Compulsory Registration of Labor Organizers as a Valid Exercise of State Police Power

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COMPULSORY REGISTRATION OF LABOR ORGANIZERS AS A VALID EXERCISE OF STATE POLICE POWER

AS A GENERAL proposition, the right of the states to regulate labor union activities through a reasonable exercise of state police power has been repeatedly affirmed by the United States Supreme Court.[1] As a practical matter, however, the extent of the states' power in this field has not been too clearly defined. A review of some recent decisions dealing with state statutes requiring registration or "licensing" of labor organizers will illustrate the difficulties which the states have encountered in their attempts to exercise control in this particular manner, and will perhaps indicate in a general way how far such regulations may go without running into federal legislative and constitutional barriers.

I

Following a trend among the states to exercise closer control over labor unions, the Texas Legislature in 1943 passed the Manford Act.[2] The preamble of this act, after stating that labor union activities affect the economic conditions of the state and country, declared it to be the policy of the state to regulate such activities in the manner and to the extent thereinafter set forth. Of the fifteen sections of the act the following are pertinent to the purposes of this discussion:

Section 2(c) defines "labor organizer" as any person who for pecuniary consideration solicits memberships in or members for a labor union. Section 5 requires all labor organizers, before soliciting any members for unions, to obtain from the Secretary of State an organizer's card; it also provides that applications

[1] Carpenters & Joiners Union v. Ritters Cafe, 315 U. S. 722 (1942); Allen-Bradley Local No. 111 v. Wisconsin Employment Relations Board, 315 U. S. 740 (1942).

[2] TEX. STAT. (Vernon, Supp. 1943) art. 5154a.

shall state applicant's name, union affiliation and be accompanied by a copy of his credentials, and further that the organizer shall carry the card when soliciting members and exhibit it upon request of the person solicited. Section 11 prescribes a civil penalty, to be assessed against unions for violation of the act, and makes violation by union officials a misdemeanor punishable by fine and jail sentence. Section 12 gives district courts, upon application of the State, power to enforce the act through injunction or other appropriate writ, and Section 13 makes it the duty of the Attorney General and of district and county attorneys to enforce the act.

The act became effective in August, 1943 and received its first test in the courts under the following circumstances:

In September, 1943, in connection with a campaign to organize the employees of Humble Oil & Refining Company's Baytown refinery prior to an election ordered by the National Labor Relations Board, Local 1002 of the Oil Workers Industrial Union, a CIO affiliate, arranged for R. J. Thomas, a CIO vice president, to speak at a meeting in Baytown on the evening of September 23. Thomas arrived in Houston on the 21st, and the next day the Attorney General applied to the District Court of Travis County, in Austin, for a restraining order, based on Sections 5 and 12 of the Manford Act, to enjoin him from soliciting memberships in the union while in Texas. The petition for the order stated that Thomas had announced his intention of speaking and soliciting members for the union at the Baytown meeting, and further stated that he would do so without an organizer's card. An *ex parte* order was requested on the ground that there was "not sufficient time before the defendant makes the threatened speech"[3] for notice to be served and returned. Thomas was served with the order in Houston six hours before his scheduled address.

In spite of the order Thomas addressed the 300 persons at the meeting as planned. At the conclusion of his speech he extended a general invitation to those present who were not members of a

[3] Thomas v. Collins, 323 U. S. 516, 521 (1945).

union to join Local 1002; then, as if to make absolutely certain of disobeying the district court's order, he singled out a non-union man, one Pat O'Sullivan, and personally asked him to join the union. Moreover, he offered to make out an application card for him. As a result, the Travis County court held Thomas in contempt and assessed a penalty of three days in jail and a $100 fine. The order of the court was in general terms, finding that he had violated the restraining order, and made no distinction between the solicitations set forth in the Attorney General's petition and those proved as violations.

In Ex parte *Thomas*,[4] the union official petitioned the Texas Supreme Court for a writ of habeas corpus, insisting that Section 5, as it had been applied to him, was in contravention of the Fourteenth Amendment as it incorporates the First,[5] in that a previous restraint had been imposed upon his rights of freedom of speech and of assembly. He also contended that the section was in collision with the National Labor Relations Act. The court, however, held the registration requirement to be a valid exercise of the state's police power, taken "for the protection of the general welfare of the public, and particularly the laboring class"[6] in that its purpose was to protect laborers from being defrauded by imposters in the guise of labor organizers. It pointed out that Section 5 does not provide for "licensing" of labor organizers and that issuance of the card is mandatory, not discretionary with the Secretary of State. The court conceded that the requirement interfered to a certain extent with the right of an organizer to speak as the paid representative of a union, but, stating that "many statutes have been enacted in this State which curtail or limit the right of one to operate or speak as agent of another,"[7] the court likened the require-

[4] 141 Tex. 591, 174 S. W. (2d) 958 (1943).

