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Picketing--A Legal Cinderella

Hugh Douglas Price

PICKETING — A LEGAL CINDERELLA

HUGH DOUGLAS PRICE*

PROLOGUE

The remarkable history of the Supreme Court's handling of picketing cases since the turn of the century is a legal Cinderella tale without parallel. It is a fascinating study of constitutional law, not only in terms of legal doctrines but in its insights into the danger of careless use of labels and generalities, the complications of a federal system, and the role of public opinion in influencing the Supreme Court. Since the concern of this article is primarily with the relation of peaceful picketing to the free speech guaranty of the First Amendment, only a brief resume of the pre-1937 development can be given.[1] The subsequent period, however, constitutes in itself a complete three-act drama of the rise and decline of picketing as "free speech."

The first reported instance of picketing in the United States occurred in 1827 in connection with a strike that resulted in indictment of the offending tailors for conspiracy.[2] Although scattered occasions of picketing continued to occur in the following decades, the use of common law conspiracy doctrines in labor disputes declined rapidly, particularly after the acceptance of labor unions as legal organizations. The first reported decision considering equitable relief against labor activity did not come until 1880.[3] Following that event the area of allowable labor "persuasion by lawful means" was rapidly nibbled away by the rise of what came to be referred to as "government by injunction."[4] By regarding business enterprises as endowed with

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*B.A. 1952, M.A. 1953, University of Florida; Teaching Fellow in Department of Government, Harvard University.

[1]For an excellent survey of this period see Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940,* 14 U. OF PITT. L. REV. 170 (1953), and *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing, id.* at 397.

[2]Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940,* 14 U. OF PITT. L. REV. 170, 171 (1953).

[3]Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168 (N.Y. 1880), *aff'd,* 24 Hun 489 (N.Y. 1881).

[4]This phrase came into wide use with its adoption by the Democratic party in the campaign of 1896; see Westin, *The Supreme Court, the Populist Movement and the Campaign of 1896,* 15 J. POLITICS 3 (1953).

the same basic rights customarily associated with real property,[5] judges were able to handle picketing as a prima facie tort. Intentional acts which damaged property rights, as did picketing, were actionable at law and enjoinable in equity, unless legally privileged.[6] Some uniformity among the state and federal courts in allowing nominal picketing, and nominal picketing only, was achieved by two Supreme Court decisions handed down in 1921.[7] Although the Norris-LaGuardia Act of 1932 generally prohibited federal courts from issuing injunctions against labor self-help activities except in cases of fraud or violence, picketing continued to be treated under the law of torts, with the burden of justification on the picketers.

ACT I: FROM RAGS TO RICHES — THE SUPREME COURT AS FAIRY GODMOTHER

In the topsy-turvy constitutional world of 1937 the Supreme Court had occasion, in *Senn v. Tile Layers Protective Union*,[8] to pass on Wisconsin's "little Norris-LaGuardia Act," which contained an anti-injunction section making, as the Wisconsin court interpreted it, all nonenjoinable labor conduct "lawful." The facts were simple: The tile layers' union had picketed a small-time, nonunion tiling contractor by the name of Senn, who had refused to sign a union shop agreement. Mr. Justice Brandeis, speaking for a five-man majority, held that the Constitution did not prohibit a state from authorizing peaceful picketing, but his opinion contained a dictum which hinted

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[5]For an analysis of the tremendous shift in American thought concerning property during the period from the end of the Civil War to the turn of the century see MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE (1951).

[6]See Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. OF PITT. L. REV. 170, 197 (1953). In general, to be privileged picketing had to be in conjunction with a strike by the employees themselves, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), or by ex-employees, American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921), for a legitimate objective of self-interest. The latter did not include violation of a "yellow-dog contract," Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

[7]American Steel Foundries v. Tri-City Central Trades Council, *supra* note 6; Truax v. Corrigan, 257 U.S. 312 (1921). The latter case is now notable chiefly for one of Justice Holmes' most eloquent dissents, *id.* at 342, one of Justice Brandeis' most scholarly dissents, *id.* at 354, and one of Justice Pitney's most incisive dissents, *id.* at 344.

[8]301 U.S. 468 (1937).

at a whole new basis for the law of picketing:[9]

> "Clearly the means which the statute authorizes — picketing and publicity — are not prohibited by the Fourteenth Amendment. 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. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends."

The precise intent of Mr. Justice Brandeis's opinion will probably never be known.[10] Although the second sentence of the above quotation, taken alone, could mean that picketing is a constitutionally protected part of free speech, it does not clearly specify that such is the intent.[11] Further, the opinion also added: "The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act."[12] Although speech could only be prohibited in case of a "clear and present danger," this matter of lawfulness was emphasized:[13]

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[9]*Id.* at 478.

[10]That Justice Brandeis did not mean that picketing was protected speech is indicated by his earlier dissent in Duplex Printing Press Co. v. Deering, *supra* note 6, at 488: "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right." Of even more importance is the fact that Brandeis joined in Roberts' decision in Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938). The Court forbade a federal court injunction against picketing under the very same Wisconsin law considered in the *Senn* case. The lower court was restrained, however, on the grounds that the picketing was authorized by the state statute and that the conditions set forth by the Norris-LaGuardia Act for issuance of a federal injunction had not been met. There was no mention of any constitutional right to picket.

[11]Professor Charles O. Gregory, *e.g.*, denies that this was the intent; see LABOR AND THE LAW 340 (1949).

[12]301 U.S. 468, 479 (1937).

[13]*Id.* at 480. The repeated reference to the absence of any unlawful aspect of the picketing is interesting in view of the subsequent development of the "unlawful

> "The sole purpose of the picketing was to acquaint the public with the facts, and, by gaining its support, to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing."

The specific holding of the case, to which four justices dissented,[14] was merely that a state may authorize working men to picket so long as they do nothing unlawful.

Three years later, in *Thornhill v. Alabama*,[15] Mr. Justice Murphy applied the Brandeis dictum, minus the test of unlawfulness, in striking down a flat prohibition by state law of all picketing: "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."[16] Arguing that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes" is "indispensable to the effective and intelligent use of the processes of popular government,"[17] he went on to indicate that only clear danger of substantive evils could justify abridgment of picketing. Cinderella-like, the conduct which had been a common law crime a century earlier, a prima facie tort from 1880 to 1937, and had only received constitutional acceptance as a statutory privilege by a five-to-four decision in 1937, thus emerged as a constitutional right and one of the fundamental liberties protected by the Fourteenth Amendment against state interference.[18]

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objective" formula.

[14] *Id.* at 483.

[15] 310 U.S. 88 (1940). Justice McReynolds, the sole survivor of the four-man minority of the *Senn* case, dissented.

[16] *Id.* at 102.

[17] *Id.* at 103. The rationale was thus the need for the communication of ideas so as to promote public benefit, not to make unions immune from regulation in the labor-management struggle for economic advantage.

[18] The *Thornhill* decision was not without some ancestry, as over 50 picketing decisions had previously considered, in varying degrees, the free speech aspect—nearly half of these had preceded the *Senn* decision; see Tanenhaus, *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 U. OF PITT. L. REV. 397 (1953). Commentator reaction to the complete reversal ranged from the bitter satire of Gregory, LABOR AND THE LAW 345 (1949), to Dodd's satisfaction at the irony involved, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513, 531 (1943). See also Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037 (1943); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942).

The *Thornhill* case, in overthrowing a body of law built up over a period of sixty years, raised far more questions than it answered. Mr. Justice Murphy's identification of peaceful picketing with protected free speech suggested that all regulation of picketing must meet the "clear and present danger" test. Viewed narrowly, however, the case only held a complete prohibition by prior restraint of all picketing to be unconstitutional. This gave little indication of how the Court might later react to various restrictions on the methods of picketing or on the objectives sought in picketing.[19] *Carlson v. California,*[20] decided the same day, in striking down a comprehensive county ordinance against display of banners by picketers provided little additional light; however, Mr. Justice Murphy showed his apparent determination to apply free speech criteria by again relying on the clear and present danger test.

The next year, in *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc.,*[21] the Court considered a state injunction against picketing which was said to be so enmeshed with past violence that it necessarily constituted coercion. Mr. Justice Frankfurter, speaking for the majority, held that "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."[22] Justices Reed, Black, and Douglas argued, in dissent, that the state could take action against the unlawful violence and thus prevent coercion without a blanket prohibition of further picketing in the conflict.[23]

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[19]That these would prove to be crucial questions was obvious. "The 'end' of labor activities and the 'means' by which they are pursued constitute the chief inquiries of labor law," FRANKFURTER and GREENE, THE LABOR INJUNCTION 5 (1930).

[20]310 U.S. 106 (1940). Reynolds, J., again dissented.

[21]312 U.S. 287 (1941).

[22]*Id.* at 293.

