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LABOR LAW AND FREE SPEECH: THE CURIOUS POLICY OF LIMITED EXPRESSION*

JULIUS GETMAN**

Labor relations is the one area of law in which the policies of the first amendment have been consistently ignored, reduced, and held to be outweighed by other interests. A "policy of limited expression" has been applied to pure speech and symbolic speech, to consumer picketing and employee boycotts, to political action and to the organizational activities of both labor and management.¹ It has been woodenly applied by the National Labor Relations Board (Board),² routinely enforced by the courts of appeals,³ and given its major impetus by the Supreme Court in a series of opinions notable for their failure to explain, rationalize, distinguish, or articulate useful standards.⁴ The approach taken in labor cases is in marked contrast to the Court's traditional commitment to freedom of expression, to its recent decisions expanding the constitutional protection given to commercial speech,⁵ and to its recent landmark decision, *NAACP v. Claiborne Hardware Co.*,⁶ finding political boycotts to be constitutionally protected when undertaken for the cause of racial equality.

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1. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980); see generally Wimberly & Steckel, *NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited*, 32 MERCER L. REV. 535 (1981) (discussing past and present Board application of the laboratory conditions doctrine).

2. See generally Wimberly & Steckel, *supra* note 1 (same).

3. See, e.g., *Soft Drink Workers Union v. NLRB*, 657 F.2d 1252 (D.C. Cir. 1980); *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396 (9th Cir. 1954); *Sunoco Prod. Co. v. NLRB*, 399 F.2d 835 (9th Cir. 1968) (enforcement denied on other grounds).

4. E.g., *Edward J. DeBartolo Corp. v. NLRB*, — U.S. —, 103 S.Ct. 2926 (1983); *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *International Bhd. of Electrical Workers v. NLRB*, 341 U.S., 694 (1951).

5. E.g., *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.* 425 U.S. 748 (1976).

6. 458 U.S. 886 (1982).

THE REGULATION OF EMPLOYER SPEECH

For employers, the policy of limited expression has its greatest significance in the area of representation campaigns. In this area, a series of Board doctrines,⁷ regularly enforced by the courts of appeals, limit the campaign arguments, the method of delivery, and even the tone of rhetoric that an employer may use.⁸ The Supreme Court has affirmed this approach in two remarkable opinions: *NLRB v. Exchange Parts Co.*⁹ and *NLRB v. Gissel Packing Co.*¹⁰ The Court, in *Exchange Parts*, held that a grant of employment benefits prior to an election was coercive. In *Gissel*, the Court upheld the propriety of the Board in finding certain employer statements to be unfair labor practices and the use of a bargaining order to remedy what it deemed to be serious employer violations.

The Court in *Gissel* dealt with an employer who had bargained with a union prior to a long, economically costly strike which nearly put the company out of business.¹¹ When business activities resumed after the strike had ended, the company began nonunion operations. Years later, the Teamsters¹² conducted an organizing drive and signed up a majority of the employees. Prior to a Board election, the company president conducted a series of talks and meetings in which he discussed the harmful effects of unionization.

In the Court's words, the company president "particularly emphasized the results of the long 1952 strike which he claimed 'almost put our company out of business.'"¹³ He also emphasized "that the company was still on 'thin ice' financially, that the Union's 'only weapon is to strike,' and that a strike 'could lead to the closing of the plant.'"¹⁴ He warned the employees "to 'look around Holyoke and see a lot of them out of business.'"¹⁵ During the period immediately before the elections, the employer made similar statements attacking the union as a "strike happy outfit"¹⁶ and stressed the danger to the company from strikes.

7. See *infra* notes 41-46 and accompanying text.

8. Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

9. 375 U.S. 405 (1964).

10. 395 U.S. 575 (1969).

11. *Id.* at 587. The company was shut down for three months in 1952 as a result of a strike with the American Wire Weavers Protective Association. *Id.*

12. General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an Affiliate of International Brotherhood of Teamsters. See *The Sinclair Co.*, 164 N.L.R.B. 261, 262 (1967), *enforced*, 397 F.2d 157 (1968), *aff'd sub nom. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

13. 395 U.S. at 587-88.

14. *Id.* at 588 (quoting the employer's pamphlet).