[5] "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." Near v. Minnesota, 283 U. S. 697, 707 (1931).

[6] *Ex parte* Thomas, 141 Tex. 591, 596, 174 S. W. (2d) 958, 961 (1943).

[7] *Id.* at 598, 174 S. W. (2d) at 962.

ment to that imposed upon securities salesmen, insurance agents, real estate brokers and the like, and pointed out that such requirements had not been held unconstitutional as abridging the right of free speech. Accordingly the act, as applied, was upheld and Thomas was remanded to custody.

In *Thomas v. Collins*,[8] a 5-4 decision,[9] the United States Supreme Court, speaking through Mr. Justice Rutledge, reversed the decision of the Texas court. The Court stated that the order holding Thomas in contempt was so worded that it was necessary to consider the penalty as having been imposed on account of both solicitations—the general invitation to the crowd and the specific solicitation of O'Sullivan—and that the judgment would have to be affirmed as to both or as to neither.[10] That being so the Court considered that Thomas was being punished for urging the audience in a public speech to join a labor union, and held that Section 5, so applied, was unconstitutional. Texas, the Court said, has power to regulate labor unions with a view to protecting the public interest, but its regulations "must not trespass upon the domains set apart for free speech and free assembly."[11]

The State cited previous pronouncements of the Court to the effect that regulations of solicitation, in the public interest, which involve no subjective test or discretionary control, are not open to constitutional objection,[12] and contended that the Texas statute in question was such a regulation. But the Court found that Thomas' general invitation, though perhaps technically a "solicitation," was so inextricably a part of his speech that it could not be subjected to regulation without also subjecting the speech to regulation. And the Court considered that a requirement of registration in order to make a public speech, whether in behalf of a labor

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[8] 323 U. S. 516 (1945).

[9] Black, Douglas, Jackson, Murphy and Rutledge, JJ. for reversal; Stone, Ch.J., and Frankfurter, Reed and Roberts, J.J., dissenting.

[10] 323 U. S. 516, 529 (1945).

[11] *Id.* at 532.

[12] Cantwell v. Connecticutt, 310 U. S. 296 (1940).

organization or a social, religious, business or political cause, was incompatible with the rights guaranteed by the First Amendment. The Court concluded that free speech, as opposed to property rights, was a matter which the states, under their police power, could not restrict in the absence of a "clear and present danger"[13] to the interests they were entitled to protect, and that Thomas' speech, made at a lawful public assembly, presented no such danger.[14] However, while condemning Section 5 as applied to the Baytown speech, the Court stopped short of declaring it unconstitutional on its face, and clearly indicated that some form of control would be valid.[15] Also, the Court apparently held that the section, even as applied to Thomas, was not in conflict with the National Labor Relations Act.[16] But whether Thomas would have been amenable to punishment for the personal solicitation of O'Sullivan, had the Travis County court order been differently worded, the Court chose to leave undecided, that being considered unnecessary to the decision, and thus the extent of the state's power to require registration was left largely undefined—or defined only negatively. Texas had simply gone too far. But the distance between the instant case, which was in the prohibited zone, and the broad concession that the states have some power in the field left room for a multitude of possible situations, with only the most general indications as to where the dividing line should be drawn.

The constitutionality of Section 5 was challenged a second time

[13] The "clear and present danger" standard for gauging permissible restrictions of the rights guaranteed by the First Amendment was first enunciated by Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47 (1919), and has been applied in many subsequent cases. Near v. Minnesota, 283 U. S. 697 (1931); Bridges v. California, 314 U. S. 252 (1941); West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943), and cases cited therein.

[14] De Jonge v. Oregon, 299 U. S. 353 (1937).

[15] "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free speech comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here." Thomas v. Collins, 323 U. S. 516, 540 (1945).