[23]See the dissent of Black, J., joined in by Douglas, J., *id.* at 299, and that of Reed, J., *id.* at 317. An analogous limitation on the free speech of the employer was, however, supported by Justice Murphy in NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 478 (1941): "The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power." In line with this "totality of conduct" view Sec. 8(c) of the Taft-Hartley Act, 61 STAT. 136 (1947), 29 U.S.C. §§141-197 (1952), provides that written or graphic expression by the employer of his views shall not constitute an unfair labor practice if "such expression contains no threat of reprisal or force or promise of benefit." Liberal critics of limitations

If *Meadowmoor* represented a retreat from the free speech approach, then *American Federation of Labor v. Swing*[24] was a direct undermining of that concept. Mr. Justice Frankfurter, for the majority, denied that a state could forbid peaceful picketing merely because of the absence of an employer-employee dispute, but his rationale was not that of picketing-free speech:[25]

> "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace."

Then he approvingly quoted the *Senn* dictum of Mr. Justice Brandeis, which is a complete *non sequitur* to the idea of drawing any kind of limited "circle of economic competition." Although Mr. Justice Murphy went along with this opinion, Justices Black and Douglas concurred only in the result.

In the 1942 session of the Court the implicit divergence of doctrine suggested in the *Swing* decision became explicit in *Carpenters & Joiners Union v. Ritter's Cafe*,[26] which resulted in a split decision marked by sharply worded dissents. Mr. Justice Frankfurter wrote the decision for the five-man majority, upholding a Texas court injunction restraining picketing of Ritter's cafe by building trades union members. Ritter was having a contractor who used nonunion labor build a home for him at a location some one-half mile from the cafe. Dropping the conciliatory ambiguity of his *Swing* case decision, Justice Frankfurter referred to picketing not so much as free speech but as an industrial weapon. Although conceding that

on union picketing generally overlook limitations such as this and the controversial "captive audience" rule, which restrict employer free speech; see Note, *Limitations upon an Employer's Right of Noncoercive Free Speech*, 38 VA. L. REV. 1037 (1952); 6 U. OF FLA. L. REV. 127 (1953).

[24]312 U.S. 321 (1941). Two intervening cases of less importance were United States v. Hutcheson, 312 U.S. 219 (1941) (upholding picketing in jurisdictional disputes as not being in conflict with the Sherman Act), and Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940) (denying power of a federal court to issue a labor injunction except as authorized under the Norris-LaGuardia Act).

[25]312 U.S. 321, 326 (1941)

[26]315 U.S. 722 (1942).

it "may be a phase of the constitutional right of free utterance," he added that this "does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute."[27] Seeing no nexus between the cafe as a business and the building dispute, Justice Frankfurter stated that the state need not allow the picketers "to conscript neutrals having no relation to either the dispute or the industry in which it arose."[28]

Mr. Justice Frankfurter's limiting of picketing-free speech to the area of economic nexus brought forth a dissent from Mr. Justice Black, which was concurred in by Justices Douglas and Murphy.[29] Honors for the day, however, went to Mr. Justice Reed, whose dissent indicated the reason for considering picketing as a part of speech,[30] the extent to which a state could regulate the method of picketing,[31] and then summarized and demolished the Frankfurter position:[32]

> "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. The legal kernel of the Court's present decision is that the 'sphere' of free speech is confined to the 'area of the industry within which a labor dispute arises.'
>
> ". . .
>
> "We are not told whether the test of eligibility to picket is to be applied by crafts or enterprises, or how we are to determine economic interdependence or the boundaries of particular industries."

The implicit prediction of Mr. Justice Reed's conclusion that "until today, orderly, regulated picketing has been within the protection of the Fourteenth Amendment"[33] was later borne out by lower court

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[27]*Id.* at 727.

[28]*Id.* at 728.

[29]*Id.* at 729.

[30]*Id.* at 738: "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."

[31]*Ibid.*: "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."

[32]*Id.* at 739.

[33]*Id.* at 738.

interpretations of the decision.[34]

The Court's concern with the question of who can picket whom, rather than with the problem of the objectives for which any picketing can be carried on, was further evidenced in *Bakery & Pastry Drivers & Helpers Local v. Wohl.*[35] The New York courts had enjoined picketing of a bakery which sold goods to nonunion route drivers who owned their own trucks, on the ground that, since the drivers were sole owners of their enterprises, no genuine labor dispute existed. Mr. Justice Jackson, speaking for the majority, held that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter"[36] and went on to deny existence of a "substantive evil of such magnitude as to mark a limit to the right of free speech . . . ."[37]

Although the decision of the *Wohl* case thus appeared superficially to be within the *Thornhill* tradition, the grounds of the decision proved to be the roots of a very different trend. Mr. Justice Jackson stated that there was no evidence of violence, force, or coercion, "or conduct otherwise unlawful or oppressive . . . or abuse of the right to free speech through the use of excessive picketing."[38] His further statement that a "state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual,"[39] without making reference to the clear and present danger test, forced Justices Douglas, Black, and Murphy into a separate concurrence. The concurring opinion, written by Mr. Justice Douglas, objected: "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 I think we have made a basic departure from *Thornhill v. Alabama* . . . ."[40] Then Mr. Justice Douglas added an observation which points out the line for much of the Court's later attitude toward peaceful picketing:[41]

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[34]See, *e.g.,* the conclusion of the federal district judge in Stapleton v. Mitchell, 60 F. Supp. 51, 59 (D. Kans. 1945): ". . . the 'clear and present danger test' as applied to peaceful picketing in the *Thornhill* case gave way to the 'reasonable basis' test in the *Ritter* case."

[35]315 U.S. 769 (1942).

[36]*Id.* at 774.

[37]*Id.* at 775.

[38]*Ibid.*

[39]*Ibid.*

[40]*Ibid.*

[41]*Id.* at 776. From this has evolved the concept that picketing is a hybrid; see

> "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 ideas which are being disseminated."

The Second World War and accompanying full employment and relative labor peace gave the Court something of a respite as far as picketing cases were concerned. In 1943, however, Mr. Justice Frankfurter did have occasion in *Cafeteria Employees Union v. Angelos*[42] to restate his views on picketing. The Court unanimously upheld the right of peaceful picketing of self-operated cafeterias, but the basis of unanimity appeared to be the inherent inconsistency of Frankfurter's opinion more than anything else. After stating that the *Senn* dictum, as applied in later cases, had enforced "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,"[43] he quoted with approval his *Swing* case rationale that a state cannot exclude picketing by drawing the circle of economic competition so small as to contain only the employer and his employees. How these two views could be compatible, or how the former could be reconciled with his opinion in *Ritter's Cafe*,[44] Justice Frankfurter did not make clear.

As the end of the war approached public opinion moved toward a more and more critical attitude in regard to organized labor.[45] New

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FREUND, ON UNDERSTANDING THE SUPREME COURT 18 (1950).

[42]320 U.S. 293 (1943). The facts involved a combination of the *Swing* case circumstances of picketing by nonemployees, plus those of the *Wohl* case, in which there was technically no labor dispute.

[43]*Id.* at 295.

[44]Justice Frankfurter emphatically denied that the state was powerless to confine the area of strife or without a right to impose restrictions; see p. 6 *supra*.

[45]The old pattern of a period of government intervention in a negative fashion to eliminate objectionable practices, then actual promotion and assistance for the particular interest in question, and finally positive regulation in the public interest, was repeated. For organized labor the Norris-LaGuardia Act of 1932 marks the first stage; the Wagner Act of 1935 marks the second; the Taft-Hartley Act of 1947 marks the third. When viewed in perspective New Deal assistance to labor does not seem so great as many commentators indicate. The period of actual promotion of unions lasted barely a decade and was largely limited to favorable legal conditions for self-development, such as had already been achieved in most other industrialized countries. In contrast, business and industry re-

restrictive legislation was passed in many states,[46] and by 1947 Congress was debating the violently anti-labor Hartley Bill, in comparison to which the ultimately adopted Taft-Hartley Act was so much milder as to be almost pro-labor.[47] The new laws defining many unfair labor practices seemed certain to force the Court to consider the status of picketing in relation to the unlawful acts or objectives which Mr. Justice Brandeis had mentioned in the *Senn* case and which Mr. Justice Jackson had hinted at in his *Wohl* opinion. Would the *Thornhill* rationale of picketing as protected free speech be relegated to the shelf as a historical oddity, or would the Court attempt to implement its logic by modifying the clear and present danger test so as to be applicable to picketing regulation?

ACT II: A STRANGER IN PARADISE — THE "UNLAWFUL OBJECTIVE" RULE AS VILLAIN

In 1949 the leading case of *Giboney v. Empire Storage and Ice Co.*[48] came to the Court. The specific facts involved picketing to prevent a distributor from selling ice to nonunion peddlers. This union action attempted to force the employer into a violation of the state anti-trade restraint law rather than of a state labor relations act or "right to work" law, but the principle was the same: picketing to force violation of a valid state law. In a carefully worded decision which gained the unanimous support of the Court, Mr. Justice Black pointed out that the picketing was part of "a single and integrated

ceived favorable legal status plus government subsidies and protective tariffs for a period of approximately a century. Labor has never received anything to compare with the Hamiltonian program backed by the Federalists, or the Whig "American Plan" popularized by Henry Clay, or the multimillion-acre public land grants for railroad promotion after the Civil War, or the Hawley-Smoot Tariff Act of 1930, or the current billions in subsidies for agriculture. For example, in 1816 Congress established a tariff to protect domestic capital against foreign competition; it was 105 years later, in 1921, before labor was able to get Congress to enact an immigration quota system to protect domestic labor. An excellent summary of the development of federal aid and its regulation is contained in FAINSOD and GORDON, GOVERNMENT AND THE AMERICAN ECONOMY cc. 2-7 (rev. ed. 1948).

