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# Where Are We Going With Picketing?

## Intra-Union Coercion Is Not Free Speech

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INTRODUCTION

IT IS NEARLY eight years since the United States Supreme Court in the case of *Thornhill v. Alabama*[1] assimilated picketing with freedom of speech and of the press. It is commonly believed today that the guideposts pointing to the limits of this constitutional immunity of picketing are lacking. Both recent state decisions and current anti-picketing legislation[2] reflect the vagueness of picketing's constitutional privileges. This uncertainty is of concern to both judges and lawyers

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[1] (1940) 310 U.S. 88, and the related case of Carlson v. California (1940) 310 U.S. 106.

[2] Five states in 1947 enacted antipicketing statutes which are of at least questionable constitutionality. Thus Pennsylvania, in a statute approved in June 1947, amended its labor relations act, to make it an "unfair labor practice for . . . any one acting in the interest of a labor organization or for an employee or for employees acting in concert . . . *To picket* . . . a place of employment . . . who is not or are not an employee or employees of the place of employment" (despite Swing case, *infra* note 66 and related text). Pa. Laws 1947, Act. No. 484. Texas in a measure approved in June 1947 made unlawful (both civilly and penally) picketing for secondary boycott purposes. Tex. Laws 1947, p. 779. South Dakota by statute approved March 1947 makes it a penal offense to picket when no labor dispute exists between an employer and his employees (or their representatives) (despite Swing case cited above). S.D. Laws 1947, p. 100. Delaware by statute approved in April 1947 (H. B. 212) as a section in a general "union regulation" law, made picketing for secondary boycott purposes a penal offense. (*Cf.* Wohl case, *infra* note 79 and related text.) Del. Laws 1947, p. ..... North Dakota in March 1947 made *civilly* unlawful (subject to injunction and liable to damages) the picketing of a plant if a strike has been called without an election and a vote for the strike by 51 per cent of the employees voting. N. D. Laws 1947, p. 372.

A number of state supreme courts have approved the suppression of specific instances of picketing under circumstances which make such suppression of doubtful constitutionality. For cases illustrative of the confusion as to picketing's free speech nature see notes 118, 120, and 125, *infra* and related text.

as well as to executives of business establishments and labor organizations, who always have had a special interest in the legal aspects of picketing. It may be added that every individual in this country has reason to share this concern. Those who today can be indifferent to any phase of such basic civil liberties as freedom of speech and of the press are indeed insulated from contemporary realities.

It is not proposed in the following discussion to review either the adoption of the "clear and present danger" test for determining permissible intrusions on free expression,[3] or the evolution of the doctrine that the "liberty" protected by the due process clause of the Fourteenth Amendment includes the liberties listed in the First Amendment.[4] That ground has been explored well and often.[5] Nor will there be a restatement of the adverse criticism aroused by the Supreme Court's action in granting picketing a free speech basis. This has been both well presented and well answered in legal journals of the widest circulation.[6] In the ensuing discussion that basic action is assumed as permanent in the sense that a complete reversal of position is not to be expected.

What is contemplated here is an examination of the post-1940 picketing opinions of the United States Supreme Court as viewed against the background of the free speech constitutional principles developed in its other cases during the past decade. On the basis of such analysis, the attempt will be made to determine the extent and the cause of current constitutional problems in the picketing field.

## I. SCOPE OF FREE SPEECH GUARANTEE

A good deal of law pertaining to the basic liberties which are listed in the First Amendment to the Constitution has been made in the past decade. Much of this has been precipitated by defiance of state and local regulatory enactments on the part of a group calling themselves

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[3] As established in Schenck v. United States (1919) 249 U. S. 47, 52.

[4] Actually only *assumed* by the Court for purposes of decision in Gitlow v. New York (1925) 268 U. S. 652, but accepted in subsequent decisions as settled therein.

[5] For an excellent review of this material see CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), especially cs. I and IX; see also Notes (1940) 28 CALIF. L. REV. 353 and 733.

[6] *Cf.* Teller, *Picketing and Free Speech* (1942) 56 HARV. L. REV. 180; also *cf.* Dodd, *Picketing and Free Speech: A Dissent* (1943) 56 HARV. L. REV. 513, in reply to Teller's article; Teller, *Picketing and Free Speech: A Reply* (1943) 56 HARV. L. REV. 532, a response to Dodd's article. See also Gregory, *Peaceful Picketing and Freedom of Speech* (1940) 26 A. B. A. J. 709.

Jehovah's Witnesses.[7] Commencing with the case of *Lovell v. Griffin*[8] in the spring of 1938, this defiance has occasioned no less than thirty-four cases leading to eighteen decisions by the Supreme Court of our country.[9] These cases involved primarily the constitutional immunities of religious activities. However, freedom of the press and freedom of speech also were implicated both directly and also as a result of the constitutional doctrine developed.

In addition to the Jehovah's Witnesses cases there have been three important freedom of the press cases. They arose out of contempt proceedings involving newspapers[10] and necessitated weighing the First Amendment's requirements against the state's right to protect its administration of justice.

There were also during this period two freedom of assembly and freedom of speech cases which involved "labor speech" other than picketing.[11]

One other case,[12] which arose out of the National Labor Relations Act and clarified the extent of the employer's right to express his opinions on labor union matters, also contributed to free speech constitutional doctrine. Finally, the case of *Valentine v. Chrestensen*[13] was adjudicated in this interval and made clear the important boundary line between the expression of opinion or of religious conviction

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[7] This has been frequently remarked by commentators, *e.g.*, Waite, *The Debt of Constitutional Law to Jehovah's Witnesses* (1944) 28 MINN. L. REV. 209, especially at 222, 226.

[8] (1938) 303 U. S. 444.

[9] Actually 19 decisions, one of which, Johns v. Opelika (1942) 316 U. S. 584, was vacated and replaced on rehearing. (1943) 319 U. S. 103. Other cases were: Schneider v. State (1939) 308 U. S. 147; Cantwell v. Connecticut (1940) 310 U. S. 296; Minersville District v. Gobitis (1940) 310 U. S. 586; Cox v. New Hampshire (1941) 312 U. S. 569; Chaplinsky v. New Hampshire (1942) 315 U. S. 568; Jamison v. Texas (1943) 318 U. S. 413; Largent v. Texas (1943) 318 U. S. 418; Murdock v. Pennsylvania (1943) 319 U. S. 105; Martin v. Struthers (1943) 319 U. S. 141; Douglas v. Jeanette (1943) 319 U. S. 157; Taylor v. Mississippi (1943) 319 U. S. 583; Board of Education v. Barnette (1943) 319 U. S. 624; Prince v. Massachusetts (1944) 321 U. S. 158; Follett v. McCormick (1944) 321 U. S. 573; Marsh v. Alabama (1946) 326 U. S. 501; Tucker v. Texas (1946) 326 U. S. 517.

[10] Bridges v. California (1941) 314 U. S. 252 (This case also involved a telegram sent by Bridges, a western labor leader.); Pennekamp v. Florida (1946) 328 U. S. 331; Craig v. Harney (May 19, 1947) 331 U. S. 367.

[11] Hague v. C. I. O. (1939) 307 U. S. 496 (This case went off on the privileges and immunities clause rather than the due process clause.); Thomas v. Collins (1945) 323 U. S. 516.

[12] Labor Board v. Virginia Power Co. (1941) 314 U. S. 469. *Cf.* also May Stores Co. v. Labor Board (1945) 326 U. S. 376.

[13] (1942) 316 U. S. 52.

through the distribution of pamphlets and the pursuit of business profit through the distribution of commercial advertising material.[14]

*First Amendment guarantees*

The position taken in these cases is that all the First Amendment rights are to be grouped from the standpoint of the extent of constitutional protection granted them against interference through regulatory laws. This principle is implicit in the discussion of most of the series. It is explicitly stated in *Prince v. Massachusetts*.[15] In this case, a Jehovah's Witness claimed the right to have her young child sell the *Watch Tower* at night in the city streets, contrary to the state's child labor law. She conceded that her claimed parental right, if viewed as a mere secular right of freedom of speech or of the press, could be restricted by Massachusetts in the interest of promoting child welfare. She contended, however, that viewed "properly" as an

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[14] There were several other free speech cases during this period, which are of no significance for this discussion. *Cf.* Mabee v. White Plains Publishing Co. (1946) 327 U.S. 178, and Okla. Press Pub. Co. v. Wolling (1946) 327 U.S. 186, in which the Supreme Court held that no violation of First and Fifth Amendments was involved in subjecting newspapers to the Fair Labor Standards Act. Similarly in Associated Press v. United States (1945) 326 U.S. 1, the Supreme Court found no such violation in subjecting publishers to the Sherman Act. *Cf.* United Public Workers v. Mitchell (Feb. 10, 1947) 330 U.S. 75, holding the Hatch Act's requirement that civil servants refrain from active participation in partisan politics could be justified by the need of efficient public service, and did not violate the First Amendment's guarantees. (Messrs. Justices Black and Douglas dissenting; Messrs. Justices Jackson and Murphy not participating.) In National Broadcasting Co. v. U.S. (1942) 319 U.S. 190, the Court held that the right to free speech did not include the right to use the facilities of radio without a license, as radio is inherently not available to all, and denial of a license on grounds of public interest, convenience and necessity was *not* a denial of free speech. *Cf.* also Bridges v. Wixon (1944) 326 U.S. 135, holding deportation of an alien on basis of membership in communist party, shown by "some of the most tenuous and unreliable evidence ever to be introduced in an administrative hearing" and without any reference to the clear and present danger test as laid down in Bridges v. Calif., *supra* note 10, violated the First Amendment's freedom of speech guarantees. Mr. Justice Frankfurter, joined by Mr. Chief Justice Stone and Messrs. Justices Roberts and Byrnes, dissented.