[16] "Since a majority of the Court do not agree that § 5 or its present application conflicts with the National Labor Relations Act, our decision rests exclusively upon the grounds we have stated. . . . *Id.* at 542.

in *American Federation of Labor v. Mann*,[17] this time without benefit of such a clear-cut controversial fact situation as the *Thomas* case presented, and the decision, insofar as it clarifies the registration issue, adds little to that case, because it merely states positively the generality which the Supreme Court implied. In this case the American Federation of Labor and others brought action in a state court under Texas' Uniform Declaratory Judgment Act[18] to test the constitutionality of the Manford Act as a whole and to secure injunctive relief against prosecutions under it. An appeal from the judgment of the trial court was taken to the Court of Civil Appeals, which held the following provisions of the act to be invalid:

1. The requirement that unions file annually a complete and detailed financial statement.

2. The requirement that union officers, agents, organizers and representatives be elected annually by a majority vote of members.

3. The requirement that all agreements with employers, containing check-off provisions, be filed with the Secretary of State.

4. The provision prohibiting collection of fees, dues or fines which would create a fund in excess of union operating requirements if so doing would work a hardship on applicants or members.

5. The requirement that unions give applicants for membership a reasonable time after obtaining promise of employment in which to decide whether they would join the unions, as a condition to such employment.

6. The provision making it illegal to require union members who had served in the armed forces to pay back dues as a condition to reinstatement.

The act, as it stands after the above excisions, contains the following requirements and prohibitions:

1. Unions must file with the Secretary of State annual reports

[17] 188 S. W. (2d) 276 (Tex. Civ. App. 1945).

[18] TEX. STAT. (Vernon, Supp. 1943) art. 2524-1.

giving name and address of union, its officers, and the national or international organization with which it is affiliated; in addition a statement of all property owned by the union must be filed. A copy of the union constitution must be filed with the first report, and any changes or amendments must be reported within twenty days.

2. Aliens and convicted felons whose citizenship has not been restored may not hold any union office or act as organizer.

3. Financial contribution to political parties or candidates by unions is forbidden.

4. Section 5.

5. The collection of money for the privilege to work or as a work permit is prohibited.

6. Books of account showing all receipts and expenditures must be kept by unions, such books to be open for inspection by members, enforcement officers and grand juries.

7. Expulsion of members, except for good cause and upon public hearing after due notice and opportunity to be heard, is prohibited, and courts of competent jurisdiction are authorized to order the reinstatement of members expelled without good cause.

In considering the validity of Section 5 the court interpreted the decision in *Thomas v. Collins* to mean that the registration requirement would be upheld if properly applied[19] and accordingly ruled that it was a valid exercise of state police power, but that it was not necessary as a prerequisite to nor a limitation upon the right of free speech. Under the circumstances of the case a more definitive statement as to what would constitute a proper application of the section would probably not have been justified. At any rate, the decision did not lay down any specific guide lines in this respect. Moreover, neither party chose to appeal. The deci-

[19] "Thus the application of Sec. 5, as a registration statute, to paid labor organizers who solicit members through other methods than those used by Thomas in the cited case —that is, otherwise than as a part of a public speech to assembled employees—is left entirely undetermined; but with the implication that it is valid if properly applied and invalid only when applied in an improper and unauthorized manner." American Federation of Labor v. Mann, 188 S. W. (2d) 276, 279 (Tex. Civ. App. 1945).

sion apparently was accepted as conclusive by the Attorney General.[20] At the time plaintiff unions had pending on appeal in the United States Supreme Court a suit testing the validity of a Kansas statute similar in many respects to the Texas statute. The unions may well have considered that an adjudication of the Kansas appeal would be decisive of the main issues in the Texas case.

This Kansas case, *Stapleton v. Mitchell*,[21] was an action by the unions to enjoin enforcement of the Kansas Labor Law.[22] The plaintiffs challenged the constitutionality of the act on the grounds that its very existence imposed a previous restraint upon the rights of free speech, press and assembly, deprived them of equal protection of the law, and that it was in conflict with the National Labor Relations Act. The cause was tried before a three judge federal court.

Section 3 of the Kansas act provided that no person should operate in the state as a union business agent without first obtaining a license from the Secretary of State, paying a $1 fee therefor, and further that applications should state the name and residence of applicant and be accompanied by a statement of the president or secretary of the union showing the authority of the applicant. It will be noted that the only substantial difference between this section and Section 5 of the Texas act is that the latter is applicable only to labor organizers who "solicit" memberships, whereas the Kansas requirement applies to business agents generally, a distinction which appears to be of controlling significance in the light of later cases. "Business agent" is defined in the act as any person who shall act for any union in the issuance of membership cards, work permits, or in soliciting from any employer any right or privilege for employees when such union has not been certified as the bargaining representative for those employees.