[46]See Dodd, *Some State Legislatures Go to War—on Labor Unions,* 29 IOWA L. REV. 148 (1944).

[47]The basic difference was that the Hartley Bill, H.R. 3020, 80th Cong., 1st Sess. (1947), aimed to outlaw all labor activities not specifically sanctioned, while the finally adopted Taft-Hartley Act relies on enumerating a specific list of unfair labor practices.

[48]336 U.S. 490 (1949).

course of conduct,"[49] aimed at violation of an important public law, such violation constituting a felony. Regarding the struggle as one between the union and the state to determine what policies should be paramount in regulating state trade practices, he concluded: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."[50]

Although this decision seemed to open the Pandora's box of "unlawful objectives," Mr. Justice Black's opinion indicated specific limits for its application. First, the picketing must be part of an "integrated" course of action. Second, the law involved must prohibit injury to the public. Third, the offense must be against an "important public law," not merely aimed at "slight inconveniences or annoyances." Finally, there must be "clear danger, imminent and immediate" of violating the law. As a modification of the clear and present danger test of a substantive evil these criteria seemed promising, but they were destined to be ignored by a majority of the Court in subsequent picketing cases.

In 1950, the tenth anniversary of the *Thornhill* decision, the Court marked the occasion by stating in *Hughes v. Superior Court of California*:[51]

> "It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."

Mr. Justice Frankfurter then proceeded to uphold for the majority

[49] *Id.* at 498.

[50] *Ibid.*

[51] 339 U.S. 460 (1951). Frankfurter here speaks for the majority. For the impact of this and other post-*Thornhill* cases on the status of picketing see Burstein, *Picketing and Speech*, 4 LABOR L.J. 791 (1953); Howard, *The Unlawful Purpose Doctrine in Peaceful Picketing and Its Application in the California Cases*, 24 So. CALIF. L. REV. 145 (1951); Sukloff, *A Decade of Picketing as an Exercise of Free Speech*, 2 SYRACUSE L. REV. 101 (1950); Tanenhaus, *Picketing-Free Speech: The Growth of the New Law of Picketing from 1940 to 1952*, 38 CORNELL L.Q. 1 (1952); Weinberg, *Thornhill to Hanke — The Picketing Puzzle*, 20 U. OF CIN. L. REV. 437 (1951).

of the Court an injunction against the picketing by a Negro civic group of a California store which, in accordance with judicially announced state policy against discrimination, refused to hire Negro employees on a specific proportional basis. With Mr. Justice Douglas absent, Justices Black and Minton concurred in the decision on the basis of the *Giboney* ruling, and Mr. Justice Reed concurred that picketing to achieve discrimination was, under the *Giboney* rationale, unlawful.[52] Judicially announced state policies thus were raised to an equal status with Mr. Justice Black's carefully stated and narrowly limited area of legislative discretion to set unlawful objectives, for whose pursuit picketing could be enjoined.

On the same day, in *International Brotherhood of Teamsters v. Hanke*,[53] Mr. Justice Frankfurter further extended the unlawful objective concept to uphold an injunction against peaceful picketing not in violation of either state law or established state judicial policy. The state court had decided that the objective of the picketing was contrary to the best interests of the people of the community and hence enjoinable. In his opinion Mr. Justice Frankfurter emphasized that "picketing is 'indeed a hybrid.' " The effort of the Court, he continued, was to "strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' "[54] In an effort to reconcile this with the Court's previous record he indicated that the *Senn* case turned solely on the Wisconsin statutory authorization rather than on a Fourteenth Amendment right,[55] and summarized the import of the *Swing, Wohl,* and *Angelos* cases as follows: "In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute."[56] Mr. Justice Clark concurred in

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[52]The California court had suggested that picketing against employment discrimination rather than for it would be allowable. This distinction is a striking parallel to the commerce clause cases holding a law requiring discrimination to be an interference with interstate commerce, Morgan v. Virginia, 328 U.S. 373 (1946), while a law forbidding discrimination is acceptable, Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).

[53]Together with Automobile Drivers & Demonstrators Local v. Cline, 339 U.S. 470 (1950).

[54]*Id.* at 474.

[55]*Id.* at 476.

[56]*Id.* at 479.

the result, while Justices Black, Minton, and Reed dissented,[57] as Mr. Justice Douglas would probably have done had he been present.

As an anti-climax Mr. Justice Minton assumed the opinion-writing chore in *Building Service Employees International Union v. Gazzam.*[58] Union picketing had been carried on for a purpose in violation of a state law, but the circumstances could be distinguished from the *Giboney* situation, since the law involved carried no criminal sanction.[59] The decision, holding that "adequate basis for the instant decree is the unlawful objective of the picketing,"[60] proclaimed that it is not the presence or absence of a criminal sanction which makes a state policy "important public law."[61] Despite this nod in the direction of his *Giboney* opinion, Mr. Justice Black concurred separately.

Thus in one year's time the rationale of clear and immediate danger of violating an important public law aimed at no slight inconveniences, as put forth in the *Giboney* case, was stretched to include violation of a public law that carries no criminal sanction at all,[62] violation of established state judicial policies,[63] and violation of policy deemed by a state court to be in the best interests of the community in a particular instance.[64] Where would the Court call a halt?

In 1951 the attention of the Court was shifted from state regulation of labor practices to the Taft-Hartley Act. In *NLRB v. Denver Building and Construction Trades Council,*[65] the second of four decisions[66] handed down the same day, all turning on the problem

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[57]*Id.* at 481. Minton and Reed, JJ., took strong exception to this strange interpretation.

[58]339 U.S. 532 (1950).

[59]Violation of the anti-trade restraint act in the *Giboney* case carried a maximum penalty of $5,000 fine and up to 5 years' imprisonment and also laid the defendant open to suit for treble damages.

[60]339 U.S. 532, 539 (1950).

[61]The *Giboney* criterion of an "important public law," however, was not just the criminal sanction involved but that it was aimed at no slight inconvenience or annoyances.

[62]The *Gazzam* case extension.

[63]The *Hughes* case extension.

[64]The *Hanke* and *Cline* extension.

[65]341 U.S. 675 (1951). Jackson, Douglas, and Reed, JJ., dissented, *id.* at 692.

[66]The first, NLRB v. International Rice Milling Co., 341 U.S. 665 (1951), turned on statutory construction of "concerted activity." Although picketing was involved, the constitutional issue of free speech was not considered.

of the Taft-Hartley Act's "unfair labor practices" as unlawful objectives, the Court upheld the prohibition of picketing as "a mere signal by a labor organization to its members, or to the members of its affiliates, to engage in an unfair labor practice . . . ."[67] In the third case, *International Brotherhood of Electrical Workers v. NLRB*,[68] in which the Court admitted that "there is no finding here that the picketing and other activities of petitioners were mere signals in starting and stopping a strike," it nevertheless upheld the injunction, since "*an* objective of the picketing, although *not necessarily the only* objective of the picketing," was to achieve an unlawful objective. Justices Douglas, Reed, and Jackson dissented in both cases.

The import of these decisions seemed disastrous to the picketing-free speech doctrine, and legal commentators were quick to read the death rites over the *Thornhill* rule:

> "Although the Court [in the *Hanke* case] did not specifically overrule the *Thornhill* case, it effectively repudiated its assimilation of picketing to speech, with the result that with other decisions the *Thornhill* doctrine has become an aberration in constitutional law as it was originally an aberration from reality."[69]

> "In spite of the Supreme Court's previous decisions discouraging such evasions, the trend now seems to be in the direction of creating a northwest passage around the *Thornhill* doctrine. This takes the course of concluding that it was never intended to protect 'illegal' picketing. And 'illegality' in this new trend will apparently be what legislatures and judges agree that it should be."[70]

> "By this time [1952] the United States Supreme Court had given up its power to control state regulation of picketing under the doctrine which characterized picketing as speech."[71]

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[67]341 U.S. 675, 690 (1951).

[68]341 U.S. 694, 700 (1951). The fourth case, Local 74, Brotherhood of Carpenters & Joiners v. NLRB, 341 U.S. 707, also decided the same day, turned on disposition of a dispute which had begun before passage of the Taft-Hartley Act.

[69]Harris, *Constitutional Law in 1949-1950*, 45 AMER. POL. SCIENCE REV. 86, 100 (1951).

[70]GREGORY, LABOR AND THE LAW 461 (1949).

[71]Divine, *Constitutionality of Economic Regulations*, 2 J. PUB. L. 98, 110 (1953).

To those of a liberal inclination the outlook appeared dark:[72]

> "Now it looks as though state courts, by the simple device of declaring union objectives contrary to public policy, can ban peaceful picketing in almost all situations where there is room for difference of opinion as to these objectives. We seem to be on the road back to government by injunction."