[15] (1944) 321 U.S. 158. Mr. Justice Murphy dissented in this case and three Justices (Jackson, Frankfurter and Roberts) approved the decision but not the grounds on which the opinion of the Court rested. The view expressed by Messrs. Justices Jackson, Frankfurter and Roberts in their special opinion was that the basis of the Massachusetts judgment, that religious activities may be regulated when they manifest themselves in such collateral and basically secular activity as public solicitation of funds or sale to the public of pamphlet material, was sound. They objected to what they deemed to be the conclusion of the majority that *any* manifestation of religious conviction may be regulated by the state when it involves participation of children, if the children's well-being (health or moral welfare) demands such regulation.

expression of religious conviction, it was constitutionally immune from such restriction. In reply to this contention the Court said:

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider v. State*, 308 U.S. 147; *Cantwell v. Connecticut*, 310 U.S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[16]

As a result of this position taken by the Court, *i.e.*, that each of the First Amendment liberties is on a parity with the others in its constitutional sanctity, it follows that constitutional doctrine developed in cases involving any one of these liberties has significance for the whole First Amendment group. Reference to such doctrine is therefore necessary for an understanding of the freedom of speech and press area into which the Supreme Court has drawn the institution of picketing.

*Detailed free speech privileges*

A number of specific rules as distinguished from basic principles were established in the numerous Jehovah's Witnesses cases.[17] Thus the First Amendment liberties include the use of the streets for the communication of ideas;[18] the mere inconvenience to government or the passing public resulting from the attempts at communication or from the litter involved in the dropping of printed material furnishes no justification for the suppression of communication.[19] These liberties also include, in the absence of direction from the householder which forbids such intrusion on his privacy, the solicitation of an audience at private homes, by knocking on doors and ringing bells.[20]

The right of such communication (in the streets and at the homes) may not be conditioned upon obtaining a license or payment of a li-

[16] *Ibid.* at 164.

[17] These rules were declared to be applicable to all the First Amendment liberties and serve to implement the basic constitutional principles involved.

[18] Lovell v. Griffin (1938) 303 U. S. 444, 452.

[19] Schneider v. State (1939) 308 U. S. 147, 162.

[20] Martin v. Struthers (1943) 319 U. S. 141.

cense tax.[21] The regulation, however, of the time, place, and manner of distribution of ideas for the necessary protection of the peace, good order, and comfort of the community is not denied the state, so long as it is done through a statute "narrowly drawn" to cover real abuses.[22] Proprietary interests, however, in a company-owned town or even in a government-owned housing project carry with them no right to intrude upon First Amendment rights.[23]

The annoyance implicit in the orderly and peaceful exercise of the above-protected privileges must be accepted as part of the price we pay for freedom. The fact that there are places other than the streets available for the distribution of ideas where this distribution could be made without as great civic annoyance is not enough to justify denial of the use of the streets. As the Court put it:

> . . . the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.[24]

As soon as the borderline between communication of ideas and public parading is crossed, however, First Amendment constitutional immunity is lost.[25] Similarly, when the ideas communicated are for the purposes of commercial advertising, there is no constitutional protection from police power control.[26] And when the means or manner of communication and exhortation presents clear and present danger of fighting, violence or riot, such immunity ceases and the police power of the state is allowed its ordinary scope.[27]

*Due process and First Amendment liberties*

The most important basic principle (as distinguished from a mere detailed rule) which has been extended and clarified in this last decade, is found in the defining of the due process requirement of the Fourteenth Amendment when restrictions on First Amendment liberties are at issue. The special sanctity of the First Amendment lib-

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[21] Jones v. Opelika (1943) 319 U.S. 103; Murdock v. Pennsylvania (1943) 319 U.S. 105.

[22] Cantwell v. Connecticut (1940) 310 U.S. 296, 304.

[23] Marsh v. Alabama (1946) 326 U.S. 501; Tucker v. Texas (1946) 326 U.S. 517.

[24] Schneider v. State (1939) 308 U.S. 147, 163.

[25] Cox v. New Hampshire (1941) 312 U.S. 569.

[26] Valentine v. Chrestensen (1942) 316 U.S. 52.

[27] Chaplinsky v. New Hampshire (1942) 315 U.S. 568, in which it was held that "fighting words" have no constitutional protection.

erties as compared with other constitutionally protected liberties has of course been undebatable since the establishment of the "clear and present danger" test in the *Schenck* case.[28] Picketing cases aside, it has been strengthened by general statements of the Court in every First Amendment case since that time. Substantial clarification of, if not *addition* to, this special sanctity was made in the *Bridges* decision handed down at the end of 1941.[29]

This case involved freedom of speech and of the press. It required determining the extent of the state's right to protect its administration of justice[30] in curtailment of asserted First Amendment liberties. A newspaper publisher and a labor leader had been held guilty of contempt for publicizing in intemperate fashion their views concerning the disposition of cases which had not been finally determined. Speaking for the Court, in an opinion which held against the state's regulatory right in the circumstances of the case, Mr. Justice Black first reviewed the development of the "clear and present danger" test from the time of its original announcement in the *Schenck* case. He then traced the strengthening of this principle in the Jehovah's Witnesses cases and in the basic free speech picketing cases and concluded:

> . . . the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial,"[31] . . . it must be "serious," . . .[32]
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> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be *extremely serious* and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[33] (Italics added.)

This is the first explicit statement in a majority opinion that restrictions on speech cannot be justified unless in addition to "immi-

[28] (1919) 249 U.S. 47, 52.

[29] Bridges v. California (1941) 314 U.S. 252, decided the day after Pearl Harbor by a divided Court (5-4).

[30] Specifically, to prevent intimidatory pressure on the judiciary.

[31] Citing Mr. Justice Brandeis, concurring in Whitney v. California (1927) 274 U.S. 357, 374.

[32] Citing *ibid.* at 376.

[33] 314 U.S. at 262.

nent danger of a substantive evil", there is the added factor that the evil in question is "extremely serious".

In view of the fact that this was a 5-4 decision it should be mentioned that the four dissenters[34] manifested no quarrel with this constitutional doctrine; rather they took issue with its application in the case. Concededly, the "evil" in question, namely frustration of impartial justice, was "extremely serious", and they believed that the danger of its occurrence as a result of the "speech" involved was clear and immediate.

The heavier demands of the due process clause of the Fourteenth Amendment when restrictions on First Amendment liberties are at issue, as contrasted with those made in testing restrictions on other liberties, were again emphasized in the *Barnette* case,[35] decided a year and a half after the *Bridges* decision. Here Mr. Justice Jackson, speaking for the Court, says:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteeenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.[36]

It must be said that the placement of the word "grave" in this statement left some room for questioning whether Mr. Justice Jackson was suggesting a retreat from the doctrine of the *Bridges* case. A later case, however, *Thomas v. Collins*[37] which involved labor speech, albeit

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[34] Mr. Chief Justice Stone and Messrs. Justices Byrnes, Roberts and Frankfurter speaking through Mr. Justice Frankfurter.

[35] Board of Education v. Barnette (1943) 319 U. S. 624.

[36] *Ibid.* at 639.

[37] (1945) 323 U. S. 516.

not picketing speech, removed any suspicion that the Court intended that doctrine to be weakened in any degree. In this 1944 case, the Court, speaking through Mr. Justice Rutledge, upheld one Thomas' claim that he was constitutionally entitled to address a meeting on behalf of an organizing drive of the CIO and at such meeting to advise and actually to solicit membership in his organization, without first obtaining an organizer's card from the Secretary of State as required by a Texas statute.

The opinion reiterated the need of showing exceptional circumstances where public safety, morality or health, or some other substantial interest of the community is at stake in order to justify placing any restrictions or ban upon speech. In speaking of permissible limitations on First Amendment liberties it is stated:

> . . . . whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. *Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.*[38] (Italics added.)

After thus strongly reiterating the free speech test of the *Bridges* case, a further basic constitutional principle was laid down. The Court continued:

> . . . It [protected free speech] extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. *"Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts* . . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.[39] (Italics added.)

This is the most direct statement[40] from the Court of the fact that *persuasion to action* as well as fact or opinion stating, is within the area of speech that has constitutional protection against state or congressional interference. As the Court in this case held that the actual

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[38] *Ibid.* at 530.

[39] *Ibid.* at 537, giving a *cf.* reference to two dissenting opinions of Mr. Justice Holmes rendered in Abrams v. United States (1919) 250 U. S. 616, 624 and Gitlow v. New York (1925) 268 U. S. 652, 672.

[40] This was implicit in most of the previous free speech decisions. It was strongly hinted at in the Thornhill and Carlson cases, *supra* note 1. See *infra* note 51 and related text.

solicitation of membership was constitutionally immunized, the statement had the force of decision.

Meantime, in the interval between the *Bridges* case and *Thomas v. Collins,* the Supreme Court had emphasized the line of demarcation between free speech and other communication masquerading as such speech. In *Valentine v. Chrestensen,*[41] the Court had placed the distribution of pamphlet materials for commercial advertising purposes outside the free speech area. And in the *Virginia Power* case[42] it had made clear that an employer's expression to his employees of anti-union sentiments could not, constitutionally, be treated as unlawful unless it was so oriented in a background of antiunion conduct as to take on the aspect of threat of evil consequence rather than that of mere opinion or persuasive appeal. Thus a clear line[43] was drawn between real opinion stating and persuasion on the one hand and coercive practices on the other. As to the latter, the employer was clearly controlled by reasonable statutory regulations. The first two, however, were the employer's constitutional privilege. They stood above and if need be in defiance of any duty which a legislature imposed upon him.

In the period since the adjudication of *Thomas v. Collins,* the only significant First Amendment cases have been contempt cases of somewhat the same general pattern as that of the *Bridges* case. The first, *Pennekamp v. Florida,*[44] was decided in the summer of 1946; the second, *Craig v. Harney,* a year later.[45] The *Bridges* case test was reiterated in the opinion of the Court in both cases. The first of the cases was handed down without dissent although with several concurring opinions. In the second the Court divided six to three. As the dissenters in the latter case believed that free speech doctrines had been stretched to protect freedom of the press to an even greater degree than in the *Bridges* case itself, we may assume that the Court has manifested no indication of weakening its demand for imminent danger of "extremely serious" social evils to justify interference with First Amendment rights.

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[41] *Supra* note 13.

[42] Labor Board v. Virginia Power Co., *supra* note 12.

[43] Reference is made to this line of demarcation in the special concurring opinion of Messrs. Justices Douglas, Murphy and Black in the case of Thomas v. Collins, *infra* note 51 and related text.

