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Constitutional Law--Freedom of Speech--Ordinance Requiring Registration of Union Organizers Held Violative

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It is questionable whether this trend of expanding the scope of judicial review of fact determinations is actually desirable. Admittedly the right of appeal is essential as a check on administrative findings, but certain practical and policy considerations should not be overlooked in an overzealous desire to provide justice. Many administrative bodies are better qualified than the courts to find the facts in their particular field; also it is they who confront the witnesses and hear the testimony. Particularly is this true in the case of federal boards and commissions, such as the National Labor Relations Board and the Federal Trade Commission. As a matter of policy our administrative agencies will be relegated to uselessness if some degree of finality is not conferred upon their factual determinations.

I believe that the substantial evidence test is a sound approach to the present problem of review. However, the test in its present form will remain necessary only so long as our administrative bodies remain at a low level of competency. When and if such agencies achieve a high degree of competency this trend towards liberal review should subside and the real problem will have found solution.

J. O. F.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—ORDINANCE REQUIRING REGISTRATION OF UNION ORGANIZERS HELD VIOLATIVE.—*D*, a salaried labor organizer, went to the town of Baxley, Georgia, and there solicited membership in a union without first obtaining a "license" as provided by a city ordinance. *D* was arrested and tried by city officials under authority of the ordinance for soliciting without the license, she was convicted and a fine and imprisonment were imposed. The superior court of the county affirmed the conviction, the court of appeals affirmed the judgment of the superior court and the supreme court of the state denied certiorari. *D* appealed to the Supreme Court of the United States. *Held,* the ordinance of the town of Baxley, prohibiting solicitation of members for an organization without a permit and making it discretionary with the mayor and city council as to whether to grant a permit, without any definitive standards or other controlling guides, is invalid as abridging the guaranty of freedom of speech as secured by the Constitution of the United States. *Staub v. City of Baxley,* 78 Sup. Ct. 277 (1958).

It has been consistently held that any state statute or city ordinance which makes the enjoyment of a constitutionally guaranteed freedom dependent upon the discretion of a public official, is void. *Kunz v. State of New York*, 340 U.S. 290 (1951) (discretionary power in administrative official to control in advance the right of citizens to speak on religious matters on the public street); *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1940) (discretion in chief of police to ban the advocacy of any cause from door to door); *Hague v. CIO*, 307 U.S. 496 (1939) (discretion in chief of police whether to grant a permit for the leasing of a hall for a public speech or holding public meetings).

Aside from the constitutional aspect of discretionary control, such control has been held to be in conflict with the National Labor Relations Act, 49 STAT. 449 (1935) as amended 29 U.S.C. § 151 (1952), in cases involving union business agents who act as solicitors. That act's purpose was to encourage collective bargaining and to protect the full freedom of workers in the selection of bargaining representatives. Thus, to allow a chosen representative to be disqualified by a governmental official would, in effect, substitute the state's judgment for that of the workers in selecting their bargaining representatives. *Hill v. Florida*, 325 U.S. 538 (1945).

Not all regulations of solicitation are open to constitutional objection, if such is affected with a public interest and involves no subjective test or discretionary control. *Breard v. Alexandria*, 341 U.S. 622 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Several economic and commercial fields have been regulated for many years, and the constitutionality of such regulations has repeatedly been upheld. Banks are required to incorporate, *Shallinberger v. First State Bank*, 219 U.S. 114 (1911); insurance agents are required to obtain licenses, *German Alliance Insurance Co. v. Lawes*, 233 U.S. 389 (1914); individuals engaging in occupations requiring a standard of skill may be forced to obtain a permit. *Dent v. West Virginia*, 129 U.S. 114 (1889).