Is such pessimism necessary? Has the unlawful objective formula really been the stroke of midnight for picketing as a modern legal Cinderella? Has the marvelous vehicle of constitutional protection turned into the pumpkin of prohibition for any objective which can be made unlawful on a reasonable basis? Is our modern legal drama to end as a tragedy before the appearance of a Prince Charming? Before hazarding a prediction as to what Act III promises to be like it may be wise to recapitulate and analyze the various approaches suggested for use in handling peaceful picketing cases.

Remarkably, one of the most nearly accurate statements of the status of picketing down to the present can be found in an article written over ten years ago:[73]

> "The recently established constitutional right of peaceful picketing is a limited right — limited by the extent to which picketing is interwoven with acts of violence, by the place in which the picketing is carried on, by the relation between the person picketed and the persons directly involved in the dispute, and, presumably, by the lawfulness of the objective in aid of which the picketing is carried on."

Today only the word "presumably" need be omitted — the unlawful objective formula is now well established and has been supported to varying degrees by every member of the present Court except the recently appointed Chief Justice, who has not yet had occasion to consider it.[74] But, to remain even as a limited right, there must be a limit on the extent to which the right can be limited. And here we reach the crux of our problem. Which of the various suggested

[72]Fraenkel, *Peaceful Picketing — Constitutionally Protected?*, 99 U. OF PA. L. REV. 1, 12 (1950).

[73]Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513, 529 (1943).

[74]For a comparison of the views of the individual justices on "unlawful objective" criteria see appendix.

constitutional criteria can best accommodate necessary limits on peaceful picketing in a manner consistent with traditional American democratic thought? Which does it appear most likely that the Court will apply in the future?

The pre-*Thornhill* attitude, which regarded picketing purely as economic coercion constituting a tort unless specially privileged, totally disregarded the undeniable element of communication in most picketing. A complete prohibition by prior restraint of all picketing by any methods and for any objectives is certainly hard to reconcile with the American tradition of maximum freedom of speech and press. Before the *Thornhill* case, however, there existed no clear restraint on the power of the states or of Congress to do so. And even in the absence of any restrictive legislation the burden of proof for justifying picketing lay on the picketers.

The *Thornhill* doctrine went to the other extreme. In identifying all peaceful picketing with protected free speech the Court ignored the very real differences between ordinary speech and picketing by an organized group. First, and least important, the factual information conveyed by means of picketing is very small in comparison to most conventional media.[75] Second, picketing differs from most conventional media in having, to a large degree, a captive audience.[76] Third, and most important, picketing per se, especially by an organized group, is indeed more than speech – it is truly a hybrid, the coercive elements of which may range from a minor psychological barrier to very drastic economic sanctions.[77] To a considerable extent acceptance of the complete identification of

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[75]In rebuttal it can validly be asked whether an "Employer is Unfair" sign conveys appreciably less information than an "I like Ike" sign or one proclaiming that "I'd Walk a Mile for a Camel." This argument appears especially weak in view of the Court's attitude toward an attempt to use picketing to convey information on a public issue; see note 113 *infra*.

[76]Billboards and loudspeakers are two other "speech" media that raise special problems because of their power to command unwilling audiences. There has been much more discussion of the right to speech than of the right to privacy for those who prefer it to being bombarded on every side by irritating advertising and other appeals.

[77]In the *Giboney* case, *e.g.*, the mere initiation of picketing resulted in an 85% decrease in the distributor's business, since 85% of the drivers were union members who would be subject to fine or suspension for crossing the picket line. Such intra-union coercion can hardly be classified as peaceful persuasion by free speech! See Armstrong, *Where Are We Going with Picketing? Intra-Union Coercion Is Not Free Speech*, 36 CALIF. L. REV. 1 (1948).

picketing with free speech would have been to invoke constitutional dogma to enforce economic *laissez faire,* not on an individualistic basis but for a pluralistic order of groups competing in largely unregulated economic warfare. It is a bit hypocritical for liberals, who have bitterly criticized the "old" Court for using the magic wand of "freedom of contract" to immunize the activities of corporations from government regulation, to demand that the current Court touch the magic wand of "freedom of speech" to every species of peaceful picketing by unions regardless of objective, economic consequence, or effect on the public welfare.

Even before *Thornhill* the fact that bans on picketing may raise questions under the First Amendment had been pointed out in over fifty decisions.[78] In retrospect it appears that Mr. Justice Murphy would have been wiser had he somewhat restrained his laudable enthusiasm for civil liberties and, in the traditional manner of constitutional law, ruled only on the issue before the Court, namely, whether a total ban on all picketing violates the First Amendment. The future law of picketing could then have been built up on a case by case basis. It now appears that the attempt to pull all peaceful picketing within the full protection of the free speech guaranty has brought a reaction which threatens to "throw the baby out with the wash."[79]

In logical terms, once it is admitted that picketing is more than conventional speech, there can be only two general approaches. If picketing cannot be divorced from the elements which make it more than speech, then it must be regarded as entitled to only a degree of protection less than that afforded speech. This approach, accepting the hybrid nature of picketing as inherent, would make it a limited right.[80] This would be done by use of a test not so strict as that of a clear and present danger of a substantive evil, but still requiring more than a mere reasonable basis for a policy before picketing, for

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[78]See note 18 *supra.* A complete identification of peaceful picketing with protected speech would, of course, still leave the Court with the difficult task of determining criteria to apply in implementing the "clear and present danger" rubric. For analysis of the considerations involved and some of the more recent developments see, respectively, McCloskey, *Free Speech, Sedition, and the Constitution,* 45 AMER. POL. SCIENCE REV. 662 (1951), and Kittleson and Smith, *Free Speech (1949-1952): Slogans v. States' Rights,* 5 U. OF FLA. L. REV. 227 (1952).

[79]Constitutionally, this would be the result of an unqualified acceptance of the unlawful objective formula.

[80]See p. 15 *supra.*

an objective contrary to that policy, would be enjoined. Mr. Justice Black used this approach in his *Giboney* opinion, but the majority of the Court have failed to follow it in subsequent cases.[81]

The second alternative, again conceding that picketing is more than speech, is to attempt to split off those instances of picketing that involve more than speech. Thus the remaining area would be entitled to full constitutional protection on the same terms as ordinary speech, while the "more than speech" cases could be relegated to "reasonable basis" regulation with no fear of loss of basic civil liberties. In logic this appears irrefutable, but in fact can picketing be so divided?

Does Mr. Justice Frankfurter's economic nexus doctrine meet the test? This theory removes an area of picketing, namely, all beyond the labor dispute or industry involved, from protection and leaves only the area within this magic circle to be regarded as constitutionally protected. It requires no elaboration to show that this is a superficial distinction bearing no necessary relationship to the degree of nonspeech coercion involved. Cases already decided by the Court have involved extreme economic coercion within the immediate area of a labor dispute; and, conversely, there are many instances in which picketing purely for publicity is carried on entirely beyond the limits of an industry or in the absence of a labor dispute. Perhaps the surest indication of the uselessness of this concept as a constitutional criterion is that it functions only for labor disputes. Picketing, although peculiarly suited as a weapon of labor, has been carried on by consumer groups, by religious factions, by patriotic organizations, by suffragettes, by draftees' mothers, by left-wing sympathizers, and by many others in circumstances often having absolutely nothing to do with economic warfare or labor disputes.[82]

A more serious attempt to separate picketing-free speech from picketing-coercion has been advanced[83] that appears similar to the current position of Mr. Justice Douglas. This is the "signal-publicity" dichotomy. Briefly, it holds that picketing for the purpose of peaceful persuasion of the public through publicity is entitled to all the constitutional protection of free speech; picketing as a signal for economic coercion, however, is beyond the pale and presumably subject to

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[81]See appendix.

[82]The existence of picketing for purposes other than those involved in labor disputes also highlights the unreality of the pre-*Thornhill* tort theory of picketing.

[83]Cox, *The Influence of Mr. Justice Murphy on Labor Law*, 48 MICH. L. REV. 767 (1950), and *Strikes, Picketing, and the Constitution*, 4 VAND. L. REV. 574 (1951).

regulation on any reasonable basis. The implicit assumption of this approach is not just that the "more than speech" aspects of picketing can be divorced, but that there are basically two separate kinds of picketing. Presumably the two may overlap somewhat, but the Court is still assumed able to draw the line between the two.

The difficulty of finding a dividing line is well illustrated by Mr. Justice Douglas's dissent in *Local Union No. 10, United Ass'n of Journeyman Plumbers & Steamfitters v. Graham.*[84] The majority had upheld an injunction against picketing when at least one of the objectives was in violation of a state right-to-work law. After attempting to distinguish lawful and unlawful purposes Mr. Justice Douglas stated: "No court would be entitled to prevent the dissemination of the news 'This is not a Union Job,' whether it be by radio, by newspaper, by pamphlets, or by picketing."[85] He then effectively contradicted himself, with apologies, as follows:[86]

> "The line between permissible and unlawful picketing will therefore often be narrow or even tenuous. A purpose to deprive nonunion men of employment would make the picketing unlawful; a purpose to keep union men away from the job would give the picketing constitutional protection."