[44] *Supra* note 10.

[45] *Supra* note 10.

## II. THE PICKETING DECISIONS

Against this background of basic principles and specific rules established in nonpicketing First Amendment cases and marking out the sacrosanct area of the First Amendment liberties, we shall now place the "free speech" picketing decisions. There are only a handful of them.

### *The basic picketing doctrine*

The foundation cases are of course *Thornhill v. Alabama*[46] and *Carlson v. California*,[47] cases which at least in their general outlines are familiar to all members of the bench and bar. Both cases involved ordinances which, as treated by the Court, banned all picketing.[48] Reaching back to a dictum uttered by Mr. Justice Brandeis (in rendering the Court's opinion in the cases of *Senn v. Tile Layers Union*[49]) which linked the publicizing of a labor dispute by picketing with freedom of speech, the Court found each of these ordinances invalid on its face as violative of the First Amendment guarantees. In a series of historic paragraphs the Court declared that the publicizing of a labor dispute was constitutionally protected speech of public concern;[50] that picketing was inclusive of "nearly every practicable and effective means" of such publicizing; that the possible economic loss to the concern picketed was neither so serious nor so imminent as to justify abridgment of liberty of discussion; that the doctrine that violence and breaches of the peace are inevitable concomitants of picketing was unfounded in fact; and finally that it was no answer to a banning of picketing, *i.e.*, publicizing the labor dispute at the scene of the labor dispute, that publicizing elsewhere was left uninterfered with.

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[46] (1940) 310 U. S. 88.

[47] *Ibid.* at 106.

[48] Actually the Thornbill case ordinance forbade picketing "without just cause or excuse". The Supreme Court however held that this phrase was so vague and without definite meaning as to make the ordinance's interdiction apply potentially to all picketing. *Ibid.* at 98.

[49] (1937) 301 U. S. 468, 478: "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

[50] Thornhill v. Alabama, *supra* note 46, at 102: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period.

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

The *Carlson* case added little but emphasis to the doctrines laid down in the *Thornhill* decision. The argument that the *Carlson* ordinance was different in that it only interdicted picketing "for the purpose of persuading others not to buy merchandise or perform services" was held of no weight. The Court said that such an objective could be found implicit in any and all picketing.[51]

As these cases concerned attempts to ban all picketing, the decisions obviously concluded only that issue. Since, however, general principles were being established, the Court's *caveats* as to what it did not mean to include are important as indicating the limits of these principles as then conceived. Two such statements[52] would seem to merit special attention in that they were drawn on in later picketing cases as supporting those later holdings. The first followed immediately the general pronouncement of the Court that publicizing a labor dispute was within the specially protected area established by the First Amendment.[53] Said the Court:

> It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.[54]

That the "conduct of their affairs" referred to in this statement of the Court means activities *other than speech activities,* seems clearly indicated by what immediately follows, which reads:

> It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.

It would seem obvious that the first paragraph quoted above was introduced as a *caveat* to make clear that the Court was not under-

[51] 310 U. S. at 104. As in the Thornhill case the Court here skirts the question of persuasion as distinguished from mere statement of fact or opinion. It falls short in this case, however, of a square meeting of the question of persuasion to action in its relation to constitutional immunities. The latter was finally done in Thomas v. Collins, *supra* note 37, at 537; see note 39 and related text.

[52] Both in the Thornhill decision, *supra* note 46, at 103, 104, 105.

[53] It follows shortly after the statement that such protection was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society". 310 U. S. at 103.

[54] *Ibid.* Here the Court refers to the dissent of Mr. Justice Brandeis in the case of Duplex v. Deering (1921) 254 U. S. 443, 479, 488.

taking to assimilate with constitutionally protected free speech any nonspeech labor activity, including *nonspeech* aspects of picketing. No other meaning could properly be read into the paragraph when viewed in its context.

The second *caveat* in the *Thornhill* case was appended immediately to the Court's rejection of the once-honored doctrine that picketing inevitably connoted violence. Here the Court warned:

> We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.[55]

The whole paragraph in which this latter *caveat* is found was concerned with the contention of the state's counsel that violence and breach of the peace were uncontrollable when picketing was permitted. The "danger" referred to obviously means danger of physical destruction of property or injury to person through violent conduct.

In viewing the first two picketing free speech cases against the background of the general principles developed in the nonpicketing First Amendment cases, it may be said in summary that they were fitted squarely into the background pattern as developed at that date. The decisions put clearly the basic test of "clear and present danger" of substantial social evil. They rested their conclusion that the anti-picketing ordinances were unconstitutional on the ground that they did not satisfy this test.[56]

*Milk Wagon Drivers Union v. Meadowmoor Dairies*[57]

The first two interdictions of specific instances of picketing to be reviewed by the Supreme Court after the *Thornhill* decision, had their origin in Illinois. Both involved injunctions that banned picketing as a matter of common law rather than because of legislation. They reached decision the same day, just under a year after the foundation cases. The first of these was the much reviewed *Meadowmoor* case. In it a divided Court upheld an Illinois injunction which prohibited a union of milk drivers from picketing stores which handled milk products bought from nonunion milk peddlers, who, as the court put

[55] 310 U. S. at 105.

[56] As previously stated, that these substantive evils must be "extremely serious" to a degree far beyond the normal police power requirement, although implied in previous cases, was not spelled out until the Bridges case, *supra* note 10, and was reiterated in Thomas v. Collins, *supra* note 37, and in Harney v. Craig, *supra* note 10.

[57] (1941) 312 U.S. 287.

it, "departed from the working standards theretofore achieved by the Union for its members as dairy employees".[58] The constitutional propriety of this injunction was rested on the Court's acceptance of what it said was the conclusion of Illinois, namely, that intimidation and threat of violence inevitably were implicit in picketing in this case, because of the extreme personal violence and destruction of property by union members that had previously marked the dispute.[59] Speaking through Mr. Justice Frankfurter the Court said:

> . . . utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.[60]

The opinion thereafter reaffirmed the *Thornhill* case doctrine and added, in comment on the *Thornhill* and *Carlson* cases: "They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases."[61] Reference then was made to the second *caveat* of the *Thornhill* case which was discussed earlier,[62] and the conclusion was reached that this injunction against the Drivers' Union was equivalent to the "statute narrowly drawn", mentioned therein as constitutionally permissible.

The three dissenters[63] took no issue with the majority's conclusion

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[58] *Ibid.* at 291. Mr. Chief Justice Hughes and Messrs. Justices McReynolds, Stone, Roberts, Frankfurter and Murphy constituted the majority. There were two dissents, one written by Mr. Justice Black and concurred in by Mr. Justice Douglas, and the other written by Mr. Justice Reed.

[59] *Ibid.* at 294. This description of Illinois' holding was vigorously challenged in the dissent of Mr. Justice Black. The latter stated: "In essence, the Illinois Supreme Court held that it was illegal for a labor union to publicize the fact of its belief that a cut-rate business system was injurious to the union and to the public, since such publicity necessarily discouraged that system's prospective purchasers. This conclusion of the court was based on the following reasoning: The Fourteenth Amendment and the Due Process Clause of the Illinois Constitution, considered (in some way not made clear) in connection with the unwritten "common law," assure respondent the unqualified right to do business free from all unjustifiable interference; publication and peaceful argument intended to persuade respondent's customers that its methods of doing business were such that they should not buy the dairy's products were therefore illegal interferences; the union's purpose to better working conditions of its members was no justification for its peaceful discussion of the controversy. *Neither the presence nor the absence of violence was considered by the court to be a necessary element in its conclusion. . . .*" (Italics added.) 312 U.S. at 304.

[60] *Ibid.* at 293.

[61] *Ibid.* at 297.

[62] *Supra* note 55 and related text.

[63] Messrs. Justices Black, Douglas and Reed.

that threatening and intimidating conduct could find no shelter in the First Amendment's guarantees. They took vehement exception, however, to the Court's justification of enjoining picketing under the facts revealed by the record in the case. Mr. Justice Black's dissent especially emphasized the fact that the violence referred to in the majority opinion had begun and ended several years earlier and had been unrelated in locale to the picketing itself which at all times had been peaceful.[64] The dissenters believed that the decision in the light of the facts involved made a serious and dangerous inroad on the doctrines announced in the *Thornhill* case and on all First Amendment constistitutional immunities.[65]

In summary of the *Meadowmoor* case, it may be said that its expounded *legal doctrine* that speech which clearly connotes violence is not free speech, negated no constitutional precedent. In applying that doctrine to the facts, however, respect for the "clear and present danger" test is found only in the dissenting opinions.

*A.F. of L. v. Swing*[66]

*Meadowmoor's* companion piece, *A.F.of L. v. Swing*, also involved picketing allegedly "oriented in a background of violence". On procedural grounds, however, this aspect of the case was held not to be before the Court for constitutional review.[67] The sole issue was held to be whether Illinois without violating free speech guarantees could enjoin peaceful picketing of a shop to which none of the shop's employees belonged or wished to belong. The Supreme Court's answer to this question was "no". The opinion concluded with a repetition of

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[64] 312 U. S. at 313.

[65] See, *e.g.*, Mr. Justice Black's concluding sentences (concurred in by Mr. Justice Douglas): "I am of opinion that the court's injunction strikes directly at the heart of our government, and that deprivation of these essential liberties cannot be reconciled with the rights guaranteed to the people of this Nation by their Constitution." *Ibid.* at 317. Also Mr. Justice Reed's conclusion in his dissent: "Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury. Nothing approaching this situation exists in this record and, in my judgment, the action of the Supreme Court of Illinois in prohibiting peaceful picketing violates the constitutional rights of these petitioners." *Ibid.* at 320.

[66] (1941) 312 U.S. 321.