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[20] The Labor Union Annual Report form supplied to unions by the Secretary of State now makes no provision for rendering the detailed financial statement required by Sec. 3(d), Art. 5154a, which was held invalid in the *Mann* case.

[21] 60 F. Supp. 51 (1945).

[22] Kansas Session Laws 1943, c. 191.

After reviewing the *Thomas* case, the court drew from it the same general conclusion which was drawn by the Texas court in the *Mann* case: the Supreme Court did not nullify the Manford Act but freely conceded the power of the state to regulate labor unions so long as the regulations did not interfere with free speech and assembly. The court also held that it might fairly be inferred from the Supreme Court opinion that a state may condition the right of an individual to solicit memberships in a union when that solicitation partakes of a commercial transaction. This again raised the difficult question: "When does a solicitation partake of a commercial transaction?"

But the federal court declined, as did the Texas court, to attempt a definitive answer. The court said:

> "... the [United States Supreme] Court did not attempt to draw the line between the purely doctrinal aspects of union enterprise which is free from restraint and the purely commercial, which, like all other enterprises, is subject to reasonable regulation—beyond the observation that the task was a 'difficult' one. The decision in the [Thomas] case rested upon the concrete clash of actualities. The Court was not required to draw hypothetical lines—it deliberately refused to do so, and we must do likewise."[23]

Then, after striking down certain portions of the act as unconstitutional and enjoining their enforcement, the court upheld the balance of the act, including the licensing provision, stating that it was not plainly unconstitutional. But at the same time the court said that it was not adjudicating the constitutionality of the prima facie valid sections as they might ultimately be construed and applied. It simply held that they did not, upon their face, encroach upon fundamental human rights. The court also held that the Kansas act and the National Labor Relations Act were not in conflict on their face, and that it would be time enough to judge the "operative conflicts" when they actually arose.[24]

This judgment was handed down in March, 1945. Whether the

[23] Stapleton v. Mitchell, 60 F. Supp. 51, 60 (1945).
[24] *Id.* at 62.

court would have held the same way had it had before it the Supreme Court's decision in *Hill v. Florida*,[25] rendered in June, 1945, presents an interesting problem of interpretation. Both parties to the Kansas case appealed to the Supreme Court, which dismissed the appeals, pursuant to stipulations, without opinion, in November, 1945,[26] and such dismissal would not seem to have the effect of an approval of the district court's pronouncements. And in view of the decision in *Hill v. Florida* it seems quite possible that the impression gained from the Kansas case that a general registration or licensing requirement is an enforceable exercise of state police power, is altogether misleading.

Hill v. Florida would seem to have cut down the states' power to regulate labor unions, as such, to a merely nominal one. The case began as a bill filed in a state court, by the Attorney General of Florida, for an injunction to restrain Hill and the union for which he was business agent from functioning until they had complied with certain provisions of a Florida labor control act.[27] Section 4 of this act provided that no person should be licensed as business agent of a union who had not been a citizen for more than ten years, who had been convicted of a felony, or who was not a person of good moral character. Whether applicants met these requirements was to be determined by a state board. The basis for the relief sought against Hill was that he had acted as a business agent in violation of this section.

Section 6 of the act, which was invoked against the union, required all labor unions operating in the state to file written reports with the Secretary of State, giving name of union, location of offices, names and addresses of officers, and to pay a fee of $1. Motions by Hill and the union to dismiss the bill on grounds that it violated the Fourteenth Amendment and conflicted with the National Labor Relations Act were overruled, and both Hill and the union were enjoined from further functioning until they had com-

[25] 325 U. S. 538 (1945).
[26] McElroy v. Mitchell and Mitchell v. McElroy, 326 U. S. 690 (1945).
[27] House Bill No. 142, LAWS OF FLORIDA, 1943, Chap. 21968, 565.

plied with the act. The state supreme court affirmed,[28] and the Unied States Supreme Court granted certiorari.

