cause of action arisen in the state court. This problem was avoided by lower federal courts in *Sampson v. Channell*[64] and *New England Mutual Life Ins. Co. v. Spence*.[65] In those cases the federal courts had opportunity to consider the point at issue as falling into one of several possible categories, which could be governed by different conflict of laws rules; the methods and rules by which courts deal with such situations are technically known as "qualification." In the cases just referred to, the courts applied state rules to the points in issue, which rules were properly applicable after the qualification had been made. In the *Griffin* case and in *Klaxon v. Stentor Electric Mfg. Co.*,[66] decided the same day, the problems did not lend themselves to qualification and in each instance the Supreme Court remanded the case to the district court with instructions that the state law be *found* and applied. In formulating and applying a conflict of laws rule a state court must not violate provisions of the federal Constitution; federal courts, applying state law, under the rule of the *Erie* case, may not apply even theretofore accepted state rules if the latter would violate the Constitution. It is for this reason that the *dicta* in the *Griffin* case, relating to the constitutional scope of Texas rules of public policy, are of great importance even though the narrow decision was that the district court must, under *Erie R. R. v. Tompkins*,[67] ascertain the scope of the Texas rule of public policy.

HORACE S. HASELTINE.

THE FIRST AMENDMENT AND THE N. L. R. A.

1. INTRODUCTION

(a) *The Problem*

There are few phrases in the parlance of democracy which are surrounded with such an aura of sanctity as that which envelops the phrase "freedom of speech." And, of course, the wisdom of so regarding it has long since been removed from the field of debate. However, conceding the wisdom, and in fact the absolute necessity, of preserving to the utmost degree the integrity of freedom of speech, there remains the task of definition. Ordinarily, we experience no difficulty in determining when freedom of speech has been denied. The history books abound with ex-

64. (C. C. A. 1, 1940) 110 F. (2d) 754, noted in (1941) 26 WASHINGTON U. LAW QUARTERLY 244.
65. (C. C. A. 2, 1939) 104 F. (2d) 665.
66. (1941) 313 U. S. 487.
67. (1938) 304 U. S. 64, 114 A. L. R. 1487.

amples. Modern industrial conditions, however, give rise to problems for the solution of which the history books are of no great assistance. There are new factors complicating the problem which make it difficult to tell at a glance whether or not the issue of freedom of speech is really involved at all. Such a situation is presented by the enforcement of the National Labor Relations Act. In that act, Congress announced the policy of protecting and encouraging labor organization. Employers have found themselves accused of running afoul of the law when the basis of their objectionable conduct is not an act, but an utterance.[1] Immediately the issue of freedom of speech rushes to the fore, accompanied by the violent protestation of employers. It is the purpose of this note to consider whether employers are justified in their protests, or whether they are attempting to take advantage of the sacred phrase "freedom of speech" by applying it to a situation where it does not and was never meant to fit.

(b) *The Nature of Freedom of Speech*

In the consideration of this problem, an understanding of the philosophical background of the doctrine of freedom of speech is indispensable. John Milton, in his immortal *Areopagitica,* presented the case for freedom of speech:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?

This concise statement is the complete philosophical basis for freedom of speech. The same idea has been put forth many times since Milton's day, without improvement, but with equal conviction. Mr. Justice Holmes applied the idea to American democracy, saying:

> * * * when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely

1. For recent discussions of this topic see: Killingsworth, Employer Freedom of Speech and the N. L. R. B. (1941) Wis. L. Rev. 211; Van Dusen, Free Speech and the National Labor Relations Act (1940) 35 Ill. L. Rev. 409; Free Speech and the Ford Case (1940—Summer) Bill of Rights Review 44.

> can be carried out. That at any rate is the theory of our Constitution.[2]

More recently, Justice Stone, now Chief Justice, put the same thought into these words:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.[3]

From these statements it is at once evident that freedom of speech is not advocated because of any inherent divinity in its nature. It is advocated because it is believed by the advocates to be the best method of achieving certain desired results. Freedom of speech has a purpose and exists only in relation to its purpose. Its purpose is to provide for something in the nature of a process of intellectual natural selection, to borrow terminology; by virtue of its ability to produce from a given number of opinions and ideas the best ones for our use, it enables us to make informed judgments as to what concerns us, to our greatest benefit.

Consequently, since freedom of speech has a purpose, it follows that it is qualified by that purpose. Therefore, when the purpose of an utterance is other than that which has been ascribed to free utterances, it may be restricted. In *Abrams v. United States*[4] Holmes acknowledged this qualifying element in the statement that when "* * * they [expressions of opinions] so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," then they may be checked. Stone, in *Thornhill v. Alabama*[5] said that abridgment of the liberty of discussion could be justified "where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." Few principles of constitutional law are as well-established as the principle that freedom of speech is a qualified, not an absolute, right.[6] Certainly no one

2. Abrams v. U. S. (1919) 250 U. S. 616, 630.
3. Thornhill v. Alabama (1939) 310 U. S. 88, 95.
4. 250 U. S. 616, 630.
5. 310 U. S. 88, 104.
6. 2 Story's *Commentaries on the Constitution* (5th ed. 1891) §1180, 634; Zechariah Chafee, Jr., *Free Speech in the United States* (1941) 8; Robertson v. Baldwin (1897) 165 U. S. 275; Brown v. Walker (1895) 161 U. S. 591; United States v. Ball (1896) 163 U. S. 662.

will deny that freedom of speech does not protect a man from penalty for falsely shouting, "fire!" in a theatre and causing panic;[7] nor will there be any disagreement that to make criminal the counselling of murder is constitutional.[8] For the rights guaranteed by the First Amendment, fundamental and basic though they be, are not more sacred than any other rights granted by the Constitution.[9] The discovery and spread of truth on subjects of general concern is one of the most important purposes of society and government. But there are other purposes of society and government, and unlimited discussion may interfere with these purposes. Therefore, the contrary purposes must be balanced against each other.[10] And although freedom of speech must weigh heavily, there are instances wherein it must be overbalanced. Again in the words of Holmes, when "words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"[11] they may be restricted. This rule is a rule of reason, and when correctly applied it will preserve the right of free speech "both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities."[12] But without the limitation of this rule, said Story, "it [freedom of speech] might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form."[13]