[67] The case was found *not* to have presented this issue but to have declared that under Illinois law (obviously common law, as no statute was involved) all picketing by "strangers" to the employer, *i.e.*, those not in a proximate relationship of employer and employee, was unlawful. *Ibid.* at 325. Mr. Justice Roberts dissented from the conclusion that the issue of picketing "oriented in violence" was not before them. *Ibid.* at 326-329.

the *Senn* case dictum, a dictum incidentally that had been uttered in a case which also involved picketing by nonemployees.[68]

In view of the later *Ritter's Cafe*[69] case it is worth noting the argument by which the Court apparently arrived at its conclusion that the injunction was an unconstitutional limitation on free speech. This seems to be built up as follows: (1) The state's policy as to the "wise limits" of an injunction in an industrial dispute *whether set by statute or by the court's pronouncement of the common law* cannot settle the scope of the Fourteenth Amendment's limitations on the state's regulatory power if a First Amendment liberty is involved. (2) The attempt of the state to limit competition between employers and workers to those who stand in the proximate relationship of employer and employed is constitutionally ineffective, at least as to publicizing a dispute between an employer and workers *in the same industry*[70] who are not employed by him; this because the interdependence of economic interests of all engaged in the same industry has become a commonplace. (3) The protection of the property of such employers therefore is not of sufficient social concern to justify limiting free speech under these circumstances any more than it was in the *Thornhill* case.

Despite the decline in the popularity of the postulates of formal logic it is of course true that the establishment of the converse does not follow from a judicial holding. Yet it must be admitted that the converse often does later become established. And it is certainly suggested by the *Swing* case reasoning that a state's limitation of economic competition between employers and workers which the Court did *not* find to be without rational basis (as it did find the limitation here) would support suppression of publicizing the dispute in the prohibited economic area. However, the significance of such suggestion is reduced when it is remembered that this case antedated the Supreme Court's arrival at the conclusion that justification of state suppression of speech necessitated the imminence of "extremely serious" social evils.[71]

Recent state statutory enactments which illegalize picketing by

[68] In the Senn case, *supra* note 49, the picketing union was endeavoring to force the employment of its members, rather than to unionize existing employees as in the Swing case. Senn was a self-employed artisan who employed no "help". The union wished him to take on union employees.

[69] *Infra* note 87 and related text.

[70] Note the limiting phrase, prophetic of the later Ritter decision, "in the same industry".

[71] This was to be announced in the Bridges case some ten months later. *Supra* notes 10, 29, 33 and related text.

persons other than employees[72] or any such picketing in support of a strike "unless the majority of employees desire it"[73] make the following statement in the *Swing* case especially significant.[74]

> The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, *whether those limits be defined by statute* or by the judicial organ of the state.[75] (Italics added.)

In summary of the *Swing* case it may be said that its exact theory is not stated directly or clearly. The opinion is couched as to its essential paragraphs in an involved style which tends to obscure meaning. As in the *Meadowmoor* case, there is no mention of the "clear and present danger" test. However, by its specific reference to the reasons given by the Supreme Court for its decision in the *Thornhill* case, the *Swing* case opinion can be said to at least suggest respect for the contemporary test set up to mark out the permissible limits on state interference with free speech.

*The 1942 picketing decisions*

In 1942, a little more than a year after the *Swing* and *Meadowmoor* cases, two more[76] antipicketing injunction decisions, each challenged

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[72] *E.g.*, Pa. Laws 1947, Act. 484.

[73] *E.g.*, N. D. Laws 1947, p. 72.

[74] 312 U. S. at 325.

[75] *Cf.* the comment made by the Court in Cantwell v. Connecticut in speaking of legislation "narrowly drawn to prevent the supposed evil" (instead of "a common law concept of the most general and undefined nature"): "Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." (1940) 310 U. S. 296, 307. *Cf.* also the Court's emphasis on the preferred position of a statute in Bridges v. California, *supra* note 10, at 260: "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v. Connecticut* . . . such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' . . . . Cf. *Herndon v. Lowry* . . . . For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation." And note that injunctions vs. specific instances of picketing have been held to be the *equivalent* of statutes narrowly drawn.

[76] In the same month that these were decided two decisions in picketing cases arising in Wisconsin were given by the Supreme Court. Neither has any importance for this discussion. Hotel Employees' Local v. Board (1942) 315 U. S. 437; Allen-Bradley Local v. Board (1942) 315 U. S. 740. Both cases were decided on the assumption that as presented by the court below, they involved the prohibition only of violent picketing.

as unconstitutional interference with free speech, were reviewed by the Supreme Court. In the interim, in the *Bridges* case, previously discussed, the Court had stiffened its former "clear and present danger of substantial evil" test for determining the point at which speech might constitutionally be restricted by the state. Imminence of "extremely serious" social evils now had to be established to justify interference with any of the First Amendment liberties.

The two 1942 picketing cases, *Bakery Drivers Local v. Wohl* and *Carpenters Union v. Ritter's Cafe*,[77] arose in New York and Texas respectively. In each case, the highest state court had approved an injunction banning peaceful picketing of specified industrial concerns. The Supreme Court reversed the New York Court of Appeals case without dissent although with a concurring opinion[78] which was bitingly critical of the main opinion. However, with four Justices vehemently dissenting it affirmed the Texas judgment. These two cases merit detailed attention in our search for the essentials of contemporary picketing constitutional doctrine.

*Bakery Drivers Local v. Wohl*.[79] The *Wohl* case arose out of a controversy in New York between a union of bakery wagon drivers and a group of nonunion peddlers of bakery products. The peddlers for the most part had been employed drivers and members of the union who, under pressure from their former employers, had become peddlers and thereafter "worked under conditions of labor which were inferior in most respects to those of the union". The union tried unsuccessfully to organize the peddlers. It then attempted to induce them to maintain a 6-day week. Failing in this, the union briefly picketed the manufacturing bakers that sold to two particular peddlers, who became the petitioners in the case. The pickets carried signs on which the names of the petitioners appeared, together with the union's complaint about the 7-day week worked by the peddlers and a request for public support for the "attempt to maintain union standards". The union also threatened to similarly picket the retail stores that continued to purchase from the peddlers.[80]

At the request of the peddler petitioners the trial court enjoined the union and its agents from picketing either the manufacturing

[77] (1942) 315 U.S. 769; (1942) 315 U.S. 722.

[78] Signed by three Justices, Messrs. Justices Douglas, Black and Murphy.

[79] (1942) 315 U.S. 769.

[80] The bakeries in promoting the peddler system apparently desired to avoid payments for workmen's compensation insurance and social security. 315 U.S. at 770, 771. The threat to picket the retail stores apparently was not carried out. *Ibid.* at 772.

bakers or the peddlers' customers, the retail stores. The judgment was affirmed without opinion both by the appellate division of the supreme court[81] and by the court of appeals.[82] The United States Supreme Court overruled the court of appeals on the ground that constitutionally protected free speech was involved in the picketing enjoined. Mr. Justice Jackson, speaking for the Court, justified the Court's reversal of the New York decision by a conclusion squarely in line with the "extremely serious evil" aspect of the *Bridges* case test, saying, "We . . . can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise."[83]

What immediately follows the above statement, however, is almost bewilderingly obscure:

> The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue.[84]

Caustic comment about this statement was included in the special concurring opinion signed by Messrs. Justices Douglas, Black and Murphy. They stated:

> If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then

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[81] Wohl v. Bakery and Pastry Drivers, etc. (1940) 259 App. Div. 868, 19 N. Y. S. (2d) 811. Two Judges, however, dissented on two grounds: (1) that this was a labor dispute within the terms of the New York anti-injunction statute (*i.e.*, its "Little-Norris-La Guardia Act") and that injunctive relief was therefore improper; (2) that the union's dispute with the peddlers was a legitimate one under the common law of New York and that enjoining the peaceful picketing to protect this legitimate union interest therefore was improper. *Ibid.* at 868, 19 N. Y. S. (2d) at 812.

[82] Wohl v. Bakery and Pastry Drivers, etc. (1940) 284 N. Y. 788, 31 N. E. (2d) 765.

[83] Bakery Drivers Local v. Wohl, *supra* note 79, at 775.

[84] *Ibid.*

> I think we have made a basic departure from *Thornhill v. Alabama,* 310 U.S. 88 . . . .[85]

Fortunately this particular obscurity of the *Wohl* case reasoning is removed by the clarifying reference made to it in its companion decision, the *Ritter's Cafe* case. The Court therein said:[86]

> The line drawn by Texas in this case is not the line drawn by New York in the *Wohl* case. The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments, the union members would only be following the subject-matter of their dispute.

This reference seems clearly an instance of the familiar judicial process of "This is what we held in such and such previous case", whereby a doctrine not at all obvious in the original case becomes established. It would seem to make clear, which the *Wohl* case itself did not, that it is the Supreme Court's view that constitutionally protected free speech includes the right of a union to follow the subject matter of its dispute, when nonunion delivery of products is at issue, and to picket the users of the objectionable delivery system both on the sending and receiving end.

Whether this approved doctrine of "following the subject matter of their dispute" extends to the right to picket those who receive goods for resale when what is objectionable to the union is not antiunion *delivery* but antiunion *manufacture,* may perhaps be deemed arguable. It would seem that logically it should.

In summary of the *Wohl* case decision it must be said that despite its preliminary lip service to the *Bridges* case test, the opinion itself seems to settle nothing but the rights of the particular parties before it. Its narrow doctrine, however, is salvaged by the Court's clarifying reference to it in its companion case, *Carpenters Union v. Ritter's Cafe.* How completely even this limited doctrine of "following the subject matter of the dispute" and picketing wherever that may lead, is conceded constitutional security, is a question left to speculation.

*Carpenters' Union v. Ritter's Cafe.*[87] One immediate answer to this question is found in the accompanying Texas case, *Carpenters' Union v. Ritter's Cafe.* In this famous decision, the Supreme Court, as

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[85] *Ibid.*

[86] 315 U.S. at 727.

[87] (1942) 315 U.S. 722.

has been stated above, divided 5 to 4 in approving an injunction issued in Texas. The majority, speaking through Mr. Justice Frankfurter, held that the Constitution's freedom of speech guarantees did not prevent Texas from prohibiting two building trades unions to "follow the subject matter of the dispute" (here the construction of a building by nonunion labor) to the extent of picketing a cafe owned and operated by the man for whom the building was being erected.

No question of either the manner of the picketing or the truthfulness of the picketers' statements was involved.

