hard to determine what evaluation or distinction has been made between whether the legislation or matter involved is of paramount public interest and whether there is a clear danger to such paramount public interest. As to what test is in fact being applied, this is also true even in the cases where the Court says it is applying one test or the other. Obviously if the Court deems legislation to be of no importance then it can find there is no clear and present danger to any paramount public interest without even weighing the effect of the words in relation to the legislation.

All of these situations are analogous in that they are related to the problem of free expression but in varying situations. The situations most analogous to the National Labor Relations Act cases are the picketing and the boycott-injunction cases. It seems clear that if there is a clear and present danger in the *Gompers* situation from the utterances or opinions expressed there is an equally clear and present danger in the employer speech of hostility or assistance under the National Labor Relations Act, where Congress considered employee organization should be protected, just as much as if Congress were to think boycotts should be prevented. There appears to be no difference between protecting employers from boycotts by speech of a union president and protecting employees from interference by speech of an employer. In each situation the speech carries a weight transcending the words themselves because of the person delivering it—in

the case of the union because the individual is a leader of the organization and in the case of the employer because he is the person who hires and fires. Obviously the Court has not applied a like test to the two situations but in the *Gompers* case has, by invoking the doctrine of conspiracy, prevented speech similar to that which it has permitted to occur in spite of the National Labor Relations Act. Why should conspiracy make any difference? Would the public interest or the danger be any the less because a number of people cause something to happen than if one person, who may have more effect, does the same thing? The conspiracy finding in the *Gompers* situation rests on the fact that Gompers was the head of an organization voluntarily formed by employees whereas the employer is head of an organization formed by others in which employees participate. The method or manner of influencing groups or masses of other people causes the effect in either case. In each case *one person* directs or influences the acts of a mass. *In each case there is a peculiar relationship between an individual and a group or a mass which causes a result rather than any expressed words per se.*

The picketing cases are even more closely related to the National Labor Relations Act and yet the Court there permits restraint. Picketing has many of the same elements of coercion as employers' speech. If a state can define or restrict its *limits*, why cannot Congress restrict the limits of employers' speech to prevent it in employee organizational matters?

Sherman Act cases also involve the element of conspiracy and are perhaps less clearly related to labor board cases. However, they indicate that where the object of speech will probably result in price fixing, it is interdicted—so also employer speech which is likely to seriously impair employee organization could be prevented.

The *Craig* case is interesting chiefly because of the position of Mr. Justice Jackson. He there finds a clear danger to the judiciary from speech—which really does not interfere seriously. And this is in spite of the fact there are other considerations in this case which might make a restriction on full and free discussion less warranted than in almost any other situation including employee organization. Public discussion of the representatives of government in each of its three branches has been considered essential to the maintenance of democratic government and to the avoidance of arbitrary action on the part of government officials. Yet Mr. Justice Jackson is willing to stop this, but not employer interference with employee organization, even though there may be in fact a serious danger to employee organization which Congress has indicated. While this is not

as close an analogy as the picketing and boycott cases, it certainly appears appropriate and explainable only either as another illustration of varying backgrounds of Justices or the "sanctity of the judiciary."

The *Mitchell* case is even more clearly contrary to the National Labor Relations Board decisions both in its test and result and, as previously indicated, contrary to practically all the other cases in the test applied. While in some respects this is not as close an analogy it is difficult to see how fundamental constitutional rights can be restricted or limited by the Court there and not elsewhere.

Thomas v. Collins, which restates the clear and present danger test, seems closer to the National Labor Relations Act decisions, including the *Virginia Electric & Power* case in the *application* of the clear and present danger test than any of the other cases,⁴³ since both involve a nullification or partial limitation of an apparently reasonable legislative enactment. As previously indicated, it is submitted that even under its clear and present danger test the Court in the *Thomas* case rendered an erroneous decision since there was clear evidence of solicitation. Of course, this might be answered by arguing that no paramount public interest was involved to which there could be a clear and present danger, but the real explanation appears to be the one stated by Mr. Justice Jackson that the Court felt the purpose of the legislation was simply to restrict speech.

Certainly the foregoing indicates the necessity for the formulation and more consistent application of a clearer rule than the existing clear and present danger test.