(c) *The Problem in Reverse*

This problem, then, of the limitations upon freedom of speech, was old before the Wagner Act was conceived. Moreover, the problem as applied to labor disputes is by no means novel to the Wagner Act. But in past years, in an era of less social consciousness, it was the employee, and not the employer who was the aggrieved party. Courts found no particular difficulty in deciding whether or not utterances and expressions made by labor unions were illegal. At least one court, enjoining a union from

7. Schenck v. U. S. (1919) 249 U. S. 47.
8. Frohwerk v. U. S. (1919) 249 U. S. 204.
9. John F. Jelke Co. v. Hill (Wis. 1932) 242 N. W. 576.
10. Chafee, op. cit. supra note 6, at 31.
11. Schenck v. U. S. (1919) 249 U. S. 47, 52; see also Whitney v. People of the State of California (1926) 274 U. S. 356, 357.
12. Schaeffer v. U. S. (1920) 251 U. S. 466, 482, dissent by Holmes and Brandeis.
13. 2 Story's *Commentaries on the Constitution* (5th ed. 1891) §1180, 684.

the publication and use of letters, circulars, and other printed matter being used as a means for carrying on an unlawful boycott, has maintained that there was no question of freedom of speech involved.[14] "We don't patronize" and "unfair dealer" lists have been similarly treated, without even the mention of the issue of freedom of speech.[15] A labor leader was prohibited from advocating a general strike "by persuasion, force or violence."[16] In the classic *Hitchman Coal & Coke Co. v. Mitchell* case,[17] the Supreme Court of the United States enjoined labor unions from "inducing or seeking to induce" employees to violate non-union contracts of employment by joining the union; and not only was this conduct by labor held unlawful, but it was denounced as malicious.

Picketing, the labor union's method of speech, its device for informing the public of its side of the controversy, has received similar treatment. A circuit court has held that "There is and can be no such thing as peaceful picketing," that "a peaceful, law-abiding man can be and is intimidated * * * [by being] compelled to pass by men known to be unfriendly."[18] Another court reached the same result in announcing that picketing would intimidate a timid man as certainly as physical assault, and would be restrained by injunction.[19] Unfortunately, not all of the cases suppressing this fundamental right of labor occurred during days of relative antiquity. In comparatively recent times, the picketing of a theatre, peacefully, causing substantial reduction in the employer's business, has been enjoined.[20] A New Jersey case held that the assemblage of a large number of pickets in the vicinity of the place of business of the employer in the furtherance of a strike was a private nuisance which not only would be enjoined, but which the legislature was powerless to legalize, since picketing in its mildest form was a nuisance.[21] The same court in another case announced that peaceful picketing was a contradiction in terms, picketing being "militant both in character and purpose."[22] The United States Supreme Court once declared that

14. Gompers v. Buck Stove & Range Co. (1911) 221 U. S. 418.
15. Lawlor v. Loewe (1915) 235 U. S. 522.
16. In re Debs (1895) 158 U. S. 564.
17. (1917) 245 U. S. 229.
18. Atchison, T. & S. F. Ry. Co. v. Gee (C. C. S. D. Ia. E. D. 1905) 139 Fed. 582.
19. Kolley v. Robinson (C. C. A. 8, 1911) 187 Fed. 415.
20. Bull v. Internat'l Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators (1925) 119 Kan. 713, 241 Pac. 459.
21. J. Lichtman & Sons v. Leather Workers' Industrial Union (1933) 114 N. J. Eq. 596, 169 Atl. 498.
22. Elkind & Sons v. Retail Clerks International Protective Ass'n (1933) 114 N. J. Eq. 586, 169 Atl. 494.

four to twelve pickets in a group constituted intimidation *per se*.[23]

2. INTERPRETATION OF THE PROBLEM BY THE NLRB

Today, however, it is the employers who complain of the invasion of their constitutional rights. The basis for the restrictions complained of is in section 8 (1) of the National Labor Relations Act:[24]

> 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.[25]

In its approach to the proper interpretation of this section with reference to the problem of freedom of speech, the Board had the benefit of some court decisions concerning a similar provision of the Railway Labor Act:[26] "Representatives for the purposes of this Act, shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." The Supreme Court, in an early decision,[27] laid down a standard for the interpretation of the section. " 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law." In the interpretation of the word "influence" the court maintained that "The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization'." The court concluded optimistically with the thought that it was quite a simple matter to appraise such questionable conduct as would fall within the compass of the act.

Nevertheless, the decision has been of little help in deciding whether an employer's utterance is "influence" or "pressure" or

23. American Steel Foundries v. Tri-City Central Trades Council (1921) 257 U. S. 184.

24. (1935) 49 Stat. 452, c. 372; 29 U. S. C. A. §158.

25. Section 7 is as follows: "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."

26. (1926) 44 Stat. 577, c. 347, §2(3); 45 U. S. C. A. §151.

27. Texas & New Orleans R. R. v. Brotherhood of Ry. & S. S. Clerks (1930) 281 U. S. 548.

the "use of authority." In a later circuit court of appeals case,[28] the problem was found bothersome. By way of *dictum*, the court said:

> It must be remembered in this connection * * * that any sort of influence exerted by an employer upon an employee, dependent upon his employment for means of livelihood may very easily become undue, in that it will coerce the employee's will in favor of what the employer desires against his better judgment as to what is really in the best interest of himself and his fellow employees.

If the National Labor Relations Board looked to the interpretation of the Railway Labor Act for guidance, it could not have helped being impressed more by this *dictum* than by the airy decision of the Supreme Court.