Without considering any of the constitutional questions involved, but solely on the basis of conflict with the National Labor Relations Act, the Court struck down both sections of the Florida act. The Court pointed out that the declared purpose of the federal act was to encourage collective bargaining and to protect the full freedom of workers in the selection of bargaining representatives.[29] This full freedom, the Court said, meant freedom to pass on the representatives' qualifications, and Section 4, inasmuch as it reposed discretionary power in a board, substituted Florida's judgment in this respect for the workers' judgment. In view of past decisions, so much of the opinion was to be expected. Section 4 was not merely a previous identification requirement, but an attempt to give the state board discretionary power to say who should and who should not serve as union business agents. The rather startling inference, however, which is to be gathered from the remainder of the opinion, is that even if Section 4 had not been discretionary, if it had been merely a previous identification requirement such as that contained in the Kansas act, the Court's holding would have been the same. It will be remembered that Section 6 of the Florida act was in no respect discretionary. Moreover, it placed no unreasonable burden upon the unions. It merely required that a union file with the Secretary of State a report giving its name, location of its office and the names and addresses of its officers, and pay a nominal fee. It is difficult to see how a state could exercise any effective control whatsoever without this basic information. Yet, Mr. Justice Black, speaking for the majority of the Court, said:

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[28] Hill v. State *ex rel.* Watson, 155 Fla. 254, 19 So. (2d) 857 (1944).

[29] Since the decision in *Hill v. Florida* the National Labor Relations Act, 49 STAT. 449 (1935), has been substantially amended by the Labor Management Relations Act, 1947, Public L. No. 101 (H. R. 3020), 80th Congress, but the declared policy of "encouraging the practice and procedure of collective bargaining" and of "protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment" remains unchanged.

> "Section 6, as here applied, stands no better [than Section 4]. The requirement as to the filing of information . . . does not in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining."[30]

Would not the same objection apply to an attempt to enforce a statute requiring general registration of labor organizers or business agents? A union cannot effectively "bargain to settle a strike or controversy" without its professional agents. They are, as the Court itself states, the *bargaining representatives.* A sanction imposed upon them would seem to bring about a situation just as inconsistent with the federally protected process of collective bargaining as was brought about by the sanction imposed on the union itself.[31]

The opinion goes further and intimates that it is not necessarily the injunctive sanction alone that is objectionable, but that an attempt to enforce the requirement by resort to punishment for past violations would also be unlawful. Again speaking through Mr. Justice Black the Court said:

> "... if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act."[32]

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[30] Hill v. Florida, 325 U. S. 538, 543 (1945). It is interesting to note that Section 6 of the Florida act, which is here held invalid as in conflict with the NLRA, is a much less onerous requirement than Section 3 of the Texas act. Section 3, although considerably pared down by the *Mann* case, still requires the same information required by Section 6 of the Florida act, *plus* a statement of all property owned by the union, including any moneys on hand. However, Section 3 continues to be enforced in spite of *Hill v. Florida.*

[31] An *amicus curiae* brief was filed for the United States in *Thomas v. Collins,* in behalf of the contention that Section 5 of the Manford Act, which is not a general requirement but applicable only to organizers who solicit members, is inconsistent with the NLRA. It would seem, *a fortiori,* that the same argument could be made against the general licensing provision of the Florida act, even in the absence of the discretionary feature.

[32] Hill v. Florida, 325 U. S. 538, 543 (1945).

Does the Court mean that both the threat of punishment for contempt and conviction under the misdemeanor section of the act comprise the fatal obstacle, or that either one alone would suffice? Chief Justice Stone, dissenting in part from the majority of the Court, apparently interpreted the majority opinion to mean the latter. He said:

> "... I can find no logical or persuasive legal ground or practical reason for saying that Congress by the enactment of the National Labor Relations Act intended to preclude the state from exercising to the utmost extent its sovereign power to enforce the lawful demands of Section 6 of the Florida Act. There is no more occasion for implying such a Congressional purpose where the union is prevented from functioning by *punishment* or *injunction* for a violation of a valid state law, than for saying that Congress, by the National Labor Relations Act, intended to forbid the states to arrest and imprison a labor leader for the violation of any other valid state law, because that would prevent *his or the union's* functioning under the National Labor Relations Act."[33] (Emphasis added.)