In this case a building contractor (named, in true Shakespearean fashion, Plaster) was erecting a building for the plaintiff Ritter. His contract did not require union labor and nonunion labor was being used. The carpenters' and painters' unions thereupon picketed a cafe owned and operated by Ritter. Their signs read at first merely that the cafe was unfair to their union but later were modified to state specifically their grievance against Ritter.[88] Upon the establishment of the picket line, the Cafe's employees who were union men quit. The union drivers refused to deliver supplies and members of organized labor groups and other labor sympathizers refused to patronize. A sixty per cent curtailment of Ritter's business resulted.

Texas enjoined this picketing, holding that it ran foul of local antitrust laws in that it was an attempt "to create restrictions in the free pursuit of business". The unions challenged the injunction as violating the freedom of speech guarantees of the United States Constitution.

Unfortunately the Supreme Court's conclusion that the injunction was constitutionally issued is the only completely clear part of the *Ritter* case opinion. Since, however, this case is of primary importance to the project undertaken in this discussion, presentation of the decision's supporting grounds will be undertaken.

Digesting a judicial opinion is often an extra-hazardous task. In this case as in the *Swing* case, it is definitely so. Therefore, lest the Court's intended meaning be inadvertently distorted, the points will be presented fully. They seem to be built up as follows:

(1) The state's right to impose some restriction upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted.

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[88] The signs read: "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painter Union 130 . . . American Federation of Labor." 315 U. S. at 723.

(2) Petitioners herein claim that constitutional immunities of peaceful picketing prevent any regulation thereof by a state in the general interest and render the state powerless to confine the use of this industrial weapon within reasonable bounds.

(3) The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved (citing the *Thornhill* case!).

(4) Nor is it lost because it takes the form of picketing even when it does not concern a dispute between the employer and his own employees.

(5) Texas has decided that its general welfare would not be served if unions involved in a controversy with a nonunion contractor were permitted *"to bring to bear the full weight of familiar weapons of industrial combat* against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder." (Italics added.)

(6) This situation does not present a limitation on speech in circumstances where there is "an interdependence of economic interest of all engaged in the same industry" (citing the *Swing* case), nor

(7) Is the line drawn by Texas that which New York drew in the *Wohl* case where, since the dispute concerned the conditions of delivery to retailers, the business of retailers was *directly involved in the dispute.*

(8) Recognition of peaceful picketing as an exercise of free speech does not imply that the state must be without power to confine the sphere of communication to that directly related to the dispute.

(9) Confinement of picketing to the area of the industry in which it arises *leaves open to the disputants other traditional modes of communication.*

(10) To deny to the states the power to draw this area-of-industry line for permissible picketing would be to write into the Constitution the rule that *no* line could be drawn.[89]

(11) This would compel states to allow disputants in industrial controversies to conscript neutrals having no relation to either the dispute or the industry in which it arose.

(12) Forbidding the conscription of neutrals represents the prevailing and probably the unanimous policy of the states.

[89] *Ibid.* at 728: "To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing."

(13) To hold that the Constitution forbids Texas to draw the line which it has drawn in this instance for permissible picketing "would be to transmute vital constitutional liberties into doctrinal dogma".

Lastly,[90] quoting directly from the *Thornhill* case, "We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants."[91]

A number of matters strike one's attention in surveying the development of the above argument. These will be listed with brief comment.

First, there is a repeated assimilation of picketing not with free speech but with weapons of economic warfare. In this respect the opinion is reminiscent of Teller's spirited criticism of the Supreme Court's first linking of free speech with picketing, a step which he believed was a product of unsound thinking that was bound to have adverse social results.[92]

Second, there is a relating of picketing to free speech in a way which seems quite the reverse of its treatment in the basic free speech picketing cases. Those cases[93] did not hold that the constitutional right to communicate *"is not lost merely because a labor dispute is involved"*. Rather they held that constitutional protection of communication is *gained because* a labor dispute is involved. They made clear moreover that whatever might be the individual right under the Constitution to communicate *any* idea, the right of communication of the facts of a labor dispute was securely rooted in the First Amendment because it meant the publicizing of a matter *of public concern*.[94]

Third, there is an insistence that denial to Texas of the right to stop the picketing at issue in this case would be equivalent to denying a state the right to stop picketing "anywhere under any circumstances

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[90] *Ibid.* at 728.

[91] Quoted from (1940) 310 U. S. 88, 103.

[92] Teller, *loc. cit. supra* note 6.

[93] Thornhill v. Alabama; Carlson v. California, both *supra* note 1.

[94] "The freedom of speech and of the press guaranteed by the Constitution embraces *at least* the liberty to discuss publicly and truthfully all matters of public concern . . . . labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government . . . ." (1940) 310 U. S. at 101, 103.

directed at any industrial controversy". This assuredly is an uncalled-for moving from the specific to the general. Had the Court held that Texas was unconstitutionally restricting free speech in prohibiting this particular instance of picketing it would no more have settled the larger question than did the *Swing* case decision[95] when on constitutional grounds it denied Illinois the right to stop a union from picketing a shop with which the shop's own employees were not in dispute.

The well-worn straw man device seems present here.

Fourth, there is what seems to be a clear *misuse* of the quotation from the *Thornhill* case which forms the peroration of the majority opinion's argument. This quotation, as mentioned in the discussion of the *Thornhill* case itself,[96] was followed by a paragraph that made its boundaries clear. The limiting of speech activities was not included but was *excluded* from the right to confine the area of industrial conflicts which the *Thornhill* case indicated was a reserved power of the states that was not circumscribed by the First Amendment. Removed from its context, the paragraph seems to support a conclusion which was the reverse of that indicated in the *Thornhill* case itself.

Fifth, there is a demoting of picketing as a free speech institution. This is the most significant aspect of the *Ritter* case. The majority opinion, while depriving picketing of constitutional protection under the circumstances of this case, apparently deemed the other "traditional modes" of communication of the facts which the pickets were not permitted to publicize, to be constitutionally sacrosanct. Indeed the opinion clearly implied, although it did not directly *hold*,[97] that a basic excuse for limiting the picketing was the fact that the other "traditional modes" of communication remained intact.

Up to this point, despite the tenor of the discussion in the *Ritter* case it would be possible to work out an analysis of the decision itself which could square with the established free speech constitutional test, *i.e.*, that there must be "imminent danger" of "extremely serious" evils to justify suppression of protected speech. This of course would necessitate the acceptance of the Court's economic analysis of the facts and also would necessitate charging the Court with the conclusion that picketing in this instance spelled imminent danger of "extremely serious" evil to society.

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[95] Also written by Mr. Justice Frankfurter. *Supra* note 66.

[96] *Supra* notes 53, 54, and related text.

[97] Since the injunction reviewed was not directed at other modes of expression it could not have actually adjudicated that question.

With these assumptions the apologia of the *Ritter* case on orthodox free speech grounds would be as follows: (1) it produces an "extremely serious" and grave evil to society to permit labor organizations to carry industrial warfare to neutrals; (2) Ritter was a neutral in respect to this labor dispute; (3) the union's publicizing of its grievance against Ritter would tend to persuade the public not to patronize Ritter and to persuade other workers not to serve Ritter; (4) this presented clear and present danger that the grave evil of conscripting Ritter, the neutral, would occur if publicizing the union's grievances were permitted; (6) therefore, communication of the union's case against Ritter could be suppressed without violating the Constitution's free speech guarantees.

However, the *Ritter* case decision, although resting on the right of Texas "to confine the area of industrial disputes" and "to prevent the conscripting of neutrals", justified the suppression of communication by picketing, at least partly, by the fact that "other traditional modes of communication" were left open to the disputants.[98] Thus the Court while reiterating that picketing is a phase of the constitutional right of free utterance seems to come to a conclusion in the decision itself that makes picketing a stepchild in the First Amendment family. The tone of the majority opinion moreover even suggests illegitimacy. Here we have a major departure from established constitutional doctrine.

It is well at this point perhaps to remind ourselves again that the Supreme Court in its *Thornhill* decision brought picketing into the inner sanctum of the First Amendment's protected areas because picketing was more than a private right of the picket to express his views; because it was a presentation of matters of public concern, discussion of which was essential to the very functioning of our democracy; because its techniques embraced all the practicable effective means whereby those interested might enlighten the public.

It is well also to recall that the *Thornhill* decision emphasized the fact that picketing was not to be deemed susceptible of suppression

[98] This point is mentioned by Mr. Justice Black at the conclusion of his dissent (concurred in by Messrs. Justices Douglas and Murphy, Mr. Justice Reed writing a separate dissent). He points out that the majority opinion defended the suppression of picketing on the ground that other methods of communication are left open to the parties in dispute. He then reminds the Court of what it had said in the Schneider case (and frequently reiterated in subsequent cases): "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. *Schneider v. State, supra,* 163." 315 U.S. at 732.

because it was communication taking place at the scene of a labor dispute.[99]

In the face of these basic picketing speech principles it would seem impossible to conclude that there could be a reconciliation of the *Ritter* case opinion with previously established constitutional doctrine. It is significant that not even a gesture was made in the opinion of the Court toward fitting the Court's conclusions into the orthodox free speech pattern.

Both dissents[100] protested the decision. Both expressed belief that to prohibit picketing because it might result *in injury to a particular person or business* (as they found was here the case) was contrary to the very essence of the *Thornhill* decision, in which it was decided that such a reason could not justify curtailment of free expression. Both evidenced the conviction that a substantial loss of free speech protection was involved in the majority opinion.

Of perhaps greater significance is the fact that both dissents made clear what these four justices believed to be the *only permissible* type of regulation to which picketing constitutionally may be subjected; namely, that which is directed at coercive practices, abuses of the patrol process, and the securing of accuracy and truth in the statements made by the pickets. Said Mr. Justice Black:[101]

> It is one thing for a state to regulate the use of its streets and highways so as to keep them open and available for movement of people and property;[1] or to pass general regulations as to their use in the interest of public safety, peace, comfort, or convenience;[2] or to protect its citizens from violence and breaches of the peace by those who are upon them.[3] It is quite another thing, however, to "abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature . . . ."[4] The court below . . . barred the petitioners from using the streets to convey information to the public, *because of the particular type of information they wished to convey.* [Italics added.] In so doing, it directly restricted the petitioners' rights to express themselves publicly concerning an issue which we recognized in the *Thornhill* case to be of

[99] Reference was made specifically in the Thornhill case to the previously established free speech doctrine that liberty of expression in appropriate places was not to be abridged on the plea that it could be exercised in some other place. (1940) 310 U. S. 88, 106.