When the Labor Board has branded the utterances of employers as unfair labor practices in violation of section 8 (1), there seem to be two underlying theories in justification, used either separately or concurrently. One theory, to be labelled the "context" theory, is that words uttered in a context of violent or other illegal acts, lose their identity as words, and may be treated without regard to constitutional limitations as to freedom of speech. The other theory, to be labelled the "inherent" theory, is that an employer's utterances, in view of his economic relationship with his employees, are inherently coercive.

Two *Ford* cases excellently illustrate the first or "context" theory. In one case,[29] a filling station manager across the street from the plant gave permission to the union to exhibit a banner announcing a meeting to be held by the union. Shortly thereafter, nine men emerged from the plant, one remarking, "What in the hell are you guys pulling off?" and then tore the banner to pieces; "service men" were also engaged in surveillance of union meetings, and in threatening employees concerning their union activities. In the other case,[30] there was a circulation of a "Vote of Confidence" in company policies, and the publicizing of the vote as a rejection of the union; and there were discharges because of membership in, and activity or suspected activity for, or sympathy toward, the union. In both cases, pamphlets with an intense anti-union bias were distributed to employees.[31] More-

28. Virginian Ry. Co. v. System Federation No. 40 (C. C. A. 4, 1936) 84 F. (2d) 641, aff'd (1937) 300 U. S. 515.

29. In the Matter of Ford Motor Co. (1940) 23 N. L. R. B. 548.

30. In the Matter of Ford Motor Co. (1939) 14 N. L. R. B. 346.

31. Pamphlet headed "FORD GIVES VIEWPOINT ON LABOR" and carried caption "Ford * * * Cautions Workers on Organization." Typical state-

over, in the latter case, the distribution of the literature was conducted in such a manner as to impress it particularly upon the recipients. Ordinarily, literature was merely placed in boxes, with employees having the privilege of taking it; but here, service men distributed the literature and made sure that each employee received it. If an employee didn't notice the literature, a service man pulled him back and gave it to him; or the literature was pushed into employees' hands as they emerged from the gate.

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ments are the following: "A monopoly of jobs in this country is just as bad as a monopoly of bread. Sometimes we catch people here in Detroit 'selling' jobs at the Ford Motor Co. by making ignorant persons believe they have a 'pull' with us. * * * This was done by crooks and they were properly dealt with. But, now along comes another group that says: 'There are 100,000 jobs out at Ford's. If you want one of them, pay us a registration fee, and so much every month, and we will pass you in, and you can work as long as you pay us.' This group is asking us to sit still while it sells our men the jobs that have always been free. If we agreed to this, they would have complete control of American labor, a control no one has ever before had." "* * * What was the great result of those strikes? Merely that numbers of men have put their neck into an iron collar. I am only trying to show them who owns the collar. * * *" "* * * A little group of those who control both capital and labor will sit down in New York, and they will settle prices, and they will settle dividends, and they will settle wages * * *" "The Wagner Act is just one of those things that helps to fasten control upon the necks of labor. Labor doesn't see that yet. It thinks the Wagner Act helps it. All you have to do is to wait and see how it works. It fits perfectly the plans to get control of labor." "I have never sought to prevent our men from joining any association—religious, racial, political or social * * * No one who believes in American freedom would do that. When our men ask about unions, I give them the same advice as when they ask about any of the other schemes that are always being aimed at men's wages. I say to them: 'First, figure out for yourself what you are going to get out of it. If you go into a union, they have got you, but what have you got?'" "We think our men ought to consider whether it is necessary for them to pay some outsider every month for the privilege of working at Ford's. Or, whether any union can do more for them than we are doing. If union leaders think they can manage an automobile factory better than we can, and pay better wages under better working conditions than we can, why don't they build a factory of their own and show us up? They have the capital—they have all the money they need and a lot more. The country is big; they have the men; and think of all the union customers they would have!" "If the union leaders are sincere, they should go into business themselves. If they have thought out a better way to manage business, let them demonstrate what it is. If they can't do that, why do they pretend they can? Of course, the financial interests that use strikes as a way to build up unions, would not permit them to build new factories—big, progressive factories with everything in them that union leaders now demand. They don't want that. They want control. I have always made a better bargain for our men than an outsider could. We have never had to bargain against our men, and we don't expect to begin now. There is no mystery about the connection between corporation control and labor control. They are simply the two ends of the same rope. To have one, you have got to have the other. You may say as emphatically as you like, that all this does not disturb me in the least. I know the scheme is wrong, and it will not work."

In these cases, it was stated that the issue was not whether the expression of opinion by an employer calculated to influence employees in derogation of their rights as guaranteed by the act, was, as such, forbidden by the act. The issue was whether, *under the circumstances of the case,* the employer *in fact* interfered with the rights of the employees. And in the determination of this question it was necessary to consider not only the bare words of the literature, but also the accompanying events and background in which these words were set. Under the circumstances of these cases, the Board found it impossible to believe that the anti-union utterances were intended to influence only employees' *mental processes.* The background of these utterances clearly revealed a broad attack by the employer upon the union organization, and the publications, being merely a part of the illegal attack, lost their identity as words and became instruments of coercion not entitled to the protection of the First Amendment. In the words of the Board, "The guarantee of such rights to the employees would indeed be wholly ineffective if the employer, under the guise of exercising his constitutional right of free speech were free to coerce them into refraining from exercising the rights vouchsafed them in the act."[32]

The second, or "inherent" theory, under which restriction of employers' utterances is justified, is not as clearly vindicated as is the first. For this reason, the Board usually bases its decision upon the first theory. Nevertheless, the Board has often gone on record in the words of the "inherent" theory, even when relying mainly upon the "context" theory.