15. *Id.*

16. *Id.* at 588.

The union lost the election. The Board concluded that the employer's conduct made a fair election impossible because it "reasonably tended to convey to the employees the belief or impression that selection of the Union . . . could lead . . . to [the closing of the] plant, or to the transfer of the weaving operation, with the resultant loss of jobs to the wire weavers."¹⁷ The Board also concluded that the employer's actions foreclosed the possibility of a subsequent fair election¹⁸ and ordered the employer to bargain with the union upon request.

Several aspects of this case are particularly notable. First, at no point did the employer directly threaten to close the plant or take economic reprisals in retaliation for the employees' voting for representation. Indeed, his comments were all premised upon the likelihood of a union-called strike. (This is typical of the vast majority of Section 8(a)(1) cases.¹⁹) Second, there was no finding that the company president was not expressing his honest convictions. Third, the remedy, which involved reversing the result of an election on the basis of an assumption about the way voters would have behaved in the absence of any impropriety, has little or no parallel in general election law.

The employer argued that his statements amounted to no more than an exercise of his first amendment rights of free speech. Rejecting this contention, the Supreme Court held that the employer's speech contained a threat of reprisal and that the bargaining order was a legitimate technique to remedy its effect.

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely. . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.²⁰

The Court also rejected the argument that a bargaining order was too severe a remedy for a speech based violation.

17. *Sinclair*, 164 N.L.R.B. at 267, *quoted in* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 589 (1969).

18. *Id.* at 267, 269.

19. National Labor Relations (Wagner) Act § 8(1), 29 U.S.C. § 158(a)(1). This section makes it an "unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees" in the exercise of their rights to organize.

20. 395 U.S. at 617.

[W]hat is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.²¹

The Court, in an earlier passage, attempted to minimize the effect of such a remedy: "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition."²²

On the basis of this analysis, the Court restricted an employer's first amendment rights to discuss the "effect he believes unionization will have on his company"²³ to the making of predictions that are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . ."²⁴ Thus, "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof."²⁵ Responding to the argument that the line between threat and prediction, thus drawn, is too weak to withstand constitutional scrutiny, the Court commented that, "an employer, who has control over that relationship and therefore knows it best, . . . can easily make his views known without engaging in 'brinksmanship'. . . . At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees."²⁶

In *NLRB v. Exchange Parts Co.*,²⁷ the Court applied similar analysis

21. *Id.* at 617-18.

22. *Id.* at 613.

23. *Id.* at 618.

24. *Id.*

25. *Id.* at 618-19.

26. *Id.* at 620.

27. 375 U.S. 405 (1964). In *Exchange Parts*, several weeks prior to a Board election, the company sent its employees a letter which mentioned several new benefits. The letter also "spoke of 'the Empty Promises of the Union' and 'the Fact that it is the Company that puts things in your envelope. . . . The Union can't put any of those things in your envelope—only the Company can do that.'" *Id.* at 407 (quoting *Exchange Parts Co.*, 131 N.L.R.B. 806, 810 (1961), *enforcement denied*, 304 F.2d 568 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964)).

The Union lost the election. The Board, however, concluded that the announcement of new benefits was meant to induce a vote against the Union and set the election aside. *Exchange Parts Co.*, 131 N.L.R.B. 806, 807, 811 (1961), *enforcement denied*, 304 F.2d 568 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964). The Fifth Circuit denied enforcement in an opinion by Judge Wisdom which summarized the case as follows:

[T]he critical fact in this case is that the benefits carried no coercive element; they

to the grant or promise of benefits holding that they were coercive because they would be perceived by employees as an indirect threat:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.²⁸

This analysis of the impact of an employer promise has been followed by the Board which on occasion has utilized a statement granting or promising benefits as the primary basis for issuing a bargaining order under the authority granted by *Gissel*.²⁹

The conclusions in *Gissel* and *Exchange Parts* rest on four basic assumptions; each of which are, in my opinion, counterfactual:

1. Employees are attentive to what the employer says during the campaign and will, as a result, pick up intimations of reprisal in statements which might be construed differently by others. They will be coerced by such intimations to play it safe and vote against union representation.
2. The installation of a union as bargaining representative is not comparable to installing a government official who received the fewest votes.
3. Under these rules, the employer is able adequately to state his case against unionization.
4. The Board, by virtue of its expertise, is to determine which employer misconduct will have so lasting an impact that a bargaining order would be more appropriate than a rerun election.