IV

An examination of a few recent decisions of the National Labor Relations Board will indicate some of the practical problems involved. In the

⁴³ Mr. Justice Jackson appears to take a different view of the decisions in the *Thomas* case. He states that labor is free to publicize its views and the employer should be equally free. He further states: "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." *Thomas v. Collins*, 323 U.S. 516, 548 (1946). However, Mr. Justice Jackson is focusing his attention on the fact that *Thomas* happened to be a labor leader, rather than on the principles of paramount public interest (as expressed by the legislature) and clear and present danger. The point shown by the Gompers and picketing cases is not whether a union leader or an employer is speaking but whether the words or speech are uttered under such circumstances as to "constitute a clear and present danger" to a paramount public interest. It does not necessarily follow, as Mr. Justice Jackson implies, that if one person is free to discuss a matter that all others who may be interested must also be free (or vice versa with restraint). The employer in the Gompers situation might, in the absence of contrary legislation, freely express his opposition to unions; yet Gompers, or for that matter the employees themselves, be restrained from publicizing the anti-union shop in a manner which might reasonably be expected to result in a boycott.

Matter of Clark Brothers,⁴⁴ the board found that it was coercive for an employer to require his employees to attend and listen to a speech by him during working hours concerning union organization. The board's theory was not that the speech itself was coercive, but that being compelled to listen to such a speech was coercion. The Eighth Circuit Court of Appeals, in the *Montgomery Ward* case has held contrary to the board on this point.⁴⁵ However, the board's position appears to be reasonable enough except that it poses a number of questions. The first question might be whether it would be any the less coercive if the employer during working hours said to his employees, "I am going to make a speech; you can come if you want to but you don't have to" and the employer then proceeded to the meeting place and awaited the arrival of his employees. In a large plant this might have little or no significance but in a small plant the coercive effect might be far greater because of the employer's knowledge of who did or did not attend the meeting than if he compelled everyone to attend. Assuming that it might be argued that it was still coercive if made during working hours on a voluntary basis, the next question might be what about after working hours? Again the same elements of coercion appear to be present.

A second practical situation which may well arise as between employer and employees, in which the employer does no more than express an opinion, can occur in connection with an election involving two unions. Suppose the employer indicates that he favors one union as against the other? Is this improper interference under Section 8(1) or assistance under Section 8(2) of the National Labor Relations Act?⁴⁶ At one time it would clearly have been found to be improper interference and assistance,⁴⁷ but if an employer is entitled to freely express opinions, these earlier interpretations may well be questioned. Such action is such a clear violation of the intent of Congress with respect to Section 8(2) of the National Labor Relations Act that it serves to emphasize that the same is also true of employer hostility in the single union case. An employer's expression of

⁴⁴ 70 N.L.R.B. 802 (1946), noted in 14 Univ. Chi. L. Rev. 104 (1946).

⁴⁵ *Montgomery Ward & Co. v. NLRB*, 157 F. 2d 486 (C.C.A. 8th, 1946).

⁴⁶ 49 Stat. 449 (1935), 29 U.S.C.A. § 158(1-2) (1942). "It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

⁴⁷ *Elastic Stop Nut Corp. v. NLRB*, 142 F. 2d 371 (C.C.A. 8th, 1944), and cases cited therein.

opinion as between two unions appears no different than an expression of opinion as between one union and no union.

A third problem has arisen in connection with both Section 8(1) and Section 8(5)⁴⁸ of the National Labor Relations Act. The act has been interpreted to require an employer to deal with the union selected as the exclusive bargaining representative and it has been said that he may not deal individually.⁴⁹ If this is true, during the course of negotiations with the union to what extent may the employer communicate directly with the employees concerning the subject matter of the negotiations? When is he dealing directly with the employees and when is he merely advising them of the course of negotiations? In *Matter of the United Welding Company*,⁵⁰ during the course of negotiations the employer wrote numerous letters to his employees, first urging them not to strike, stating that such action would do them no good, and subsequently during the strike urging and persuading them to accept the company's proposals. The employer pointed out that the strike was costing the employees money in wages and might cost the company business and thereby affect their employment, and continually queried as to why the union would not accept proposals from this company which it, according to the company, was accepting from other companies, and also asked repeatedly whether the men knew what the union was doing here and elsewhere. This action unquestionably was going behind the union, undermining its position, weakening its ability to negotiate effectively, and apparently was contrary to the requirement of the act that the employer should deal only with the union designated as the exclusive bargaining representative. Nevertheless, the board found that the letters *were not coercive* and were, therefore, privileged. The next step from the letters in the *United Welding* case might very well be a direct offer to individual employees. Presumably this would then become coercive. Now it does not seem that there is any magic, or need be, about whether action is or is not within the term "coercive." This term is at best a vague concept. It is clear, for instance, that an attorney representing a client may not deal directly with another individual who is also represented by an attorney.⁵¹ This is not because of any ele-

⁴⁸ 49 Stat. 449 (1935), 29 U.S.C.A. 158 (5) (1942). "It shall be an unfair labor practice for an employer. . . (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

⁴⁹ *J. I. Case v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Corp. v. NLRB*, 321 U.S. 678 (1944).