Again, the Board's attitude in this connection can best be illustrated by *dictum* in another *Ford* case. "Whether the words or actions of an employer constitute interference, restraint, or coercion, within the meaning of the act, must be judged not as an abstract proposition, but in the light of the economic realities of the employer-employee relationship."[33] In this case, the same intensely anti-union pamphlets had been distributed as in the other *Ford* cases. The employees, the Board found, could hardly have misunderstood the import of these pamphlets; not only must they have realized the company's uncompromising hostility to the labor union but they must certainly have realized that measures would be taken to make this opposition effective. In view of the dominant position of the employer who possesses power of economic life and death over the employee, these utterances, whether

32. In the Matter of Ford Motor Co. (1940) 19 N. L. R. B. 732.
33. In the Matter of Ford Motor Co. (1940) 23 N. L. R. B. 342.

couched in terms of argument or advice or not, are given a coercive effect which would not exist if these statements were directed to economic equals.

In other words, here again the Board finds that the purpose of the utterances of the employer is inconsistent with the purpose of the doctrine of freedom of speech. By virtue of economic relationship with employees, the employer is almost inherently incapable of addressing to the intellect of his employees an argument which they are free to accept or reject without compulsion. In such a situation there is no free trade in ideas in the competition of the market. On the contrary, the utterances themselves serve as a warning that economic force will be used to back up the opinion expressed.

Although, as illustrated by the *Ford* case, the Board has often gone out of its way to announce the theory of "inherent coerciveness" while actually relying upon the "context theory,"[34] there have been cases wherein the Board sustained its decision on the former theory. Thus it has been held to be an unfair labor practice where an employer assembled employees and read a statement purporting to inform them of their rights under the National Labor Relations Act, but which statement the Board found to be misleading;[35] where an employer questioned employees concerning the union, orally seeking to discredit union and organizers;[36] and where the employer made speeches to employees, asserting that the union would do them no good.[37] In none of these cases was a background of violence, discrimination, or company-unionism relied upon.

Armed with these two theories, the Board has brought many different types of utterances within the interdict of the act. The distribution of anti-union pamphlets has often been declared an unfair labor practice.[38] A great furor was created when the board thus labeled the distribution of a pamphlet entitled "Communism's Iron Grip on the C. I. O." which consisted mainly of quotations from a speech delivered by a Congressman in the

34. In the Matter of Harry Schwartz Yarn Co., Inc. (1939) 12 N. L. R. B. 1139; In the Matter of North Electric Manufacturing Co. (1940) 24 N. L. R. B. No. 52; In the Matter of Walter Stover (1939) 15 N. L. R. B. 635; In the Matter of Jahn & Ollier Engraving Co. (1940) 24 N. L. R. B. No. 94.

35. In the Matter of Express Publishing Co. (1939) 13 N. L. R. B. 1213.

36. In the Matter of Rockford Mitten & Hosiery Co. (1939) 16 N. L. R. B. 501.

37. In the Matter of Lone Star Gas Co. (1939) 18 N. L. R. B. 420. In this case, however, there was surveillance of union activity and discrimination subsequent to the talks.

38. See notes 39, 40, 42 infra.

House of Representatives.[39] In spite of the commotion occasioned, the case was never appealed to the courts. In another case,[40] the Board objected not so much to the distribution or to the contents of a pamphlet, as to the employer's statements accompanying the distribution.[41] Usually, however, pamphlets have been objected to on the basis of their negative explanation or interpretation of the National Labor Relations Act. Where emphasis is placed upon what the employees are not bound to do, or upon what the act does not purport to do, as opposed to what the employees may do or what the act does purport to do, the distribution of the pamphlet is an unfair labor practice.[42] Such a pamphlet is held to distort the true significance of the act and to mislead readers with respect to employees' rights under the act. Pamphlets indulging in vilification of a union[43] and announcing anti-union demonstrations[44] have also been held objectionable.

Threats by or on behalf of the employer obviously are not countenanced. Statements threatening layoffs unless union activity ceases,[45] threatening that supervisory employee will not work with union employees,[46] threatening to move the plant before union recognition is given,[47] and threatening to close the factory if union activity does not cease[48] are all held in violation of the act.

However, subtler expressions than those contained in the blatant propaganda leaflets or in the threats have been held to run afoul of the act. For instance, assertions that the management could do more for the employees than the union could and that salaries would be increased without regard to the union were said to imply that the employees would derive no benefits from union affiliation, and the assertions therefore constituted inter-

39. In the Matter of the Muskin Shoe Co. (1938) 8 N. L. R. B. 1.

40. In the matter of Nebel Knitting Co., Inc. (1938) 6 N. L. R. B. 284.

41. "I do not deny that I am 100% against labor unions."

42. In the Matter of Jahn & Ollier Engraving Co. (1940) 24 N. L. R. B. No. 94; In the Matter of Mock-Judson-Voehringer Co. (1938) 8 N. L. R. B. 133; In the Matter of Mansfield Mills, Inc. (1937) 3 N. L. R. B. 901.

43. In the Matter of Union Drawn Steel Company (1938) 10 N. L. R. B. 868.

44. In the Matter of Elbe File and Binder Company, Inc. (1937) 2 N. L. R. B. 906.

45. In the Matter of Walter Stover (1939) 15 N. L. R. B. 635; In the Matter of the North Electric Manufacturing Co. (1940) 24 N. L. R. B. No. 52.