It appears difficult at first glance to reconcile this case with the *Thomas* case in which the Court held that the registration requirement of the Texas act did not conflict with the federal act,[34] but the Court distinguished the two cases as follows:

> "In that case [Thomas v. Collins] we did not have, as here, to deal with *such* a direct impediment to the free exercise of the federally established right to collective bargaining."[35] (Emphasis added.)

As suggested above, the decision in *Hill v. Florida* might logically have been the same even if the licensing provision had not been discretionary, and the only difference between the Florida and Texas requirements, other than the discretionary feature, is that the former, like that of Kansas, is a general requirement

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[33] *Id.* at 546. It is suggested in a note in 55 YALE L. J. 440 (1946) that it might be a more "sophisticated" appraisal to view Section 6 as having been struck down, not so much because of its conflict with the NLRA, as because it was a part of an obviously antilabor statute; in other words, that if it had not been in bad company, it might have been sustained, and that similar requirements, in different settings might be upheld in the future.

[34] See note 16 *supra.*

[35] Hill v. Florida, 325 U. S. 538, 543 (1946).

applicable to all business agents, while the latter applies only to the function of soliciting memberships. And it would seem to follow that while the former is regarded as a direct impediment to collective bargaining, the latter, though perhaps an impediment, is not "such a direct" one as to be objectionable. The difference seems to be one of degree.

The uncertainty as to what the states can and cannot do, which still exists in spite of, or perhaps because of, the foregoing decisions, is well illustrated by the recent California case, In re *Porterfield.*[36] Porterfield, a labor organizer, applied for a writ of habeas corpus to secure release from custody after conviction of violating an ordinance of the city of Redding, which prohibited soliciting for compensation, without license, of memberships in organizations requiring payment of dues. The ordinance was declared invalid by the court because it, like the Florida requirement, gave discretion to a local body to issue or withhold licenses on the basis of its appraisal of applicants' good moral character. But in discussing the general question of state and local registration requirements designed to protect the public against fraud, the court expressed its quandary over the reasoning in *Thomas v. Collins.* The court took the view that the Supreme Court held it lawful for Thomas to solicit the 300 persons without having procured a card, but that whether it was lawful to solicit the individual had been left an open question. The court said:

> "Of course, Thomas was at least equally carrying on his business of soliciting members for compensation when he addressed 300 as when he addressed one. It would seem that he was more efficiently carrying on his business when addressing 300 than he would have been by addressing one and that the need for whatever protection the statute afforded the public was correspondingly greater in respect to the larger number. There scarcely seems to be magic in the number 300. ... If the speaker may lawfully solicit two persons to join a union, may he not solicit one?"[37]

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[36] 28 Cal. (2d) (Adv. 102), 168 P. (2d) 706 (1946).

[37] *Id.* at 718.

II

From the foregoing decisions it is believed that the following conclusions may safely be drawn:

1. A requirement that labor organizers register before making "routine business" solicitations of memberships is a valid exercise of state police power, provided it does not operate as a prerequisite to the rights guaranteed by the First Amendment.

2. A general, non-discretionary requirement of registration before functioning as a business agent, for a union whose activities "affect" interstate commerce, though perhaps not objectionable on constitutional grounds, is of questionable validity on the ground of conflict with the National Labor Relations Act, as amended.[38] This is particularly true if the requirement is attempted to be enforced by injunction.[39]

The questions under the first conclusion, above, that have been left unanswered are: (a) under what factual circumstances is solicitation a routine business matter, hence subject to regulation, and (b) when does it partake of a quality that brings it under the protection of the free speech guaranty? Without answers to these questions the conclusion is of little practical value. The Supreme Court of the United States has deliberately refused to draw the dividing line. It has said only that when a labor leader makes a speech in behalf of unionism and solicits his audience to join a union, he is beyond the line. As the late Justice Cardozo once put it, in reference to another matter, "The hinterland may be plain when the frontier is uncertain."[40]

The difficulty of locating a dividing line lies in the fact that a good many day-to-day solicitations of individual memberships are bound to involve in some measure the "doctrinal aspects" of union enterprise—are bound to entail a job of "selling" the individual on the idea of unionism. On the other hand, many solicitations will

[38] The National Labor Relations Act applies only to activities which "affect" interstate commerce. Labor Board v. Jones & Laughlin Corp., 301 U. S. 1 (1937).

[39] Hill v. Florida, 325 U. S. 538 (1945).