The first and fourth of these assumptions were addressed in the empirical study of union representation elections which I conducted with Professors Goldberg and Herman.³⁰ Based on data collected over a two-

were not conditioned upon the employees' relinquishment of any rights. . . . It is impressive logomachy to turn "allurements" into "coercion" by divining a secret purpose. It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club. But a carrot is not a club. Labor is not a donkey. Persuasion is not coercion.

NLRB v. Exchange Parts Co., 304 F.2d 368, 376 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).
28. 375 U.S. at 409.

29. *See, e.g.*, Texaco, Inc., 178 N.L.R.B. 434 (1969), *enforced*, 436 F.2d 520 (7th Cir. 1971) (bargaining order predicated on an employer's solicitation and adjustment of grievances); International Harvester Co., 179 N.L.R.B. 753, 753-54 (1969) (issuing a bargaining order because "few unfair labor practices [are] so effective in cooling employees' enthusiasm for a union than the prompt remedy of the grievances which prompted the employee's union interest in the first place").

30. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW & REALITY (1976) [hereinafter cited as LAW & REALITY]. *See* Getman & Goldberg, *The*

year period under carefully controlled circumstances in thirty-one elections, we concluded that employees are not particularly attentive to the campaign, that perceptions of coercion are unrelated to the actual statements made, and that employees are not thereby persuaded to vote against representation. Indeed, their perception of threats of reprisal is highly correlated with voting *for* representation. We also found that Board doctrine concerning the issuance of bargaining orders is totally unrelated to campaign impact.³¹

The Court's assumption that selection of union representatives is a minor or casual matter, easily changed by the employees if it is determined to be undesirable,³² ignores both the important changes which come with union representation and the extent to which Board rules serve to protect stability rather than free choice after a union is installed. The record suggests that union incumbents are much more likely to be around after ten years than are their counterparts elected to public offices.

The Court's assurance that an employer can easily make his views known without coming close to the brink³³ would be convincing if the Court had explained how the possible harmful effects of unionization can be legally addressed. In my experience, knowledgeable employer counsel, desirous of avoiding unfair labor practices, have difficulty with this wavering line. Perhaps the Court really meant for the employer to stay away from the issue altogether, but the position that unionization may lead to plant closings or transfers of work is, after all, not without its adherents, many of whom base their arguments on respectable market theory. The reasons why a union might cause an employer to go out of business are well explained in Professor Rees' classic work, *The Economics of Trade Unions*.³⁴ Because the argument is based on assumptions about union behavior, a certain amount of employer discretion is a necessary element for a full and open discussion on the effects of unionization.

The law currently protects employer discretion with regard to plant closings in a way that ignores both union rights and employee interests. An employer may close down in retaliation for a union vote or in re-

Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation, 28 STAN. L. REV. 263 (1976); Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975).

31. LAW & REALITY, *supra* note 30, at 115.

32. *See supra* text accompanying note 22.

33. *See supra* text accompanying note 26.

34. A. REES, *THE ECONOMICS OF TRADE UNIONS* (1962). *See also* NLRB v. Village IX Inc., 723 F.2d 1360 (7th Cir. 1983).

sponse to a union position expected in collective bargaining without even discussing the matter with the union.³⁵ But to refer to those rights during an organizational campaign would probably be an unfair labor practice. Thus, the campaign assumes employee ignorance which it is unlawful to correct.

I am aware that my own conclusions are not free from doubt. The findings of the Getman-Goldberg-Herman study, in particular, have been challenged in a variety of publications with a variety of arguments ranging from gut feelings to sophisticated mathematical analysis.³⁶ I do not urge that our recommendations are entitled to constitutional status; my point is only that the factual assumptions, on which the attempts to distinguish between speech in the labor context and speech in other contexts are based, are extremely doubtful.