[100] One presented by Mr. Justice Black with Messrs. Justices Douglas and Murphy concurring; the other presented by Mr. Justice Reed.

[101] 315 U.S. at 731. Mr. Justice Black annotated his statements according to the indicated numerals: 1) Schneider v. State (1939) 308 U.S. 147, 160; 2) Cantwell v. Connecticut (1940) 310 U.S. 296, 306-307; 3) Thornhill v. Alabama (1940) 310 U.S. 88, 105; 4) Schneider v. State (1939) 308 U.S. 147, 160.

public importance. It imposed the restriction for the reason that the public's response to such information would result in injury to a particular person's business, a reason which we said in the *Thornhill* case was insufficient to justify curtailment of free expression.

Mr. Justice Reed put it as follows:

Until today, orderly, regulated picketing has been within the protection of the Fourteenth Amendment. Such picketing was obviously disadvantageous to the business affected. In balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the burdens of the picket line. It was a limitation on state power to deal as it pleased with labor disputes; a limitation consented to by the state when it became a part of the nation, and one of precisely the same quality as those enforced in *Carlson, Thornhill* and *Swing*.

We are not here forced, as the Court assumes, to support a constitutional interpretation that peaceful picketing "must be wholly immune from regulation by the community in order to protect the general interest." We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required . . . .[102]

In addition to the attack upon the opinion of the Court on the basis of broad principles involved, both dissents also took issue with the majority's conclusion that Ritter was a neutral and not "involved" in the dispute of the Carpenters. They challenged the Court's interpretation of the facts, *i.e.*, its analysis of the ramifications of the dispute itself. Here Mr. Justice Black said:

Whether members or non-members of the building trades unions are employed is known to depend to a large extent upon the attitude of building contractors. Their attitude can be greatly influenced by those with whom they do business . . . . Whatever injury the respondent suffered here resulted from the peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building. This information, under the *Thornhill* case, the petitioners were privileged to impart and the public was entitled to receive.[103]

Similarly, Mr. Justice Reed stated:

By this decision a state rule is upheld which forbids peaceful picketing of businesses by strangers to the business and the industry of which it is a part . . . . This rule is applied, in this case, even though the picketers are publicizing a labor dispute arising from a contract to

[102] 315 U. S. at 738.

[103] *Ibid.* at 730.

> which the sole owner of the business picketed is a party. Even if the construction contract covered an attached addition to the restaurant, the Court's opinion would not permit picketing directed against the restaurant. To construe this Texas decision as within state powers and the *Wohl* decision as outside their boundaries, plainly discloses the inadequacy of the test presumably employed, that is, the supposed lack of economic "interdependence" between the picketers and the picketed.[104]

In summary of the *Ritter* decision it must be said that five members of the Court as then constituted[105] subscribed to a decision that seemed to set picketing apart from other modes of communication. While reiterating that it was a phase of free speech they permitted a state, in the interest of "confining the area of economic competition" between employers and employees, to set limitations on picketing which apparently they did not feel it was free to impose on the "traditional modes of free speech". They thus suggested a constitutionally inferior type of speech, *i.e.*, free speech—but not so free.

Four members of the Court, in contrast, made clear their belief that this decision was a denial of basic constitutional doctrine and an unwarranted intrusion on important civil liberties. They indicated it as their view that the suppression of peaceful and truthful picketing for *the protection of any private business* was contrary to the essential doctrine of the *Thornhill* case. More important perhaps than any of the foregoing was their clear spelling out of what they deemed to be the only constitutionally appropriate limits upon picketing speech, namely, its regulation for the promoting of the *public* interest and safety, convenience and comfort, freedom from breach of the peace, free passage in its streets, as well as public protection from the publicizing of dishonest statements.

They further made clear that even were it proper to suppress picketing in order to "reasonably confine the area of economic competition" (which they emphatically denied) the line drawn in this case was, in their opinion, unreasoned, illogical and indefensible.

*Cafeteria Employees Union v. Angelos*[106]

A year and a half was to pass before another picketing case reached the Supreme Court. Two cases, both originating in New York, were

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[104] *Ibid.* at 739.

[105] Mr. Chief Justice Stone and Messrs. Justices Roberts, Byrnes, Frankfurter and Jackson. The first three named are no longer on the bench.

[106] Cafeteria Union v. Angelos together with Cafeteria Union v. Tsakires (1943) 320 U. S. 293.

then disposed of in one opinion, *Cafeteria Employees Union v. Angelos*. Here injunctions had been granted which interdicted a union from picketing two cafes which were being operated by their owners without employed assistance. The New York Court of Appeals in a 4-3 decision had affirmed the judgments granting these injunctions on the grounds that: there was no labor dispute involved since there were no employees in either cafeteria and the picketers' "unfair" signs were therefore deliberately false and misleading; the picketers had been insulting and had conducted themselves illegally in that some of them had stated that "patronage of the cafes would aid the Fascist cause" and that the food served was "bad".[107]

The Supreme Court, speaking again through Mr. Justice Frankfurter, reversed the New York court and found the picketing in these cases protected by the Constitution's free speech guarantees. The opinion first quoted the often-cited *Senn* case dictum:[108] "members of a union might, 'without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranted by the Federal Constitution.'" Then followed this somewhat astonishing statement:

> Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner *regardless of the area of immunity as defined by state policy*.[109] (Italics added.)

In support of this statement the *Swing* and *Wohl* cases were cited. Mention of the *Ritter* case was conspicuously lacking.

The Court found that the use of such words as "unfair" and "Fascist" was merely loose language and not "falsification of facts".

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[107] The cafeterias at one time had been operated with employed nonunion help. Thereafter they had drawn up articles of partnership which brought the former employees into the status of partners. The union had contended in the trial court that these articles of partnership were a fraud and that most of the so-called owners who were the previous nonunion employees were actually in the same position as when they had served openly as employees. The union alleged that this fictitious partnership had been resorted to in order to take advantage of New York's rule that self-employed business men who did not have any employed assistance legally could not be pressured by a union to employ workers. The trial court had found against the union's contentions. See Angelos v. Mesevich (1943) 289 N. Y. 498, 46 N. E. (2d) 903.

[108] 320 U. S. at 295, quoting (1937) 301 U. S. 468, 478.

[109] 320 U. S. at 295.

The incidents of abuse through insult were also found to be too "episodic and isolated" to justify suppressing the right of free speech. Reference was then made to the *Meadowmoor*[110] case, the Court stating of it:

> But we also made clear "that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of disassociated acts of past violence."[111]

In summary of the *Angelos* decision it may be remarked first that the actual economic situation at issue was identical with the one which had produced the often-repeated *Senn* case dictum, *i.e.*, an operating owner picketed by a union in an endeavor to induce him to cease self-operation and to employ union assistants. To be mentioned also perhaps is the fact that the war was then grimly with us and our immediate national security rested to a substantial degree on labor's determined efforts. It is probable that all thinking was influenced by this situation. It remains that the general tone of this decision suggested the reinstatement of the basic *Thornhill* case doctrine.

*Cafeteria Employees Union v. Angelos* is the latest case in which the Supreme Court has rendered a full opinion on picketing. Over four years have passed without any additions from the final authority to the free speech picketing picture.

*Segregating the free speech in picketing*

The Court may hand down one or more picketing decisions during this term. Whether the *Ritter* case majority view will be reinforced or will be replaced by that expressed by the four *Ritter* case dissenters, is obviously an open question. The conspicuous omission of reference to the *Ritter* case in the later *Angelos* opinion, together with the broad policy statement therein, quoted above, could ease the complete banishing of the *Ritter* case doctrine should the Court, as seems probable, desire this.

The vigor of the conviction expressed by the four dissenters in the *Ritter* case that it was wholly out of line with established constitutional doctrine and presented a dangerous limitation of a basic civil liberty, suggests that these Justices in adjudicating future picketing cases will adhere to the views therein expressed. It is important to note also that the civil liberty views which these four dissenters manifested

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[110] *Supra* note 57.

[111] 320 U. S. at 296.

are views which at least one of the Justices appointed to the Supreme Court since that decision has indicated that he himself maintains.[112]

The importance to everyone of the First Amendment liberties suggests the desirability of an early rehabilitation of picketing. It would seem a hazardous thing to term picketing "an aspect of free communication" and then to degrade it as such by restrictions foreign to free speech generally. A doctrine which establishes a species of second-rate free speech might furnish a convenient wedge of intrusion into the entire First Amendment's protected area. The basis of the special constitutional protection accorded the First Amendment liberties rests on the conviction that the last thing that should be interfered with in a democracy is the expressing of any and all views, at least on matters of public importance,[113] and the soliciting of support for such views. Short of imminent danger of "extremely serious" social evil, private inconvenience and economic loss and even a considerable degree of social discomfort are deemed not too great a price to pay for the advantages to our democracy of competitive free speech.

It may be that one of the things which the Court most helpfully might do when clarifying the constitutional status of picketing is to spell out the fact that picketing is a complex institution, in part *speech,* and as such entitled to its place in the free speech protected area, and in part a coercive intramural disciplinary labor weapon. The latter of course has no connection with First Amendment liberties. And the effectiveness of picketing more often than not rests upon this latter aspect.

There have been several references made by individual justices to the difference between coercion and opinion stating or persuasive appeals. Mr. Justice Douglas joined by Messrs. Justices Black and Murphy in a brief concurring opinion in the case of *Thomas v. Collins* described the dividing line between speech and coercive action in the following words:[114]

> . . . once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true

[112] Reference is made to Mr. Justice Rutledge, who wrote the Court's opinion in Board of Education v. Barnette, *supra* note 9, and also the Court's opinion in Thomas v. Collins, *supra* note 37, and who signed the opinion of the Court in the recent free speech case of Craig v. Harney, *supra* note 10. Mr. Justice Burton, another addition to the Court since the Ritter case, also signed the opinion in Craig v. Harney.