46. In the Matter of Virginia Ferry Corp. (1938) 8 N. L. R. B. 730.

47. In the Matter of California Cotton Oil Corp. (1940) 20 N. L. R. B. 540.

48. In the Matter of Semet-Solvay Co. (1938) 7 N. L. R. B. 511; In the Matter of Cowell Portland Cement Co. (1938) 8 N. L. R. B. 1020; In the Matter of Trenton Garment Co. (1938) 4 N. L. R. B. 1186.

ference, restraint, and coercion.[49] An appeal to the "conscience and self-respect" of an employee, by asking "What would the old man think of you?" and advice to an employee to consider his family were similarly illegal.[50] Interrogating employees concerning their union membership was unlawful interference, for it constituted an implied threat that the employer's economic power might be used to the disadvantage of employees active in the union.[51] Questioning employees concerning their grievances after the advent of a union was illegally coercive, for it gave rise to the implication that the employees might secure redress of their grievances without the union.[52] Moreover, it has been held that the response of an employer to a question asked by employees, to the effect that he advised them against an outside union, constituted an unfair labor practice.[53] The offer of collective bargaining with an unaffiliated committee of the respondent's employees was illegal interference, for it was prejudicial to an independent union.[54] The subtlest instance of interference, restraint, and coercion, however, was the giving of currency by a supervisory employee to a false rumor concerning the union, which the Board found to have interfered with the free choice of the employees at an election.[55]

49. In the Matter of Knoxville Publishing Co. (1939) 12 N. L. R. B. 1209.

50. In the Matter of the A. S. Abell Co. (1938) 5 N. L. R. B. 644.

51. In the Matter of Rockford Mitten & Hosiery Co. (1939) 16 N. L. R. B. 501; In the Matter of Harry Schwartz Yarn Co. (1939) 12 N. L. R. B. 1139; In the Matter of Boss Manufacturing Company (1937) 3 N. L. R. B. 400; In the Matter of Foote Brothers Gear and Machine Corp. (1939) 14 N. L. R. B. 1045.

52. In the Matter of The Dow Chemical Co. (1939) 13 N. L. R. B. 993.

53. In the Matter of Brown Shoe Company, Inc. (1940) 22 N. L. R. B. 1080.

54. In the Matter of American Manufacturing Co. (1938) 5 N. L. R. B. 443; In the Matter of David E. Kennedy, Inc. (1938) 6 N. L. R. B. 699.

55. In the Matter of Yale & Towne Manufacturing Co. (1939) 10 N. L. R. B. 1321. Many of the coercive statements attributed to the employer were actually made by a supervisory employee. The employer is not responsible for the statements of every supervisory employee, however. A "straw boss" type of foreman, who acts only in advisory capacities as to lay-offs and hirings and often is not consulted at all, and who is himself eligible to membership in the union, does not by his statements make the company responsible. In the Matter of Ford Motor Co. (1939) 18 N. L. R. B. No. 167. But when the foreman is more than a "straw boss" and is actually the workers' first contact with the management, the rule is otherwise. In the Matter of Ford Motor Co. (1940) 23 N. L. R. B. 342; In the Matter of the Serrick Corp. (1938) 8 N. L. R. B. 621. Such foremen are generally relied upon for information concerning the work of men under them and consulted at the time of selection of men for lay-off and re-employment; their recommendations are usually followed; and even though their wages are only slightly higher than those of the ordinary

3. Court Interpretation of the Problem

An analysis of the attitude of an administrative board toward the object of its administration is, of course, incomplete without an accompanying analysis of the extent to which policy of the administrative body has been sanctioned by the courts. The attitude of the courts toward the problem at hand is now settled. In the first place, the "context theory" is as well accepted by the courts as it is by the Board.[56] The underlying idea in the judicial enforcement of this theory is the opinion by Justice Holmes in *Aikens v. State of Wisconsin*:[57]

> No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

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employees, their statements are attributable to the employer. It is not necessary, to hold the employer responsible for their statements, that these employees have the power to hire and fire. In the Matter of Ford Motor Co. (1940) 23 N. L. R. B. 548. All that is necessary is that the employee should exercise substantial employer functions. In the Matter of Ford Motor Co. (1940) 23 N. L. R. B. 342.

The extent to which an employer is held responsible by the courts for the statements of supervisory employees is, in general, quite similar to the extent to which the employer is held responsible by the Board. It has been held that the power to hire and fire must belong to the supervisory employee. Ballston-Stillwater Knitting Co. v. N. L. R. B. (C. C. A. 2, 1938) 98 F. (2d) 758. However, most of the cases make no such requirement. If an employee is so closely connected with the management that his suggestion for employment or discharge is practically as potent as the power to hire and fire, his statements are attributable to the employer. International Ass'n of Machinists, Tool and Die Makers v. N. L. R. B. (App. D. C. 1939) 110 F. (2d) 29. Even this requirement is among the more stringent ones. The employer may be held on the doctrine of respondent superior. Swift & Co. v. N. L. R. B. (C. C. A. 10, 1939) 106 F. (2d) 87. And although it has been held that statements of supervisory employees are not attributable to the employer unless made within the scope of actual, implied, or apparent authority (Cupples Co. Manufacturers v. N. L. R. B. (C. C. A. 8, 1939) 106 F. (2d) 100.), the Supreme Court has held that the question is not one of legal liability on principles of agency. H. J. Heinz Co. v. N. L. R. B. (1941) 311 U. S. 514. Rather it is a question of whether the employer gains from the statements any advantage in the bargaining process which the act proscribes. Such advantage would be gained when the utterances of the supervisory employees take place under circumstances which make obvious the fact that the policy of the employer is being expressed. N. L. R. B. v. Whittier Mills Co. (C. C. A. 5, 1940) 111 F. (2d) 474; N. L. R. B. v. Swank Products (C. C. A. 3, 1939) 108 F. (2d) 872; Humble Oil & Refining Co. v. N. L. R. B. (C. C. A. 5, 1940) 113 F. (2d) 85.

56. N. L. R. B. v. Virginia Electric and Power Co. (1941) 62 S. Ct. 344.

57. (1904) 195 U. S. 194; see also Mr. Justice Frankfurter's opinion in Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc. (1941) 312 U. S. 287.

Thus, if an utterance is but a step in an illegal anti-union plot, it may not claim the privilege of free speech. Indeed, it may not even claim to be speech at all, since it merges into the plot, and is not distinguishable from it.