In practice the latter statement rests upon a false antithesis, since by keeping union men away pressure is exerted on the employer to deprive nonunion men of jobs. Yet this very purpose, which would make the picketing unlawful, can be accomplished by the mere dissemination of news, which Justice Douglas says no court would be entitled to prevent. He finally lamented the lack of definitive findings as to the specific purpose of the picketing. Was it a signal for coercion or was it peaceful persuasion? Mr. Justice Douglas did not know, and

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[84]345 U.S. 192 (1953). This case shed no new light on the constitutional status of picketing, since the Court had already accepted the unlawful objective formula and had previously upheld state right-to-work laws. See Lincoln Union v. Northwestern Iron & Metal Co. and Whitaker v. North Carolina, 335 U.S. 525 (1949). The Court had no difficulty in combining the two to prohibit picketing one of the purposes of which was in violation of the right-to-work law. Interestingly, Justice Black, who first clearly used the unlawful objective approach in *Giboney* and who also wrote the opinion upholding state right-to-work laws, dissented. He could do this without being inconsistent because the law involved did not necessarily meet the criteria he outlined in his *Giboney* opinion.

[85]345 U.S. 192, 202 (1953).

[86]*Ibid.*

it appears most unlikely that any court in the country could determine the question. Although intent may be vitally important in many phases of law, it is certainly inappropriate and largely irrelevant as a constitutional criterion for picketing cases.

The weakness of the signal-publicity test is not merely that it is unworkable in practice — it is as fallacious in theory as the economic nexus of Mr. Justice Frankfurter. It assumes, quite wrongly, that a signal and publicity are the two largely exclusive halves of picketing. A moment's reflection will show that, while not all signals may aim at publicity, it is hard to conceive of successful publicity that cannot also be taken, quite spontaneously perhaps, as a signal for economic coercion. The signal aspect is not so much a part of the communication as it is a matter of subjective interpretation. Thus the same picketing may be publicity to an interested onlooker but a quite definite signal to a union member who would be subject to a fine equal to a year's wages if he were to cross the picket line. Since the Court has already held that when any one of the purposes of picketing is to foster an unlawful objective picketing may be enjoined in toto,[87] the signal-publicity criterion appears to have been stillborn. This is scarcely to be lamented, inasmuch as all picketing contains at least potential elements of both signal and publicity. And, since "result" is one of the most frequently accepted indications of "intent," the probable effect of attempting to use this test would be to enjoin picketing whenever it appeared effective and allow it when it did not matter.

Picketing, as indicated time and again, is more than economic coercion but also more than pure speech. Since the attempts to divide picketing into its pure speech and more-than-speech instances appear to be fruitless, the better solution lies in the "limited right" approach along some such lines as those suggested by Mr. Justice Black in his *Giboney* opinion.[88] At present, however, Mr. Justice Black is fol-

[87]International Brotherhood of Elec. Workers v. NLRB, 341 U.S. 694 (1951).

[88]That this opinion uses the unlawful objective approach should not blind one to the all-important fact that he carefully qualified what was to be regarded as serious enough to warrant enjoining all picketing in a dispute. It is the qualifications, not the empty verbal formula, that matter. Even the "clear and present danger" test is, in essence, also a qualified test of "unlawful objective." The limitation is that there must be a clear and present danger of a substantive evil within the power of government before speech may be classified as unlawful. In comparison to this Justice Black's four-part test seems at least equally useful as a judicial instrument, but its lack of rhetorical appeal appears to have proved

lowing a lonely path in dissent or separate concurrence in most picketing cases. Mr. Justice Douglas appears to be permanently frustrated by the lack of psychoanalytic evidence of purpose in picketing. Meanwhile the majority of the Court is deciding cases on a gross perversion of Mr. Justice Black's suggested test: picketing for any and all unlawful objectives may be enjoined. The unlawful objective formula certainly has the merit of simplicity, and in one form or another it has been accepted by every member of the present Court who has had occasion to pass on it,[89] but as a constitutional standard does it have anything other than simplicity to recommend it? If not, are we to abandon the concept of constitutional limitation merely because it becomes difficult to define a limit?

Again a little logical analysis is instructive. Peaceful picketing was, under *Thornhill,* presumed to be protected as free speech, and the only limitation on speech is clear and present danger of a substantive evil. But now picketing for any objective declared by Congress, state legislatures, or the courts to be contrary to public policy may be enjoined. And what is the limit on objectives that can be declared unlawful? Constitutionally, and the distinction later becomes of the first importance, the only limit under present economic due process is that the Court can find some sort of reasonable basis for the law. "Unlawful objective" is thus not itself a constitutional standard and bears absolutely no relation to the First Amendment; rather, it is a mere verbal formula.[90] Its acceptance makes a "reasonable basis" the only constitutional restraint.[91] At this point the discussion switches ground from civil liberties, the First Amendment, the "preferred position" doctrine, and effective judicial review into the field of economic and social policy, procedural due process, and judicial respect for any policy of a legislative majority so long as the policy does not lack a reasonable basis or upset the federal system. Thus

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fatal.

[89]See appendix for a comparison of the varying degrees of acceptance.

[90]The concept of something being an unlawful objective was implicit in Frankfurter's economic nexus doctrine, in which conscripting neutrals beyond the industry involved would be unlawful, and in Cox's signal-publicity test, in which picketing as a signal would be unlawful. Used without any qualification, however, the "unlawful objective" rubric is a mere verbal formula that ignores all the speech aspects in picketing and relegates it, under the Court's post-1937 economic "due process," to regulation on any sort of reasonable basis.

[91]Thus either the speech element in picketing or the existence of the First Amendment is ignored in favor of a Hobbesian acceptance as "good law" of whatever a state legislature or the Congress passes.

either picketing is speech and should be protected to the full extent of the clear and present danger test, or it must be relegated to regulation on a reasonable basis like any ordinary phase of economic life. To an absolutist there is no middle way out of the dilemma. But such "label thinking" in terms of absolutistic standards and fixed categories is incompatible with the Supreme Court's balancing-process function and ignores the hybrid nature of most picketing. It also may be criticized on one more very practical level.

As has been emphasized by one recent commentator, civil liberties cases involve both the judges' libertarian sympathies and their conception of the role of the judiciary.[92] At present it might be pointed out, before criticizing any retreat from *Thornhill,* that a strict enforcement of the picketing-free speech dogma would render unenforceable or unconstitutional a significant part of the Taft-Hartley Act and of numerous state laws on the right to work, on trade restraints such as involved in the *Giboney* case, and on other aspects of labor relations. Further, the virtual abdication of control of social and economic policy to legislative majorities in the period since 1937 has placed the Court in a strangely ambivalent position as it seeks to assert decisive judicial control in the field of civil liberties. Aside from the all too obvious fact that this development of the law of civil liberty has come at the very time when public sentiment, as reflected in the actions of the Chief Executive, the Congress, and state legislatures, is narrowing the field, the effect of the Court's extreme self-restraint in reviewing social and economic legislation is to cast popular doubt upon the validity of its claim to review any acts of legislation, including those touching upon civil liberties. As yet the Court has failed to work out a satisfactory rationale as to why the justices should defer to the majority desire for social and economic legislation but resist the majority desire for legislation curbing activities thought by the members of the Court to be within the domain of civil liberties.[93]

Although reasonable judicial restraint is certainly to be desired in a democratic society, the very foundation of constitutional government requires that there be some enforceable limits on power.[94] The

[92]Pritchett, *Libertarian Motivation on the Vinson Court,* 47 AMER. POL. SCIENCE REV. 321 (1953).

[93]The dilemma of the Court has been analyzed by Latham, *Supreme Court and Supreme People,* 16 J. POLITICS 207 (1954).

[94]The reluctance of the Court to enforce such limits in the areas of control of the mails, the rights of public employees, and the status of aliens and naturalized

extent of judicial abdication proclaimed by Mr. Justice Frankfurter and, for the purpose of allowing free reign in enjoining picketing for any unlawful objective, accepted by a majority of the Court, seems excessive. That the Court has lowered the standard to accept any reasonable legislative declaration of an unlawful objective is bad enough, but when it is considered that judicial statements of policy and *ad hoc* court determinations of the best interests of the community have also been accepted as establishing unlawful objectives the situation is indeed not encouraging.[95]

Still, our legal Cinderella is considerably better off today than before *Thornhill.* It is now firmly established that a blanket prior restraint of all picketing is unconstitutional; and, more important, the whole burden of proof has been shifted from the picketers to those claiming to be unlawfully hurt. As with the presumption of innocence, this is no small difference. To demand further that every legislative regulation of picketing be regarded as presumptively unconstitutional,[96] as the only alternative to government by injunction, is to create a false dilemma that ignores the middle ground, foreshadowed in the brief period from *Senn* to *Thornhill,* in which picketing in labor disputes is established and limited by statute. But should not the Court retain some check on the extent to which picketing can be regulated?