[40] Connolly v. Scudder, 247 N. Y. 401, 160 N. E. 655 (1928).

not. Many, perhaps most, will require little more than a proffered application blank and a fountain pen. And there would seem to be no feasible way, in practice, to make a distinction between the two. The fraud which the registration statutes are designed to protect against may be equally latent in both kinds of solicitation. Therefore, registration must be a prerequisite to engaging in the general class of endeavor, or it will not serve its purpose. Registration was not intended, or at least it could not legitimately have been intended, as a prerequisite to the propounding of doctrine. If it has the latter effect in some instances, then it can only be said that in this "peripheral zone"[41] the right to utter words must give way to the right to control if this valuable police function is to be performed at all. Free speech will not suffer any greater detriment as a result of such a requirement, honestly applied, than it has suffered because securities salesmen must register before pursuing their occupation. On the other hand, the selling of securities is no more in need of protective regulation than are certain aspects of union enterprise. Unionism is the concrete expression of a social ideal, but it is also big business.

Perhaps it is not possible to draw a more precise rule from all the decisions than to say that when a man is making what, according to "our traditional notions,"[42] is a *speech*, whether to one or to one thousand, his act is not, in the absence of a clear and present danger to the interests which the states are entitled to protect, subject to regulation.[43] Under such a rule, an organizer out on a construction job signing up a worker, even though he resorts in some

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[41] *Ibid.*

[42] The Supreme Court has found it desirable to resort to the "traditional notions" standard on occasion. International Shoe Co. v. State of Washington, 326 U. S. 310 (1945).

[43] A precise, rigid rule inclusive enough to cover and do justice in all possible situations can hardly be conceived. Absence of ironclad rigidity has the advantage of allowing a vigilant court to cut through technical subterfuge and divine the real import of each case. Thus the Supreme Court has prevented freedom of religion from being curtailed by a too liberal application of a valid city ordinance, Jamison v. Texas, 318 U. S. 413 (1943), and has also prevented individuals from escaping just regulation by the device of dressing up what is really a business transaction with an artificial coating of "free speech." Valentine v. Christensen, 316 U. S. 52 (1942).

degree to "doctrinal" persuasion, is not any more engaged in making a speech than is an insurance agent, when selling a policy. Thomas obviously did make a speech at Baytown. The distinction between the two is easily discerned by the eye of common sense and fair play.

On the other hand, Thomas also made what in every respect was a business solicitation—that of O'Sullivan. It was separable from and unnecessary to his speech, and there is no more reason to say that it was protected merely because it immediately followed a protected act than to say that an assault and battery on O'Sullivan would have been. Thomas deliberately brought himself within the scope of a reasonable regulation, and had the district court's order been differently worded, Thomas should have been amenable to punishment.

Once it is understood and settled that the states may require registration only as a means of protecting the public against being defrauded and not to protect it against a particular doctrine,[44] the matter of registration prior to soliciting memberships would seem to become largely academic. Labor organizers who at any time are required to engage in the kind of activity to which such statutes are meant to apply will register once, and that registration will, as a practical matter, cover all shadings of solicitation from the purely business through the purely doctrinal. Such statutes accrue to the benefit of bona fide labor unions as well as the public, and it seems a fair surmise that unions will view them in that light if they are properly applied.[45] Section 5 was not challenged by the unions in Texas until they were given reason to believe

[44] "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." Jackson, J. concurring in Thomas v. Collins, 323 U. S. at 545.

[45] There were 223 labor organizers' cards issued under the Texas statute between its effective date and the *Thomas* case. Cards are still being issued by the Secretary of State in spite of the case, and there is no prosecution by the state of record under Section 5 other than that of Thomas.

that it might be so literally interpreted that it could be used as a weapon to silence or harass union spokesmen. That it was so employed in the *Thomas* case was obviously the opinion of at least one member of the United States Supreme Court. Mr. Justice Jackson, in his concurring opinion in that case, stated with unusual frankness:

> "I cannot escape the impression that the injunction sought before he had reached the state was an effort to forestall him from speaking at all and that the contempt is based in part at least on the fact that he did make a public labor speech."[46]

Whatever else may be said about the case, it cannot be denied that its practical result is that the State of Texas continues to exercise the valuable and legitimate police function of registering labor organizers who solicit memberships. At the same time our traditional concept of free speech lost nothing of its substance and meaning.

E. P. Van Zandt, Jr.

[46] Thomas v. Collins, 323 U. S. 516, 548 (1945).