The illegal anti-union plot which serves as a background for the utterance may consist of discriminatory discharges of employees for union activities,[58] industrial espionage,[59] support of a company or "inside" union,[60] intimidation and violence,[61] sponsoring of an anti-union mass-meeting,[62] influencing employee elections,[63] or surveillance of union meetings and activities.[64]

The utterance appearing in such a background need not be violently anti-union. As said by the court in *National Labor Relations Board v. Link Belt Co.*,[65] "The fact that these various forces at work were subtle rather than direct does not mean that they were none the less effective. Intimidations of an employer's preference, though subtle, may be as potent as outright threats of discharge." A statement that "You are under no obligation to join any union and cannot be forced to do so, as this tannery will always operate as an open shop. This Company will deal individually with any employee that wishes to do so at any time,"[66] was held to be coercive. And similarly, a sample ballot

58. Continental Box Co., Inc. v. N. L. R. B. (C. C. A. 5, 1940) 113 F. (2d) 93; International Ass'n of Machinists, Tool and Die Makers v. N. L. R. B. (1940) 311 U. S. 72; N. L. R. B. v. Colten (C. C. A. 6, 1939) 105 F. (2d) 179; N. L. R. B. v. Oregon Worsted Co. (C. C. A. 9, 1938) 96 F. (2d) 193; N. L. R. B. v. Viking Pump Co. (C. C. A. 8, 1940) 113 F. (2d) 759; N. L. R. B. v. Elkland Leather Co., Inc. (C. C. A. 3, 1940) 114 F. (2d) 221; N. L. R. B. v. Link-Belt Co. (1941) 311 U. S. 584.

59. Consolidated Edison Co. v. N. L. R. B. (1938) 305 U. S. 197; N. L. R. B. v. Link-Belt Co. (1941) 311 U. S. 584, Continental Box Co., Inc. v. N. L. R. B. (C. C. A. 5, 1940) 113 F. (2d) 93; Republic Steel Corp. v. N. L. R. B. (C. C. A. 3, 1939) 107 F. (2d) 472.

60. Consolidated Edison Co. v. N. L. R. B. (1938) 305 U. S. 197; N. L. R. B. v. Link-Belt Co. (1941) 311 U. S. 584; N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780; N. L. R. B. v. Elkland Leather Co., Inc. (C. C. A. 3, 1940) 114 F. (2d) 221.

61. Republic Steel Corp. v. N. L. R. B. (C. C. A. 3, 1939) 107 F. (2d) 472; N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780.

62. N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780.

63. Republic Steel Corp. v. N. L. R. B. (C. C. A. 3, 1939) 107 F. (2d) 472; N. L. R. B. v. Colten (C. C. A. 6, 1939) 105 F. (2d) 179.

64. Republic Steel v. N. L. R. B. (C. C. A. 3, 1939) 107 F. (2d) 472. Of course, the illegal anti-union acts mentioned in this and preceding footnotes have not occurred in the cases as isolated from other illegal anti-union acts. There are usually many such acts within each case, and consequently, it is difficult to tell for certain what the effect of one act in isolation would be.

65. (1941) 311 U. S. 584, 589.

66. N. L. R. B. v. Elkland Leather Co., Inc. (C. C. A. 3, 1940) 114 F. (2d) 221, 223.

phrased in such a manner as to suggest adverse criticism of the union, with the plain implication that a certain vote was desired, was held to be violative of section 8.[67]

Most of the objectionable statements, however, have been in the nature of threats, or clearly implied threats: "This Union business has got to—has gone far enough * * * he [president] is going to close the shop down if this Union business continues * * *;"[68] "To hell with C. I. O.;"[69] "Republic stands for the 'Open Shop Principle.' Every Republic Employee owes a duty of loyalty to the Company so that its best interests may be served. Conduct detrimental to the interests of the Company and which may disrupt the satisfactory relations between employees and management will not be tolerated;"[70] "C. I. O. is a racket conducted by racketeers."[71]

The issue of inherent coerciveness was resolved against the Board by the Supreme Court in the recent case of *National Labor Relations Board v. Virginia Electric & Power Company.*[72] In a none too scholarly opinion, Mr. Justice Murphy said that "If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone." The whole complex problem of inherent coerciveness of speech was dismissed with the curt statement that "Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise."[73] The court also made it clear that it was not the Board's function to appraise such "subtleties" either, for the Board was overruled for attempting to make the appraisal. Such "imponderable subtleties," therefore, are beyond the pale of the law. This confession of legal impotence is not rendered any more satisfactory by its manner, that is, without citation of authority or discussion of the principles involved. The opinion overlooked all of the litigation in point which has occurred in the circuit courts of appeals, in such a manner as to dismiss it as of no importance whatever. It will therefore be interesting, even at the risk of being overly academic, to examine into the back-

67. N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780.

68. N. L. R. B. v. Viking Pump Co. (C. C. A. 8, 1940) 113 F. (2d) 759, 760.

69. N. L. R. B. v. Link-Belt Co. (1941) 311 U. S. 584, 593.

70. Republic Steel Corp. v. N. L. R. B. (C. C. A. 3, 1939) 107 F. (2d) 472, 474.

71. N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780, 787.

72. (1941) 62 S. Ct. 344.

73. Id. at 349.

ground of the issue, which Mr. Justice Murphy saw fit to omit entirely.

The weight of authority in the circuit courts of appeals is in accord with the conclusion announced by the Supreme Court. An employer who volunteered that he would advise his son against joining a union was held not to be exercising coercion.[74] The reasoning of the court was that "it is difficult to think" that Congress intended to prevent an employer from expressing such an opinion. Having found it difficult to think, the court did not exert itself unduly in that direction. One court stated that the management did not coerce or intimidate its employees respecting their union activities where an employer asked an employee if he belonged to the union or knew anything about it.[75] Presumably, that statement is the basis of the decision. Where an employer in response to a question asking advice, replied that his preference was for a local over an outside union, the court disagreed with the Board that there was a violation of the employees' rights, but seemed to do so with considerable misgivings, for the reasoning was devoted to a justification of a decision the other way, had the court felt so inclined.[76] In these words the court revealed its doubt as to the wisdom of its own decision:[77]

> * * * 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.