If picketing is more than speech then it is only right that our legal Cinderella cannot claim the tiny glass slipper of "clear and present danger" that is designed for speech only. Although Cinderella's foot is too large for that slipper, the author — and, by analogy, Mr. Justice Black — would not relegate her to any "reasonable" sort of footwear that may be presented, but would seek to tailor some sort of less glamorous First Amendment protection of a hybrid sort.

Act III: That Old Black Magic — The Taft-Hartley Act as Prince Charming?

The most recent developments in the Court's treatment of picketing

citizens has been discussed in terms that are generally also applicable to peaceful picketing in McCloskey, *The McCarran Act and the Doctrine of Arbitrary Power,* 4 Public Policy 228 (Harvard Univ. Grad. School of Pub. Adm'n 1953).

[95]These are the results of the *Hughes* and *Hanke* cases, respectively. Such determinations do not come "encased in the armor wrought by prior legislative determination," Bridges v. California, 314 U.S. 252, 261 (1941).

[96]See the famous note 4 to United States v. Carolene Prod. Co., 304 U.S. 144,

have not been in relation to the First Amendment, but their crucial influence on the future status of peaceful picketing and on the use of the "unlawful objective" formula make them worthy of close attention. The predictions of the prophets of doom that acceptance of an unqualified unlawful objective rule by a majority of the Court spelled a return to government by injunction have not been fulfilled. The so-called Northwest Passage around *Thornhill* has not led back to the old pre-1937 world but into a New World in which the legal battles over picketing are neither constitutional nor common law but rather turn on statute law. And here again another article appearing over a decade ago and relating the status of picketing to the struggle between federal and state jurisdictions hinted at the turn of the most recent developments.[97]

Paradoxically, the statutory Prince Charming currently claimed by our legal Cinderella, union picketing, turns out to be none other than the Taft-Hartley Act![98] And let there be no mistake – this role is now clearly recognized by both sides, as evidenced by the following conclusion to an article written by the ultra-conservative, pro-business columnist, Henry Hazlitt: "Peaceable and balanced labor relations are most likely to come through the repeal or drastic revision of the Taft-Hartley Act and local enforcement of the common law against coercion, intimidation, and violence."[99] Here is a conservative Republican, who believes in the gold standard and a return to government by injunction, strongly denouncing the Taft-Hartley Act, which was passed by the conservative, Republican-controlled 80th Congress. Why this sudden reversal of positions?

Briefly, the Taft-Hartley Act was passed as a comprehensive statute to govern labor-management relations coming within the vast

152 (1938).

[97]Teller, *Picketing and Free Speech,* 56 HARV. L. REV. 180, 218 (1942): "The rivalry over jurisdiction between the state and federal courts is as old as the Constitution. It is in relation to this controversy, and not in reference to its identification with free speech, that the present constitutional status of picketing should be determined." While Teller was quite right about the ultimately crucial importance of federalism, he was largely concerned with the maintenance of state court control through the common law rather than with the problem of conflicting federal and state statute law in the labor relations field; see note 120 *infra.*

[98]Technically, of course, this is the Labor-Management Relations Act of 1947, 61 STAT. 136 (1947), 29 U.S.C. §141 (1952), amending the 1935 National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. 151 (1946), popularly known as the Wagner Act.

[99]Hazlitt, *The Ethics of Picketing,* Newsweek, Dec. 28, 1953, p. 59.

scope of the commerce power.[100] The act outlines both rights and duties, and one of the federal rights guaranteed labor is to engage in concerted activities so long as they do not constitute unfair labor practices as determined by the National Labor Relations Board.[101] Such comprehensive federal legislation inevitably raised the question as to whether it did not pre-empt the field within the scope of the commerce power so that states could neither add to nor subtract from the rights and duties therein provided. Most legal commentators believed that such must be the result,[102] and several state courts ruled that the state was powerless to exercise jurisdiction over picketing in interstate commerce except in the case of violence or mass picketing, when use of the state police power has been the traditional remedy.[103] In 1952 a test case, argued on the issue of pre-emption, reached the Supreme Court but was dismissed on the ground that the writ of certiorari had been improvidently granted.[104]

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[100]Recently extended to purely intrastate commerce in the utility field by Amalgamated Ass'n v. Wisconsin, 340 U.S. 383 (1951), 5 U. OF FLA. L. REV. 205 (1952).

[101]For discussions of the act see Cox, *Federalism in Labor Law,* 67 HARV. L. REV. 1297 (1954), *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 1 (1947); Cox and Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950); Hall, *The Taft-Hartley Act v. State Regulation,* 1 J. PUB. L. 97 (1952); Handler, *The Impact of the Labor-Management Relations Act of 1947 Upon the Jurisdiction of State Courts Over Union Activities,* 26 TEMP. L.Q. 111 (1952). Between the categories of unfair practices and protected activities there has been a "twilight zone"; see International Union v. Wisconsin Empl. Rel. Bd., 336 U.S. 245 (1949) ("quickies"); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (strike in breach of contract); Elk Lumber Co., 91 N.L.R.B. 333 (1950) (slowdown); *cf.* Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E.2d 697 (1951) (organizational picketing).

[102]This was the view of Emil Schlesinger, *A Summary and Critique of the Law of Peaceful Picketing in New York,* 22 FORD. L. REV. 20, 73 (1953): "Yet, if the logic of its past opinions is to flower, if the patterns established by Congress are to have meaning, the Court *must* ultimately hold that Congress has pre-empted the entire field of purposes and objectives in labor-management relations, which affect interstate commerce, and that it has entrusted the administration of this field to the NLRB and its enforcement to the federal courts." In substantial agreement with this view are Cox and Seidman, *supra* note 101.

[103]This exception has firm precedent in Allen-Bradley Local v. Wisconsin Empl. Rel. Bd., 315 U.S. 740 (1942), and Cole v. Arkansas, 338 U.S. 345 (1949).

[104]Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952). The case involved a state court injunction against peaceful picketing which the union claimed was within the federally pre-empted area of labor relations. In relation to peaceful strikes for higher wages the Court had

On December 14, 1953, however, Mr. Justice Jackson, speaking for a unanimous Court, announced a decision in *Garner v. Teamsters, Chauffers and Helpers Local 776,*[105] a case involving picketing which was within the scope of the Taft-Hartley Act and also prohibited by action of the state. The Pennsylvania Supreme Court had held that the federal "provisions for a comprehensive remedy precluded any State action by way of a different or additional remedy for the correction of the identical grievance."[106] Against this view it had been argued that the Taft-Hartley Act protected public rights for the public interest, but that it was up to the states to provide additional legislation to protect private rights in labor disputes.[107] The Court's answer was unequivocal:[108]

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

So long as a comprehensive labor-management relations act remains

already upheld the exclusiveness of federal power in International Union of United Automobile Workers v. O'Brien, 339 U.S. 454 (1950). The key remaining issue was whether federal intervention was so comprehensive as to pre-empt the entire field and thus prevent the states from acting even on issues not specifically covered in the Taft-Hartley Act.

[105]74 Sup. Ct. 161 (1953). Prior to this decision there had been considerable confusion on the exclusiveness of federal jurisdiction. *Compare, e.g.,* Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council, 93 F. Supp. 217 (D. Me. 1950), *with* Goodwins, Inc. v. Hagedorn, *supra* note 101. See also Birnbaum, *Jurisdiction of State Courts to Enjoin Illegal Picketing of Employers Engaged in Interstate Commerce,* 3 SYRACUSE L. REV. 376 (1952); Handler, *supra* note 101.

[106]Garner v. Teamsters, Chauffeurs & Helpers Local 776, 373 Pa. 19, 28, 94 A.2d 893, 898 (1953).

[107]This dichotomy was confidently argued by Rose, *The Labor-Management Relations Act and the State's Power to Grant Relief,* 39 VA. L. REV. 765 (1953). For Rose's critical view of the decision see *Garner v. Teamsters: The Supreme Court and Private Rights,* 40 VA. L. REV. 177 (1954). Whether the pen will prove mightier than the bench remains to be seen.

[108]Garner v. Teamsters, Chauffeurs & Helpers Local 776, 74 Sup. Ct. 161, 171

in force nationally and concurrent state jurisdiction is denied, it appears that the ultimate extent to which the constitutional protection of picketing as speech might be shrunk has become largely a moot question:[109]

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraints. For the policy of the national Labor Management Relations Act [Taft-Hartley Act] is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

The above case, and a decision handed down the same day holding an automobile dealer within the power of the commerce clause and hence subject to the Taft-Hartley Act,[110] were the cause of Mr. Hazlitt's outburst against the Taft-Hartley Act.[111] But when the Court indicates that all picketing is not proscribed – not because it is constitutionally protected to some degree but solely because it is not the policy of Congress to completely condemn "the weapon of picketing" – it only confirms the view that, as one commentator put

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(1953).

[109]*Id.* at 170.

[110]Howell Chevrolet Co. v. NLRB, 74 Sup. Ct. 214 (1953).