Only the Court's factual assumption about labor relations explains why normal first amendment protections should not apply to employer statements ambiguously referring to the harmful consequences of unionization. In other contexts the Court has been unwilling to assume that speech has a coercive or threatening impact.³⁷ It has rejected the claims of government officials to be able to predict the impact of speech on bystanders.³⁸ It has insisted that calls to violence or threats of harm must be clearly spelled out and followed by action before characterizing them as unlawful.³⁹ It has insisted that remedies for unlawful speech be

35. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

36. See, e.g., Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1782-86 (1983). Ross, *Afterthoughts on the Short-Lived Experiment in Deregulation of Representation Elections* (Book Review), 77 MICH. L. REV. 560 (1979); Kochan, *Legal Nonsense, Empirical Examination and Policy Evaluation* (Book Review), 29 STAN. L. REV. 1115 (1977); Peck, *NLRB Election Law* (Book Review), 53 U. WASH. L. REV. 197 (1977); Shapiro, *Why Do Voters Vote?* (Book Review), 86 YALE L.J. 1532 (1977); Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View* (Book Review), 28 STAN. L. REV. 1181 (1976); Miller, *The Getman, Goldberg and Herman Questions* (Book Review), 28 STAN. L. REV. 1163 (1976). But see generally Getman, Goldberg & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981).

37. E.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-20 (1982); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). But cf. *Thomas v. Collins*, 323 U.S. 516, 530-32 (1945) (similar principle in labor context); *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (same).

38. E.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Cohen v. California*, 403 U.S. 15, 22-23 (1971); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-09 (1969). Even when treating government restrictions on expression with great deference, the modern Court has required a "clear and present danger" of violent reaction. *Feiner v. New York*, 340 U.S. 315, 320 (1951).

39. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also *Hess v. Indiana*, 414 U.S. 105 (1973) (words not intended and not likely to produce imminent disorder are not punishable). Historically, the Court has been quick to find that the expression of unpopular or radical groups is incitement. E.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919).

limited in such a way as to protect whatever legitimate message the speech might contain. And it has rejected the idea that the identity or position of the speaker may justify regulation.⁴⁰ The Court has also consistently rejected remedies for unlawful speech based upon the assumption of an irremediably harmful consequence.

The Court in *Gissel* referred with evident approval to the Board's laboratory conditions doctrine.⁴¹ This doctrine has included a variety of rules obviously inconsistent with general first amendment policies. For example, elections have been set aside for minor injections of racism into a campaign,⁴² for statements suggesting the futility of voting for the union,⁴³ for showing films deemed by the Board to be misleading and inconsistent with sober and reflective thought,⁴⁴ and for discussions of

40. *Police Dep't v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the Court stated:

[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. at 96. See also *Widmar v. Vincent*, 454 U.S. 263 (1981) (applying compelling state interest standard to denial of forum to student religious group); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976) (prior restraint on the use of a public forum must be accompanied by procedural safeguards).

41. The laboratory conditions doctrine was first announced in *General Shoe Corp.*, 77 N.L.R.B. 124 (1948):

Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. . . . In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

Id. at 127-28. Although the doctrine fell into disfavor under the Eisenhower Board, see 1 *THE DEVELOPING LABOR LAW* 311 (2d ed. 1983), the Board reaffirmed *General Shoe* in *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962).

In the wake of the Getman-Goldberg-Herman study, see *LAW & REALITY*, *supra* note 17 and accompanying text, the NLRB has been inconsistent in its adherence to the laboratory conditions standard. The doctrine was partially abandoned in *Shopping Kart Food Mkts.*, 228 N.L.R.B. 1311 (1977). *Shopping Kart* was overturned in *General Knit of California*, 239 N.L.R.B. 619 (1978), but was reaffirmed in *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982). This uncertainty has created some consternation in the courts. See, e.g., *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983) (en banc).

42. *E.g.*, *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962).

43. *E.g.*, *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962).