But the court which decided that an employer who volunteered that he should prefer one union over another was within his rights, had no such doubts, dismissing his statement as not amounting to a scintilla when considered in the light of his previous conduct in connection with union activities.[78] Where the utterance was made by a policy-making officer of the employer, the court held that the employer was not to be held responsible for an "isolated" utterance, in the absence of evidence of any

74. N. L. R. B. v. Union Pac. Stages (C. C. A. 9, 1938) 99 F. (2d) 153.
75. Foote Bros. Gear & Machine Corp. v. N. L. R. B. (C. C. A. 7, 1940) 114 F. (2d) 611.
76. N. L. R. B. v. Falk Corp. (C. C. A. 7, 1939) 102 F. (2d) 383.
77. Id. at 389.
78. N. L. R. B. v. Sands Manufacturing Co. (1938) 306 U. S. 332.

policy of proscribed discrimination.[79] This decision seems to give rise to the implication that utterances made by the employer himself might possibly be considered a violation of the act, even though the background were lacking. In another case overruling the Board, the court made some effort to justify its decision on the basis that the utterances *in fact* did not interfere with, restrain, or coerce employees in their rights under the act.[80] The only possible conclusions from this decision are (1) that the court trespassed on the domain of the Board in fact finding, or (2) that it ruled as a matter of law that the statements could not be coercive. Neither conclusion speaks kindly for the decision, the former being clearly error, and the latter being evidence of muddled expression. A case affirming the employer's right to suggest retention of individual bargaining rests upon the profound basis that such suggestion is all right as long as it is not coercion.[81] Similarly, another case, with reference to a statement of open shop policy, held that the statement alone was no evidence that the employer was undertaking to interfere with or dominate his employees.[82]

> All that the statute prohibits is domination, interference, and support. The employer has the right to have and to express a preference for one union over another so long as that expression of opinion is in the exercise of free speech and is not the use of economic power to coerce, compel or buy the support of the employees for or against a particular labor organization.

This statement obviously begs the question, for the very issue is whether or not the speech is the use of economic power to coerce.

In order to qualify for the protection announced by the courts in the cases just discussed, the utterance need not be as mild as the utterances were in those cases,[83] nor in fact, need there even be a complete absence of discriminatory background.[84] In *N. L. R. B. v. Ford Motor Co.*,[85] where the statements concerned were

79. Martel Mills Corp. v. N. L. R. B. (C. C. A. 4, 1940) 114 F. (2d) 624; N. L. R. B. v. Mathieson Alkali Works (C. C. A. 4, 1940) 114 F. (2d) 796; N. L. R. B. v. Sparks-Withington Co. (C. C. A. 6, 1941) 119 F. (2d) 78.

80. Press Co., Inc. v. N. L. R. B. (App. D. C. 1940) 118 F. (2d) 937.

81. Midland Steel Products Co. v. N. L. R. B. (C C. A. 6, 1940) 113 F. (2d) 800.

82. Continental Box Co., Inc. v. N. L. R. B. (C. C. A. 5, 1940) 113 F. (2d) 93, 97.

83. But see Note, Recent Limitations on Free Speech (1938) 48 Yale L. J. 54, 72.

84. N. L. R. B. v. Ford Motor Co. (C. C. A. 6, 1940) 114 F. (2d) 905.

85. Id. at 915.

contained in the pamphlet already described,[86] the court held that it was not enough to set the publication condemned against a background of alleged discriminatory discharges of 24 employees out of a total of 80,000 men. In this same case[87] it was said that "If the concept that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, it is difficult now to say, in view of the National Labor Relations Act, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, that the concept is still a sound one." And then the court blandly stated that "The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied." This profound observation was made after the court had described in some detail a violent and unprovoked assault on union handbill distributors, mostly women, by company "service men" and after the court had found the company responsible for such conduct. To say the least, the court's attitude here is not unduly realistic.

On the other hand there have been some expressions of sympathy by the circuit courts of appeals for the idea of inherent coerciveness of speech. The *dictum* in the *Falk*[88] case has already been quoted.[89] In *National Labor Relations Board v. Prince*[90] the court seemed concerned over the problem and discussed it at length, but could not bring itself to decide that the mere distribution of propaganda by the employer constituted interference, restraint, and coercion, although the court indicated that it thought so. The decision, however, was placed on another ground.

But there are cases which bear on the issue by way of decision, and not merely *dictum*. In *Montgomery Ward & Co. v. National Labor Relations Board*,[91] there was a background to justify the decision on the "context theory," but the court did not in any way connect that background with the speech, thus giving rise to the implication that it might not be necessary. In *Virginia*

86. See note 31, supra.
87. Id. at 914.
88. N. L. R. B. v. Falk Corp. (C. C. A. 7, 1939) 102 F. (2d) 383, 389. See note 84, supra.
89. See note 77, supra.
90. N. L. R. B. v. Reed & Prince Mfg. Co. (C. C. A. 1, 1941) 118 F. (2d) 874.
91. Montgomery Ward & Co., Inc. v. N. L. R. B. (C. C. A. 7, 1939) 107 F. (2d) 555.

Ferry Corp. v. National Labor Relations Board,[92] there was likewise a background of discriminatory discharges, but the court in its decision did not even mention them. The decision was concerned only with the speech complained of. In another case,[93] the court held that a statement of open shop policy was designed to discourage organizational efforts, and held it to be an unfair labor practice, without discussion, although it could have relied, had it cared to, upon an illegal anti-union background.