[111]Actually the *Garner* decision follows the line of reasoning of Hill v. Florida, 325 U.S. 538 (1945), which held Wagner Act provisions originally aimed at anti-union practices of employers to also preclude state legislation inconsistent with the guaranties of the act, and of International Union v. O'Brien, 339 U.S. 454 (1950). The unfortunate over-extension of exclusive NLRB jurisdiction into truly local labor problems results mainly from two factors. First, the Wagner Act was framed to utilize all of the Federal Government's then (1935) rather narrowly limited power in the field, but with the constitutional revolution of 1937 this power was tremendously expanded. Second, the Taft-Hartley Act failed to provide that national action should be restricted to a scope short of the greatly extended post-1937 limits on national power in the labor field. Obviously the Federal Government need not act to the full extent of its permissible power, nor need it reduce the role of the states to an absolute minimum.

it: "There can be but one conclusion drawn from an analysis of the recent cases: The *Thornhill* doctrine exists only as a historical footnote."[112]

The only other picketing cases decided during the 1953 term of the Court give no indication of any trend back to the attempt to spell out the limits of picketing regulation by means of constitutional interpretation.[113] Comprehensive congressional regulation and federal pre-emption of most of the labor-management relations field, including such concerted activities as peaceful picketing, indicate that the future status of picketing will not be determined largely through government by injunction under the common law rules of tort, or by anti-labor state legislatures wielding an unqualified power to set unlawful objectives, or by nine justices meditating in Washington on the meaning of the First Amendment. The future limits on peaceful picketing in labor disputes apparently will be largely worked out between the President and the elected representatives of the Congress. The constitutional basis from which they will work may be roughly summarized as follows.

(1) A total ban by prior restraint of all picketing cannot be justified by any criteria used by the Court since *Thornhill* and would presumably still be held unconstitutional as violative of the First Amendment.

(2) Picketing by unorganized groups for noneconomic purposes has never been before the Supreme Court since the picketing-free speech doctrine was announced in 1940. In many situations, such as political campaigns, its ordinary use could hardly be prohibited by any conceivable stretching of the unlawful objective formula. Since picketing per se cannot be made unlawful, it would seem likely that

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[112]Burstein, *Picketing and Speech*, 4 LABOR L.J. 791, 803 (1953).

[113]NLRB v. Local Union 1229, 74 Sup. Ct. 172 (1953), is interesting as a reflection on the argument that the factual content of picketing is too small to warrant protection. Striking technical employees of a Charlotte TV station substituted for the usual picketing signs material attacking the low quality of the station's programs and asking if Charlotte was a "Second Class City." Although Frankfurter, Black, and Douglas, JJ., held that this was "concerted activity" and not just cause for dismissal, the majority, including Chief Justice Warren, upheld the firing of employees on the ground that criticism not directly related to the labor dispute was disloyalty and hence sufficient cause for dismissal. Since the case concerned only job rights, rather than an injunction or punishment, the constitutional issue of free speech was not involved, except for the implied necessity of a "content nexus" as well as of an "economic nexus." Capital Service, Inc. v. NLRB, 74 Sup. Ct. 699 (1954), further implemented the *Garner* trend.

picketing for purposes not within the scope of economic coercion might still claim constitutional protection under the First Amendment.

(3) Picketing by labor unions in economic disputes is more than just speech and is subject to regulation beyond that applied to ordinary speech.

(a) Congress may regulate the methods and purposes of picketing in labor-management disputes falling within the scope of the commerce power. Unfair labor practices as determined by the National Labor Relations Board acting pursuant to the Taft-Hartley Act constitute unlawful objectives, for which picketing may be enjoined by the federal courts. Otherwise, workers may picket as a federally protected right to concerted activity under the act. The states can neither add to nor subtract from the list of unfair labor practices or the extent of the right to concerted activity, except for traditional use of the police power.

(b) The states may regulate the method of picketing in respect to numbers, quietness, truthful placards, open ingress and egress, suitable hours, absence of violence, and other appropriate regulations under the police power.[114]

(c) The states may regulate the objectives for which picketing may be carried on in the areas reserved to them under the Taft-Hartley Act and in the dwindling area of intrastate commerce not touched by the commerce power.[115] At present a state's determination of an unlawful objective may be made by the legislature on any reasonable basis with or without a criminal sanction, or may be based on judicial policy, or may be arrived at by the state court's interpretation of the best interests of the community. The last-mentioned extension, how-

[114]A borderline exception to this is Amalgamated Ass'n v. Wisconsin, 340 U.S. 383 (1951), denying power of a state to apply compulsory arbitration to labor disputes of public utilities in which picketing or a strike would endanger the health or safety of the community.

[115]Federal regulation has been so over-extended into areas of local labor relations that the evils of concurrent regulation can only be avoided by a substantial contraction of the scope of NLRB jurisdiction, or the advantages of federalism will be largely lost in the labor relations area. For examples of extension into local industries see Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953) (automobile agencies); NLRB v. Stoller, 207 F.2d 305 (9th Cir. 1953), *cert. denied*, 74 Sup. Ct. 517 (1954) (laundries); NLRB v. American Bottling Co., 205 F.2d 421 (5th Cir. 1953), *cert. denied*, 346 U.S. 921 (1954) (bottling companies).

ever, received the unqualified approval of only four justices, including the late Chief Justice Vinson.

EPILOGUE

The picketing-free speech doctrine which rose so rapidly into prominence in the American constitutional scene with the *Thornhill* decision now appears to have been generally overruled *sub silentio.* Whether the magic wand of "free speech" will ever again be applied to union picketing is questionable. More likely, the picketing-free speech cases will serve as a reminder that various activities involving the communication of ideas but not specifically equal to ordinary speech may raise First Amendment questions.[116] When such questions are not raised in some clear manner, as by the comprehensive prior restraint in the *Thornhill* case or by restraint of picketing for political rather than economic objectives, it now appears that the Supreme Court will leave to the political branches of government, especially to those of the national government, the responsibility of setting the limits on acceptable picketing.

By treating picketing as a statutory right guaranteed under certain conditions by the Taft-Hartley Act rather than as a constitutional right guaranteed by the First and Fourteenth Amendments, the majority of the present Court has neatly evaded the difficult problem of working out appropriate criteria for a "limited right."

From the viewpoint of those who regard picketing as primarily speech, our Cinderella is headed back to the scullery; conversely, for those who look at picketing as an obvious form of economic coercion she is on her way back to the ball.[117] Since picketing is an integral part of the controversial labor-management relations field, which is supercharged with emotion as well as characterized by deep-seated differences of political belief based on widely divergent social philoso-

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[116]In the future the Court would do well to beware of the use of labels and blanket identifications. If the *Thornhill* case included within the area of protected speech too much, too categorically, it would appear that other cases such as Beauharnais v. Illinois, 343 U.S. 250 (1952), and Cantwell v. Connecticut, 310 U.S. 296 (1940), may have excluded too much, too categorically. Without becoming completely eclectic, there is something to be said for Justice Frankfurter's famous distrust of generalities in the application of constitutional concepts.

[117]For a spirited discussion of picketing as coercion see Jones, *Picketing and Coercion: A Jurisprudence of Epithets;* Gregory, *A Defense;* Jones, *A Reply;* Gregory, *A Conclusion,* 39 VA. L. REV. 1023-1069 (1953).

phies, such a difference in viewpoint is probably inevitable. At present the advantage, both in terms of decisions and of semantics, lies with those who regard picketing as coercion.[118]

For economic conservatives it is frustrating for the Court to virtually admit, on the one hand, that even peaceful picketing is not constitutionally protected and yet, on the other hand, largely take away under the commerce power the right to regulate picketing except by act of Congress and subsequent enforcement through the federal courts. But neither do liberals and civil-liberties enthusiasts have anything to exult over — any federal statute is likely to prove a rather inconstant Prince Charming. Should the provisions of the Taft-Hartley Act guaranteeing the right to participate in concerted activity be repealed, or modified[119] so as to permit concurrent state regulation, the power of the Court to strike down any sort of unnecessarily restrictive policy favored by state legislative or congressional majorities will be weakened. It might be concluded from a politico-psychological interpretation of the Court's shifts in attitude in regard to picketing that in recognition of existing political realities it is over-zealously pushing federal pre-emption of the labor-management relations field throughout the vast area of the commerce power as a sort of compensation mechanism for having failed to meet the First Amendment questions raised by peaceful picketing in a context of economic dispute.[120]

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[118]The hybrid nature of picketing — part speech and part economic coercion — makes the assertion of judicial checks on legislative restraints even more difficult than in the case of pure civil liberties issues. Once the unlawful objective shibboleth is used the Court is on the defensive and the issue is framed largely in terms of legislative regulation of economic action, which the Court is prone since 1937 to uphold, rather than in terms of restraint of speech, which the Court has regarded with more suspicion.

[119]Thus far all attempts at amendment of the Taft-Hartley Act this year have been defeated. Although President Eisenhower's proposals involved features favored by both labor and management, neither side was satisfied. On the key issue of allowing greater autonomy for state action the proposals faced an unusual opposition coalition of Southern states' rights advocates, who regarded the Republican plan as not going nearly far enough, and Northern liberal Democrats, who opposed it as going much too far. See especially the Smith bill, limiting NLRB jurisdiction, S. 1785, 83d Cong., 1st Sess. (1953), and the Goldwater Bill, ceding the states power to regulate strikes and picketing in industries affecting interstate commerce, S. 1161, 83d Cong., 1st Sess. (1953).