[113] Including of course religious views.

[114] 323 U. S. at 543.

> whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses.

In a concurring opinion in the *Wohl* case, speaking through Mr. Justice Douglas, the same Justices referred specifically to the fact that picketing was more than speech:[115]

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.

The paragraphs which follow the above quotation suggest that Mr. Justice Douglas was thinking here especially of the patrol aspect of picketing rather than of the intramural picketing discipline of unions,[116] although the latter may also have been in his mind.

As a matter of fact, actual physical patrol is not the most important nonspeech ingredient of the picketing institution. It does not always necessitate actual patrolling, *i.e.*, the presence of a picket line, to give picketing its intra-labor coercive weapon effect. An imaginary picket line, known in labor circles as a "phantom" or "invisible" picket line, suffices for such purpose, and actually is often used when manufacturing plants are involved and it is deemed unprofitable to waste pickets on an appeal to a nonexistent public. Here notification is made to other sympathetic labor organizations of the fact that picketing of the plant has been "declared". This calls union disciplinary control promptly into action. Union members are ordered not to deliver goods to and from the picketed establishment and not to patronize it directly or to buy its products elsewhere. All this is of course implicit in patrol picketing as well. Equally of course all this is *something quite aside from picketing's free speech aspect.*

This is not to suggest that there is anything improper in such union disciplinary action. It is to suggest however that this aspect of picketing obviously does not stand rooted in the First Amendment. The state's right to regulate this aspect of picketing is similar to its power of regulation over other concerted activities that do not have the special constitutional immunity granted the First Amendment rights. This means that statutes expressive of the state's regulatory power directed, for example, at the union's right to *force* its members

[115] 315 U. S. at 776.

[116] *Ibid.*

to respect picket lines and to discipline them for violating rules flowing from the establishment of a picket line, would be subject only to the general "rational basis" test required by the Fourteenth Amendment's due process clause.

On the other hand if union members, acting on principle and not on pain of discipline from their union, will not cross a picket line when requested by fellow workers not to do so, they are "persuaded" in just as real a sense as any other nonunion member of the public. The picket's right to state his case and to appeal for such sympathetic response is the very essence of the *speech* aspect of picketing. Interference with this aspect of picketing, like interference with all other protected speech, would seem to be proper only under "compelling circumstances" when "extremely serious" social evils are imminently threatened.

It is only this latter aspect of picketing, of course, that the Court assimilated with the First Amendment liberties when it handed down the *Thornhill* decision. As has been stated, this was implicit in the first *caveat* of that case.[117] It may be doubted however that this has been made sufficiently clear. The frank dissecting of picketing to separate out its nonspeech aspects and to label them as such might aid in the rehabilitation of picketing constitutional doctrine. It is not unlikely that an underlying objection to the intra-union "coercive weapon" aspects of picketing has inclined some Justices who otherwise take a firm position for the protection of First Amendment liberties, to draw lines that seem logically indefensible in picketing cases.[118]

Assuming the reinstatement of the real speech aspect of picketing, *i.e.*, picketing proper,[119] as an unqualifiedly legitimate member of the First Amendment family, we could then hope for an early correction

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[117] *Supra* note 96, and related text.

[118] This is clearly manifested in some of the recent state cases which enjoin peaceful picketing. *E.g.*, Markham & Callow v. International Woodworkers (1943) 170 Ore. 517, 135 P. (2d) 727; Bloedel Donovan Lumber Mills v. International, Etc. (1940) 4 Wash. (2d) 62, 102 P. (2d) 270; Swenson v. Seattle Central Labor Council (1947) 27 Wash. (2d) 193, 177 P. (2d) 873. With judicial recordation of the dissection of picketing suggested above we might find Mr. Justice Jackson inclined to repeat and apply for the protection of picketing speech proper the words which he used not long ago in his concurring opinion in the nonpicketing labor speech case of Thomas v. Collins: "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." 323 U. S. at 545.

[119] Distinguished from the "union control" weapon aspect of picketing.

of a now frequent practice of state supreme courts. This is the practice of approving as constitutional the enjoining of peaceful picketing for an "unlawful labor objective",[120] without any consideration of the seriousness of the social evil which the particular objective connotes.

*Picketing for "unlawful objectives"—state cases*

All states now hold to the view that concerted labor activities may be directed only toward "lawful labor objectives". California first established itself some 40 years ago in the opposite position, as to both the right to strike and the right to boycott. The supreme court then held in a 6-1 decision[121] that both such rights were absolute. This doctrine however was quietly but definitely abandoned in our state and the lawful objective doctrine accepted in its place, in a series of cases adjudicated between 1940 and 1945.[122]

The line of demarcation between lawful and unlawful objective has been drawn by the state courts mostly as a pronouncement of the state's common law rather than under direction of statute. As in other fields of common law, there has been substantial difference of rule from state to state as to what is a lawful objective.

Until the assimilation of picketing with constitutionally protected free speech, the states, to the extent that they permitted picketing at all, subjected the right to picket to the same regulatory control that they imposed upon the right to strike or boycott. All were "concerted activities of labor" and all were limited by the established policies of the state. After the *Thornhill* case and subsequent United States Supreme Court decisions, the state courts of necessity re-

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120 *E.g.*, Fashioncraft v. Halpern (1943) 313 Mass. 385, 48 N. E. (2d) 1; Silkworth v. Local 575 (1944) 309 Mich. 746, 16 N. W. (2d) 145; Empire Storage & Ice Co. v. Gihoney (Mo. Sup. Ct. Sept. 8, 1947) 20 L. R. R. M. 2584; Peters v. Central Labor Council (1946) 42 Ore. 715, 169 P. (2d) 870; International Ass'n Mach. v. Downtown Emp. Ass'n (Tex. Civ. App. 1947) 204 S. W. (2d) 685; but *cf.* Park & Tilford Corp. v. Int. Brotherhood of Teamsters (1946) 27 Cal. (2d) 599, 165 P. (2d) 891, in which the supreme court of California upheld the union members' constitutional right to picket (as freedom of speech) even though concededly this might induce the employer, for reasons of business profit, to commit an unlawful act. (Here, the requiring of his workers to join a union not representative of his employees, which was forbidden by the National Labor Relations Act.)

121 Parkinson v. Building Trades Council (1908) 154 Cal. 581, 98 Pac. 1027. At this time picketing had not been held a lawful activity in California.

122 McKay v. Retail Auto Salesmen's Union (1940) 16 Cal. (2d) 311, 106 P. (2d) 373; Smith Metropolitan Market v. Lyons (1940) 16 Cal. (2d) 389, 106 P. (2d) 414; Steiner v. Long Beach Local (1942) 19 Cal. (2d) 676, 123 P. (2d) 20; James v. Marinship (1944) 25 Cal. (2d) 721, 155 P. (2d) 329; Bautista v. Jones (1944) 25 Cal. (2d) 746, 155 P. (2d) 343.

examined their position in picketing cases in the light of these decisions. Thus the Minnesota supreme court in 1943,[123] under the force of these decisions, reversed its earlier position based upon "state policy", and upheld the right of a union to picket with the objective of inducing a building contractor to stop working in his own business and to employ labor instead.[124]

In general, however, except when confronted with a controlling Supreme Court decision covering an identical factual situation, the state courts have continued to apply their "unlawful objective" doctrine to picketing cases. Without doubt they have been encouraged to do so by the problematical constitutional status of picketing and by the lack of any clear test for determining the extent of the state's regulatory rights. Especially responsible, unquestionably, is the *Ritter's Cafe* case which both in its tone and in the logically difficult line of its decision proper encouraged state courts to enforce their own picketing rules and chance an overruling by the United States Supreme Court.[125]

The supreme court of Massachusetts put the matter very bluntly when it stated recently: "We do not understand, however, that that court [United States Supreme Court] has held that picketing in support of an unlawful objective cannot be enjoined. . . . Until there is an unequivocal pronouncement to that effect we adhere to the view of the law laid down in our own decisions."[126]

If, as seems at least highly probable, picketing speech is restored to full status in the First Amendment group of liberties, this practice of the state courts will stand out as indefensible. Unless the achievement of the objective which the Court finds *unlawful* would be pro-

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[123] Glover v. Minneapolis Building Trades Council (1943) 215 Minn. 533, 10 N. W. (2d) 481.

[124] This business man employed union labor for all work except furnace installation and sheet metal work which he did himself. Under the common law of Minnesota, as in the state of New York, union activities directed against him to force him to cease working in his own business were *unlawful.*

[125] Even in cases which seem clearly within the factual situations covered by other supreme court of California upheld the union members' constitutional right to picket 311 Mich. 489, 18 N. W. (2d) 905, enjoining a union from picketing a funeral home whose partner-owners had breached their contract with the union to which they had contracted to belong (subject to a year's notice of termination). The facts make this case hard to distinguish in principle from the Angelos case. Also Empire Storage & Ice Co. v. Giboney (Mo. Sup. Ct. Sept. 8, 1947) 20 L. R. R. M. 2584, enjoining picketing as unlawful restraint of trade (facts similar to those of the Wohl case, *i.e.,* union picketed an ice company which sold to nonunion peddlers).

[126] Colonial Press v. Ellis (1947) ..... Mass. ....., 74 N. E. (2d) 1, 4.

ductive of "extremely serious" social evil, how may the state constitutionally prohibit picketing speech for such objective? Such suppression of picketing would violate the special due process requirement which, the Supreme Court has emphasized and reiterated, is brought into play when the state interferes with First Amendment liberties.[127]

An excellent example of such unjustifiable suppression of free communication is found in the Massachusetts case just mentioned.[128] In that case the state's supreme court affirmed the granting of an injunction which had been sought by a printer and distributor of books. This interdicted the local union to which his employees belonged both from striking and *picketing* for the objective of obtaining a renewal of a maintenance of membership clause in a collective agreement. The court did this on the ground that under Massachusetts common law a strike for a closed shop was a strike for an *unlawful* strike objective; "maintenance of membership" was similarly an unlawful strike objective since it also was a union security device albeit of lesser degree; picketing in support of an unlawful strike objective could be enjoined without violating the United States Constitution's guarantee of freedom of speech.