Two recent cases in circuit courts of appeals, however, presented the issue squarely, and the courts met the issue squarely, seemingly without hesitation. In one of the cases[94] a superintendant made statements "from which the men might fairly infer that it was not to their interest to become members of the union and that they might suffer from such an association." This was held to be ample basis for the order of the Board directing the employer to cease and desist from interfering with his employees in the exercise of their guaranteed rights. And in the second case,[95] the opinion is a beautiful exposition of the theory of inherent coerciveness of an employer's utterances. "Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded if the hearer is in his power." And again, the court said, "Words are not pebbles in alien juxtaposition; they have only 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 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 an 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."[96]

However, the opinion of Mr. Justice Murphy, which is the law, says that the Board may make no such decision, for it would involve the consideration of "imponderable subtleties." Thus is dismissed the statement in the *Link Belt*[97] case that "The fact

92. Virginia Ferry Corp. v. N. L. R. B. (C. C. A. 4, 1939) 101 F. (2d) 103.
93. N. L. R. B. v. Elkland Leather Co., Inc. (C. C. A. 3, 1940) 114 F. (2d) 221.
94. N. L. R. B. v. A. S. Abell Co. (C. C. A. 4, 1938) 97 F. (2d) 951, 956.
95. N. L. R. B. v. Federbush Co., Inc. (C. C. A. 2, 1941) 121 F. (2d) 954, 957.
96. Ibid.
97. (1941) 311 U. S. 584.

that these various forces * * * were subtle rather than direct does not mean that they were none the less effective. Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge." One would be much more satisfied with Mr. Justice Murphy's opinion if he had seen fit to give a little attention to the merits of the issue before stating his conclusion. It is to be hoped that ultimately the Supreme Court will give the question more adequate consideration.

4. Conclusion

The real problem of this discussion has been how far employers may go with their utterances in an attempt to emasculate the policy of Congress with respect to guaranties to labor. But the policy of Congress is subservient to the Constitution; if the policy is contrary to the Constitution, it cannot be upheld. Moreover, since a statute involving civil liberties is in question, the burden of proof as to constitutionality lies with the proponents of the statute and its policy, there being no presumption of constitutionality.[98]

An analogous situation is seen in connection with the criminal law. Holmes' statement that if the most innocent and constitutionally protected of acts is a step in a criminal plot, neither its innocence nor the Constitution will prevent punishment of the plot by law,[99] actually begs the ultimate question. Merely declaring an act to be a crime does not solve the problem,[100] for Congress's ability to declare acts to be crimes is subject to constitutional limitation. For instance, Congress may declare an act to be a crime, which is effected by means of words: incitement to riot. This law limits absolute freedom of speech. Thus it is seen that two interests must be weighed in the balance: the interest of freedom of speech and the interest of the public welfare. Obviously there is no logical mathematical solution. The solution must be a subjective, intuitive one. The example presented is not very difficult. With the crime of sedition, there is more difficulty. And when we leave the field of criminal law altogether, there is yet more difficulty.

Therefore, the solution of the problem presently being discussed is found in a subjective balance of interests. The answer depends largely upon who does the balancing. Factors to be

98. Schneider v. State (1939) 308 U. S. 147. Noted (1940) 40 Colum. L. Rev. 531.

99. Aikens v. State of Wisconsin (1904) 195 U. S. 194.

100. Chafee, op. cit. supra, note 6, at 14.

taken into consideration are the degree or amount of suppression and the importance of the policy to be effected. It is the writer's opinion that the policy to be effected by the National Labor Relations Act is sufficiently important and the degree of suppression of speech involved is sufficiently small in most cases, that the policy of the act tilts the scale in its favor.

With respect to utterances with an illegal-anti-union background, there is no disagreement. Both the Board and the courts hold that such utterances do not receive the protection of the First Amendment. The difficulty has been with cases having no discernible background of the proscribed type. But, in the first place, there are relatively few cases of this nature in the books. And in the second place, there are likely to be in the future very few cases of this nature, in view of experience with what the factual situations have been in the past. Nevertheless, where the expression does appear as an isolated fact, it seems that, with one significant qualification, the theory of inherent coerciveness of the expression should be followed. That qualification is in the addition of the word "may." An employer's utterance *may* inherently interfere with the rights of the employees as guaranteed by the act. The "may" is inserted as qualifying the legal effect of the utterance, not its logical effect. For there may conceivably be times when an utterance, although in strictest logic it does interfere, should not be allowed to have that legal effect. In such situations, whether or not to proscribe the speech is determined, as indicated, by the process of balancing interests. For instance, legitimate criticism by an employer of union policies, made in good faith and without actual intent to coerce his employees, might be allowed on the ground that to hold otherwise would place organized labor beyond criticism by employers, and that this result is less desirable than allowing the slight actual coercion which would logically result. Admittedly, a determination under this concept would be difficult. But the law has never shied from application of vague rules. Moreover, the great majority of cases, as previously indicated, are clear-cut. Usually there is no question as to what purpose is served by a particular utterance. And in the relatively few cases where circumstances are such that the coercive element is not obvious, the employer being in good faith, discretion may be allowed for the purpose of deciding the issue on the basis of a balance of interests.

Such an interpretation of the problem is not open to the objection that we are allowing an entering wedge into the sacred

chamber of our civil liberties. There is no entering wedge, because the problem is being solved without revolutionary principles, but in a time-honored fashion. And to those who object to the direction in which the scales tip, it is submitted as an ultimate conclusion that under this interpretation of the problem, employers would not be denied freedom of speech at all. They would not be denied the right to address arguments to the intellect of their employees in the hope that these arguments might be accepted voluntarily; they would be denied the privilege of coercing their employees by means of an act effected by means of words. Free speech is strictly an intellectual instrument. The rights of labor cannot be nullified by any intellectual influence. Therefore, utterances which do tend to nullify them, are not in the exercise of intellectual influence, and do not come within the protection of the First Amendment. A more careful consideration of the definition of free speech in terms of intellectual commerce, in the final analysis, would simplify the problem.

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