[120]Such an interpretation presumes only the obvious: that the Court recognizes that both labor and management command considerable political power, but that their access to influence at different levels of government and through the various

The sharp conflict over states' rights[121] and certain other issues in labor relations has obscured the vital fact that there is a large area of common agreement in the labor-management field.[122] The judge-made law of the era of government by injunction was grossly inadequate, and the political strength of organized labor makes discussion of any attempt to return to it academic. On the other hand, the public has reacted against unlimited economic warfare; and picketing, since it may also involve economic sanctions and group discipline as well as ordinary speech, has come in for its share of regulation.[123]

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branches of government is strikingly different. Hence questions of procedure or jurisdiction have great substantive importance in terms of result. At the national level organized labor is ordinarily most influential through the Chief Executive, since he is chosen by an electoral system which puts great emphasis on the populous two-party states, where urban labor is strongest. Conversely, Congress over-represents traditionally conservative rural elements and the small nonindustrial states, neither of which tend to be very favorable toward labor. On this basis passage of the Taft-Hartley Act by Congress and its veto by President Truman was to be expected. Although labor is at some disadvantage in Congress, it stands a far better chance of attaining its ends there than in the state legislatures of most states. The least favorable recourse for labor would be a return to injunctive regulation by the state courts. Thus the Supreme Court's emphasis upon federal pre-emption has come, like the Greek *deus ex machina,* to the aid of labor; and Mr. Hazlitt's plea for a return to "local enforcement of the common law" is explicable in terms of the optimum goal of management.

[121]The sudden concern for states' rights by the very same political groups that pushed federal intervention into the area of labor regulation, via the Taft-Hartley Act, is not to be taken too seriously. Even the South, where the cry is somewhat more hallowed than hollow, went to war in 1861 in part because of fear that President Lincoln would respect states' rights in administering the Fugitive Slave Law in the Northern states. For some classic examples of the inconsistency of various groups on the issue of state v. federal action see Harris, *States' Rights and Vested Interests,* 15 J. POLITICS 457 (1953). This is, of course, a valid case for limiting national intervention in the field so that the federal principle can be maintained in the area of labor law. The case is well presented in Cox, *Federalism in Labor Law,* 67 HARV. L. REV. 1297 (1954). Professor Cox concludes that NLRB jurisdiction has been extended too far and should be contracted either by the Court or by statute, but that there is no sound reason for concurrent regulation of the same industries by both the states and the Federal Government.

[122]The conflicting viewpoints of the CIO, AFL, and NAM on the Taft-Hartley Act are presented in the symposium on *The Law and Labor-Management Relations,* 23 TENN. L. REV. 112-176 (1954). Emphasis upon the areas of agreement is stressed by Cox, *Revision of the Taft-Hartley Act,* 55 W. VA. L. REV. 91 (1953).

[123]It is worth noting that in almost every case it is the action of non-picketing union members or of the general public which actually constitutes the coercion.

While industrial peace and quiet are worthy goals, economic freedom — like political freedom — depends upon a certain degree of competition and conflict. The risks of strikes and picketing cannot be totally eliminated without endangering collective bargaining, and collective bargaining cannot be discarded without substituting an even greater degree of government control. As George Bancroft put it a century ago:[124]

> "The feud between the capitalist and laborer, the house of Have and the house of Want, is as old as social union, and can never be entirely quieted; but he who will act with moderation, prefer fact to theory, and remember that every thing in this world is relative and not absolute, will see that the violence of the contest may be stilled."

It is definitely in the public interest that violence and extreme coercion in labor relations be stilled, but it is equally important that the speech element in picketing be given due consideration. Excessive attempts by either labor or management to invoke government intervention for its own economic advantage can only lead to a "politicized" economy in which both would be subordinated to bureaucracy, with freedom largely lost in the shuffle.

If the Congress and the state legislatures will act with moderation in regard to the regulation of picketing the Court may not be forced to again take up the thorny problem of definitively classifying the "hybrid" of peaceful picketing. Should it be forced to do so it has adequate precedents for protecting the public's right to information

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Forbidding a single picket to march up and down with a sign is a handy way of short-circuiting the most effective means of signaling a boycott or publicizing the existence of a labor dispute. The same picket may be doing both simultaneously, for, as Justice Holmes pointed out, dissenting in Gitlow v. New York, 268 U.S. 652, 673 (1925), "Every idea is an incitement." If speech protection is not to be considered at all in regulating pickets carrying signs, then what of a sound truck broadcasting the facts of a labor dispute? What of dissemination of the news by radio, by newspaper, or by pamphlet? What is to prevent the extension of the use of the unlawful objective formula to prohibit any sort of communication by any effective means of information concerning labor disputes? It would be more in keeping with the American tradition to seek to put some limits on the coercive action, *e.g.*, forbid unions to fine members for crossing a picket line, rather than to attempt to suppress every possible signal or idea that can be taken as a signal.

[124]Quoted in A. M. SCHLESINGER, JR., THE AGE OF JACKSON vii (1946).

concerning labor disputes against Pickwickean regulations based on quibbling use of the unlawful objective formula.[125] It is to be hoped that, with the primary responsibility for regulating union picketing now resting upon the Congress, the Court will brook no interference with noneconomic picketing except in accord with free speech criteria.[126] There is also no inherent reason why the Court's abdication in favor of any unlawful objective established by state judicial action or on the basis of a state court's *ad hoc* determination of the best interests of the community need prove permanent. There is no strong argument for the area of picketing regulation not being subject to judicial review in the interest of the speech elements involved. The field does not require highly technical knowledge of a specialized nature; the processes of the Court are not unsuitable; the subject matter certainly has not traditionally been insulated from judicial control.

In retrospect it is hardly surprising that the *Thornhill* case did not usher in the millenium in regard to disputes over picketing. The "happily ever after" of the fairy tale apparently was not meant for ordinary life, or for the development of constitutional law.

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[125]The slippery phrase "unlawful objective" conceals an important distinction in that it covers not only (1) action to compel an employer to engage in unlawful conduct but also (2) bargaining demands which the employer could grant without violating any statute or public policy but which the court happens to regard as beyond the required scope of bargaining. For example, Professor Cox has pointed out that in Massachusetts "a strike for a closed shop was unlawful even though a closed shop agreement was valid and enforceable in the same courts," *Federalism in Labor Law*, 67 HARV. L. REV. 1297, 1327 (1954).

[126]It is in this area that the *Thornhill* precedent may maintain some vitality. If the Court is to permit legislative regulation of picketing within the scope of labor-management relations the way should be cleared to apply either the clear and present danger test or the criteria of a limited right to all noneconomic picketing.

APPENDIX

SUPREME COURT ACCEPTANCE OF "UNLAWFUL OBJECTIVES" FOR PICKETING

CASE, RATIONALE OF MAJORITY OPINION, AND AUTHOR OF OPINION	JUSTICES												TOTAL JUSTICES ACCEPTING SPECIFIC RATIONALE
	Vinson	Black	Douglas	Reed	Frankfurter	Murphy	Jackson	Rutledge	Burton	Clark	Minton	Warren	
PICKETING-FREE SPEECH													
Thornhill: Clear and present danger of a substantive evil (Murphy)	-	X	X	X	X	X	-	-	-	-	-	-	8*
STATE REGULATION													
Giboney: Integrated conduct—a clear danger of violating an important public law (Black)	X	X	X	X	X	X	X	X	X	-	-	-	9
Gazzam: Objective of violating an important public law that has no criminal sanction (Minton)	X	C	O	X	X	-	X	-	X	X	X	-	7
Hughes: Objective of violating established state judicial policy (Frankfurter)	X	C	O	C	X	-	X	-	X	X	C	-	5
Hanke: Objective determined by state court to be contrary to best interest of community (Frankfurter)	X	D	O	D	X	-	X	-	X	C	D	-	4
FEDERAL REGULATION													
NLRB v. Denver Bldg. & Constr. Trades Council: Signal picketing for unfair labor practice under Taft-Hartley Act unlawful (Burton)	X	X	D	D	X	-	X	-	X	C	D	-	6
International Brotherhood of Electrical Workers v. NLRB: Publicity picketing for unfair labor practice under Taft-Hartley Act unlawful (Burton)	X	X	D	D	X	-	X	-	X	C	D	-	6
EXCLUSIVENESS OF FEDERAL POWER													
Garner v. Teamsters, Chauffeurs & Helpers: Federal regulation of labor practices exclusive both within scope regulated and in excluding state action in area designed to remain free (Jackson)	-	X	X	X	X	-	X	-	X	X	X	X	9

*Also includes Chief Justice Hughes and Justices Roberts and Stone

KEY TO SYMBOLS
- X Participated in majority opinion
- C Concurs in decision
- D Dissents to opinion and decision
- O Absent from bench at time of decision
- - Not on the Court at the time