The Court in the principal case held the ordinance invalid as abridging the guaranty of freedom of speech because it made the right of one to solicit members for an organization depend upon the uncontrolled will of an official, expressly stating in the margin that the Court was not confronted with any question concerning the right of the city to regulate the pursuit of an occupation. In so holding it left unanswered one important question; are union

organizers subject to reasonable state regulation? Some insight may be had to this question by considering whether the activity of an organizer for a labor union is a routine business matter, hence subject to regulation, *Carpenters & Joiners Union v. Ritters Cafe,* 315 U.S. 722 (1942), or of such nature as to bring it under the protection of the free speech guaranty, which the state is forbidden to abridge. *Near v. Minnesota,* 238 U.S. 297 (1931).

In the case of *Thomas v. Collins,* 323 U.S. 516 (1945), it was held that an act which required the obtaining of a permit before any solicitation could be made, which was so broad as to apply to public speeches by way of a prior restraint, was invalid as applied to a solicitation for union membership contained in a public speech given before assembled employees. The act was not declared unconstitutional on its face and the Court intimated that some control would be valid if reasonably applied by stating at page 540: "Once the speaker goes further . . . 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 of identification requirement may be imposed." Under this holding it would seem that an organizer is given a "dual" role in respect to his different activities, one in which he makes speeches in public in which he solicits great numbers of persons for his organization; the other where he makes private contacts, soliciting persons individually, in behalf of his organization, for funds or subscriptions. In the former he must not be regulated, in the latter some regulation is valid if reasonably applied. But where is the dividing line between his exercise of free speech and his acting in purely a commercial nature? The Court here did not draw the line but simply said that the act was beyond it. It might be well to note, however, that the registration requirement involved in the *Thomas* case has since been applied to labor organizers' solicitations made "otherwise than as part of a public speech. . . ." *AFL v. Mann,* 188 S.W.2d 276, 279 (Tex. Civ. App. 1945). Also similar requirements have been applied to union business agents. *Stapleton v. Mitchell,* 60 F. Supp. 51 (D. Kan. 1945).

With no specific guide lines, nor a pronouncement by the Court as to what extent a state may regulate union organizers, it would seem that any attempt to so regulate them would meet with either constitutional barriers, U.S. CONST. amend. I, or federal legis-

lative barriers, National Labor Relations Act, 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1952). But there seems to be no valid reason for giving immunity to labor organizers, although it is true that some of their activities are in their very nature within the guaranty of freedom of speech as being a concrete expression of a social ideal, namely unionism. Even so, it is well to remember that unionism is also big business. Then too, the activities of a union organizer are not always above reproach and may create a vital community concern. For example he may use force or threats of force against employees who refuse to join the union, or he might commit acts of violence, or cause such acts to be committed in an otherwise peaceful picket line. See *NLRB v. Local 140, United Furniture Workers, CIO,* 233 F.2d 539 (2d Cir. 1956). Perhaps if the organizer were required to make his presence known through a reasonable registration requirement then such activities would be curtailed or at least be less frequent because the notoriety given to his presence would lessen the effects of his actions.

It is submitted that a state does have a substantial interest in the protection of its citizens inasmuch as it has the right to protect them from being defrauded or otherwise harmed by any form of solicitation; and a requirement of registration of labor organizers, absent any discretionary feature which does not prohibit the expression of social ideas whether they be unionism or whatever, should be allowed without objection. It is sincerely felt that our concept of free speech will lose nothing for such regulation, but on the contrary a valuable function of the state police power will not be thwarted.

J. L. R.

CONSTITUTIONAL LAW—TAXATION OF INTERSTATE COMMERCE—RAILROAD LOOP TRAFFIC.—*P* railroad originates in Virginia and passes through West Virginia, with two loop deviations into Virginia and Kentucky totaling six miles. *P* is taxed for the privilege of doing business in West Virginia on the basis of a percentage of its property within the state, as well as on a percentage of its net income earned within the state. W. VA. CODE c. 11, art. 12a, § § 2 and 5b (Michie 1955). In a declaratory judgment action, *P* contended that the loop traffic should be considered in determining whether such tax constituted a direct burden upon the interstate business of *P*. *D* de-