⁵⁰ 72 N.L.R.B. No. 165 (1947).

⁵¹ See *In re O'Neil*, 228 App. Div. 129, 239 N.Y. Supp. 297 (1930), where the court found an attorney not responsible for insurance company direct settlements with clients of other lawyers,

ment of coercion as such, but rather on the basis of superior knowledge, experience, etc. So also it would seem that Congress could constitutionally require an employer to meet and negotiate only with the union as a principal.

The board itself has held, as indicated before, that where speech is part of a complex of unfair labor practices it may be restrained although it has doubted its own ability to restrain any further speech merely because the employer at one time engaged in unfair labor practices.⁵²

The foregoing does not mean, nor is it intended to say, that an employer cannot or should not express any views or opinions with relation to labor relations or unions. It is intended to prove that employer speech generally is coercive by nature and that, even though not coercive, certain speech is clearly interference, assistance, or failure to bargain with the exclusive representative. It seems clear that an employer has and should have the right to express his views in public where they are not directed solely to employees, and also that he should have the right to answer unjust accusations or false statements, and in some instances, upon request, to discuss the rights of the employees to select or not select a union, to the extent that the information given is accurate and in good faith. Admittedly this, on occasion, might create border-line situations as to whether the speech was or was not proper. It seems equally clear that direct employer hostility or assistance, or what is in effect individual bargaining, should be preventable if Congress so desires. The fact that there may be close cases should not permit the carrying on of such activities in these situations any more than in such cases as libel or slander, particularly in view of the fact that the sanction imposed by the National Labor Relations Act is not such as to seriously impede or restrict free expression. The test in the case of speech under the National Labor Relations Act should not be whether there is "coercion or no coercion" but rather whether expressions or ac-

but clearly indicated that disciplinary action could result from conscious by-passing of other attorneys.

⁵² In *Matter of Fisher Governor Co.*, 71 N.L.R.B. No. 206 (1946), the board discussed at some length its power to restrain employers from any further speech where the employer engaged in a complex of unfair labor practices, including hostile speeches. Chairman Herzog was of the view that the board could enter an order with respect to such speech but that it could not later prevent it unless again so coupled with other acts as to be coercive. Member Reynolds took the view that under the facts of the case the speech was not coercive and hence no order should be entered, while Member Houston stated that the order was proper and it was not necessary to pass on the matter of subsequent application at the present time. This case might be compared with *Milk Wagon Driver Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941), in which the Supreme Court sustained an injunction against any future picketing for the reason that the picketing was so coupled with prior violence that subsequent picketing could not be separated in the public mind from the antecedent violence.

tion, either coercive or otherwise are such as to clearly interfere with fundamental public rights which Congress reasonably created or protected. Accordingly, employer statements which are not coercive could be interdicted and statements which might have elements of coercion, such as answers to improper accusations, might be justified.

The entire discussion indicates that the problem of free speech, whether under the National Labor Relations Act or in its broader phases, is an extremely complicated and difficult one. Neither the clear and present danger test nor the reasonable standard test applied to other situations seems to adequately fit the problem. It would appear that if Congress or state legislatures acted reasonably to protect a public interest, and if action or words clearly interfered with the carrying out of that public interest, such action or words should be restrained. An exact or precise formula may not be possible of achievement. It would probably approach Mr. Justice Douglas' view in the *Mitchell* case. In the secondary boycott situation it might permit statements that anyone who does not employ union help is unfair but prevent the naming of persons hiring non-union help. In the case of the National Labor Relations Act, employers might be permitted to express their views generally when not confined to employees, to answer false charges, to explain matters to employees upon inquiry when acting in good faith, but not to indicate open hostility to organization or a preference between unions or attempt to negotiate directly.

Other examples and illustrations will, of course, come to mind. What constitutes free speech is not likely to be determined with the preciseness of Euclidean geometry. Neither need it have the indefiniteness of the weather. An occasional strike may be a ball or vice versa, but at least the same umpires should be able to create a reasonable degree of uniformity of decision in comparable situations—something which is now lacking.