The question of the right of Massachusetts to enjoin the strike itself is beyond the limits of our discussion here. It may be remarked in passing that the constitutional propriety of such a regulation has not yet been passed upon by the Supreme Court of the United States. As to the picketing, if we "dissect" the picketing institution as suggested in earlier paragraphs, then we must concede to Massachusetts the constitutional right to forbid and penalize all nonspeech aspects of the picketing, subject only to the need of satisfying the "rational basis test" that is applied to ordinary police power measures when subjected to constitutional review.[129]

The suppression of the real *speech* aspect of picketing for this objective, however, is another matter. This would include of course both a statement of the union's grievance (here the refusal of the employer to renew the maintenance of membership clause in his collective agreement with his workers) and an appeal for support both

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[127] See *supra* notes 29-33, 35-38 and related text.

[128] Colonial Press v. Ellis, *supra* note 126.

[129] This would mean that so far as the Constitution is concerned, the entire disciplinary control union machinery in support of the picketing could be enjoined and, if the legislature saw fit to do so, its coercive use might be subjected to penal sanctions, if such action by the state could be deemed reasonably necessary for the public welfare.

by the general public[130] through withdrawal of patronage and by sympathetic[131] workers through withdrawal of services. Suppression of this picketing speech, like suppression of all other forms of free speech, should have to meet the basic freedom of speech test, *i.e.*, the suppression would have to be justified as necessary to prevent imminent danger of "extremely serious" social evils.

The latter would seem impossible to establish without wiping out all distinction between the regulatory power of the state when First Amendment liberties are involved and its power of regulation absent the implication of such liberties. Closed shop contracts themselves were not deemed unlawful as a matter of common law in Massachusetts as in some states. Only labor's concerted effort to obtain such security against the employer's choice was interdicted as unlawful.[132] The advocacy of a union security clause was therefore not the advocacy of an *illegal institution* as judged by Massachusetts law. Freedom of speech in matters of industrial controversy would seem to have reached the vanishing point if union members under such a state of local law constitutionally could be prohibited from stating their

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130 Including of course members of labor organizations who are part of the buying public.

131 *I.e.*, acting through choice and not on pain of discipline.

132 This principle was laid down in Fashioncraft v. Halpern, when the court said: "Whatever advantage might in general accrue to trade unionism by the acquisition of a closed shop arrangement with an employer, there is not sufficient relationship between the aim sought and the self interest of the strikers to justify the intentional infliction of harm on another. A strike for a closed shop has, accordingly, been held a strike for an unlawful purpose . . . .

"On the other hand, agreements voluntarily made between an employer and a union calling for a closed shop have always been recognized and enforced in this Commonwealth . . . . In this Commonwealth a strike for a closed shop is for an unlawful labor objective . . . And peaceful picketing in furtherance of such strike may be enjoined." *Supra* note 120, at 388, 48 N. E. (2d) at 3.

It is of interest to compare this with the statement of the supreme court of California in McKay v. Retail Auto Salesmen's Union:

"The interest of the defendant unions in the present controversy is direct and obvious. The closed union shop is an important means of maintaining the combined bargaining power of the workers. Moreover, advantages secured through collective action redound to the benefit of all employees whether they are members of the union or not, and members may resent nonmembers sharing in the benefits without liability for the obligations. Hence a closed shop policy is of vital importance in maintaining not only the bargaining power *but also the membership of trade unions.* These considerations serve to justify the defendants' conduct as much against the complaint of nonmember employees as against the complaint of an employer." (Italics added.) *Supra* note 122, at 326, 106 P. (2d) at 381.

cause and soliciting support by purely persuasive effort shorn of intramural coercive union support.[133]

A slightly different situation is presented in those states which have specifically outlawed the closed shop institution in terms that make such union contracts void and unenforceable.[134] The enjoining of picketing for such an objective, however, would seem challengeable in these states on the same basis as in the Massachusetts situation just discussed. The propriety of such enjoining would have to rest on the fact that "extremely serious social evils" would result from the creating of such a void and unenforceable contract.

The same rule again would seem properly to control in states having statutes[135] that in addition to declaring closed shop contracts unenforceable—or in lieu thereof declare them "illegal"—and permit either directly or by implication the several remedies of injunction and damages to anyone suffering from their operation.

A further and more problematical question is raised by the states which not only declare closed shop contracts illegal but also make their creation or enforcement a penal offense punishable by imprisonment as well as fine.[136] Now picketing for such objective takes on the appearance of urging the public to put pressure on the employer to commit a crime. The state's right to make the contracting for a closed shop a crime would seem clearly to rest merely on ability to satisfy the *"rational basis"* test. It follows that, if once such contracting has been made a crime, picketing an employer with a placard stating that "*X* does not grant a closed shop—Do not patronize" automatically loses constitutional immunity, then the special test which the Court

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[133] Another very recent Massachusetts case enjoined picketing under circumstances difficult to justify on free speech principles. In Saveall v. Demers (Dec. 1, 1947) ..... Mass. ....., 76 N. E. (2d) 12, the supreme court upheld the enjoining of picketing by a union with the object of inducing a self-employed barber to maintain the rates charged in union shops. Aside from the decision proper the discussion in the case really indicates a refusal to accord picketing a free speech basis and a determination to return it to the position of a presumptive tort.

[134] *E.g.*, Del. (H. B. 212) Laws 1947, p. .....; FLA. CONST. (1944) Declaration of Rights §12; Mass. Laws 1947, c. 657 (part of the state labor relations act); N. D. Laws 1947, p. 376, subject to approval by popular referendum June 1948; Tex. Laws 1947, p. 107.

[135] *E.g.*, Ariz. Laws 1947, p. 173; Ga. Laws 1947, p. 616 (criminal penalties are also imposed); N. C. Laws 1947, p. 381; Va. Laws 1947, p. 12. Although criminal liabilities are not specified in the statute they may be imposed by the common law of the state. See State of North Carolina v. Bishop (Dec. 19, 1947) ..... N. C. ....., 45 S. E. (2d) 858.

[136] *E.g.*, Ark. Acts 1947, p. 211; Ia. Laws 1947, p. 388; Me. Laws 1947, p. 542; Neb. Laws 1947, p. 584; S. D. Laws 1947, p. 99; Tenn. Acts 1947, p. 267.

has set up for determining the constitutionality of interference with First Amendment liberties has fallen by the wayside and the mere rational basis test has been substituted.[137] All that is needed is two steps instead of one: first, make the objective a misdemeanor and then second, suppress picketing on the ground that it creates imminent danger that criminal conduct will result.

The Supreme Court obviously must determine whether it is willing to abdicate under these circumstances and to surrender to legislative bodies part of the territory which it has held to be marked out for special constitutional protection.

### III. CONCLUSION

In conclusion to, and in summary of, the foregoing pages, it may be said that close scrutiny of the Supreme Court's picketing decisions bears out the general impression that the degree of constitutional protection afforded picketing is at present ill defined. To be sure, there has been uninterrupted continuity of lip service to the basic doctrine laid down in the *Thornhill* case, namely that picketing is publicly important speech and as such an aspect of the specially protected free communication of the First Amendment. Discussion of the Court in several decisions,[138] however, and one actual decision have thrown a shadow upon this doctrine. This one decision moreover, namely that involving the *Ritter's Cafe,* in effect reduced picketing to the status of an inferior brand of free communication. The same decision in addition, in setting the limits for a state's permissible interference with picketing, drew a factual line that logically is so difficult to defend, as to invite state courts, pending further clarification by the Supreme Court itself, to draw any line that they choose.

To this reference to the *Ritter* case two comments should be added: (1) The force of its doctrine was somewhat lessened by general statements made in the only subsequent picketing opinion;[139] and (2) the permanence of the Court's views as expressed in that case are at best highly problematical. The latter is true both because a First Amendment civil liberty is involved (which always weighs

[137] If this technique were successful it would of course permit the state "to accomplish indirectly what it may not accomplish directly", which Mr. Justice Douglas in his concurring opinion in the Wohl case (signed also, it will be remembered, by Messrs. Justices Black and Murphy) indicates should not be permitted. 315 U. S. at 777.

[138] *E.g.*, A. F. of L. v. Swing, *supra* note 66, and Bakery Wagon Drivers v. Wohl, *supra* note 79.

[139] Cafeteria Employees Union v. Angelos, *supra* note 106.

heavily against mere "continuity" considerations) and because the four dissenters in the *Ritter's Cafe* case (who are still on the Court) presented therein civil liberty constitutional views which at least one other subsequently appointed Justice has clearly manifested in other court decisions. The four *Ritter* case dissenters have made their position on picketing crystal-clear. They have indicated that they believe picketing speech is subject to precisely the same rules as other protected speech, *i.e.*, it may be constitutionally regulated only for the necessary protection of the administration of government, the public peace, safety and convenience, public decency and for the protection of the public streets and ways from undue traffic interference.[140]

It is important to note that the common practice on the part of state courts of enjoining picketing for unlawful labor objectives has been undertaken without any feeling of responsibility for the special due process requirement which comes into play when First Amendment liberties are involved. If picketing is to be rehabilitated this practice surely should be corrected in the case of objectives ouly *civilly* illegal, by clear direction from the Supreme Court that this special requirement be observed in reviewing picketing cases. What should be the rule when picketing for objectives which have been made criminal as well as civilly illegal is at issue, presents a problem which the Supreme Court must resolve.

Finally, as has been suggested, judicial dissection of the picketing institution to segregate and place on record its real speech aspect would seem to be in order. This would point up what the Court undoubtedly has meant in terming picketing an aspect of free communication. It would remove any possible suspicion that members of the Supreme Court have intended intra-union coercive control to be carried as a "free rider" into the area of constitutional immunity reserved for the First Amendment liberties. The gain to true civil liberty might be substantial.

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140 Picketing in advocacy of a general strike obviously could be deemed to connote inevitable widespread violence and if so would be enjoinable for the necessary protection of the public peace and safety. Picketing in support of a lesser degree than total general strike might be held constitutionally subject to interdiction by similar reasoning if such picketing was actually tied in with uncontrollable disruption of the peace.