44. For some time, the Board prohibited the showing of "And Women Must Weep," an anti-union propaganda film distributed by the National Right to Work Committee during election campaigns. *E.g.*, *Spartus Corp.*, 195 N.L.R.B. 134 (1972), *enforced on other grounds*, 471 F.2d 299 (5th Cir. 1973); *Storkline Corp.*, 142 N.L.R.B. 875 (1963); *Plochman & Harrison—Cherry Lane Foods, Inc.*, 140 N.L.R.B. 130 (1962). Apparently prompted by rejections of this position by the courts of appeals, see R. GORMAN, *BASIC TEXT ON LABOR LAW* 155 (1976), the Board reversed itself. *Litho Press of San Antonio*, 211 N.L.R.B. 1014 (1974), *enforced* 512

unionism, containing no hint of reprisal, held either in the employee's home or in the office of someone high enough in the company for the office to be considered the "locus of final authority."⁴⁵

The Court's switch from the marketplace to the laboratory constitutes more than a casual change in metaphor. The images represent two significant views of speech. One recognizes the value of diversity of expression and the ability of the hearer, as consumer, to make an intelligent choice; the other suggests the need for purity, the possibility of precise measurement, and the ability to devise adequate remedies. The laboratory conditions doctrine rests ultimately upon the assumption that free choice is fragile—that it will be undermined by the type of robust debate encouraged by the first amendment in other areas.⁴⁶

THE FIRST AMENDMENT AND UNION ACTIVITY

Unions have claimed first amendment protection for two traditional tactics: picketing and boycotts. In its initial picketing decision holding unconstitutional an Alabama statute that prohibited picketing for the purpose of furthering a boycott, the Court held that peaceful labor picketing was a protected form of expression.⁴⁷

The health of the present generation and of those as yet unborn may depend upon these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern.⁴⁸

The Court's decisions after *Thornhill v. Alabama*, however, reflect a constant retreat from the idea that picketing is a form of protected speech dealing with important societal issues. Because most of the cases

F.2d 73 (5th Cir. 1975); see also *Sab Harmon Industries, Inc.*, 252 N.L.R.B. 953 (1980) (showing of "The Springfield Gun" ruled unobjectionable, based on *Litho Press*).

45. *E.g.*, *General Shoe Corp.*, 97 N.L.R.B. 499 (1951).

46. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-83 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Winters v. New York*, 333 U.S. 507, 510 (1948). See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585-89 (1980) (Brennan, J., concurring) (discussing nature of the first amendment's grant of public access to trials). *Cf.* *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (applying same principle in labor context).

47. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

48. *Id.* at 103. See Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 954-57 (1982); Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1486-88 (1982).

have involved picketing, or the threat of picketing, to force an employer to recognize a minority union, picketing has been perceived as a technique of coercion as much as an expression of ideas.⁴⁹ This concept was expressed most famously by Justice Douglas in *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*.⁵⁰ "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."⁵¹

The meaning of this passage, which has been repeatedly quoted in labor picketing cases,⁵² is far from clear. The first clause, referring to patrol of a locality, suggests that the special vice of picketing is the physical deterrent inherent in maintaining a line that people will think it risky to cross. But this analysis rests upon the existence of certain facts which are not always present, which indeed have been notably absent in subsequent picketing cases decided by the Board or the courts. The second clause is confusing: Does it refer to physical coercion, to the idea that picketing calls for categorical response by dedicated union members and those subject to union discipline, or to the assumption that people will respond to a picket line according to their views of labor rather than to the message contained on any sign? If it refers to fear, it is wrong, for fear is not a necessary aspect of all conduct characterized as picketing; if it refers to the response of unionists, it fails to distinguish picketing from other union authorized inducements to boycott such as leaflets, newspaper ads, or speeches.⁵³ The fact that people might re-

49. *E.g.*, *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, *rh'g denied*, 354 U.S. 945 (1957); *Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953); *Building Employees Int'l Union v. Gazzman*, 339 U.S. 532 (1950); *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470 (1950). *Cf.* *Hughes v. Superior Court*, 339 U.S. 460 (1950) (state may prohibit picketing aimed at persuading merchants to hire minorities); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (state may prohibit picketing of wholesaler who deals with non-union peddlers). *But cf.* *Senn v. Tile Layers Union*, 301 U.S. 468 (1937) (fourteenth amendment does not prohibit state from authorizing organizational picketing).

50. 315 U.S. 769 (1942).

51. *Id.* at 776-77 (Douglas, J., concurring).

52. *E.g.*, *NLRB v. Retail Store Employees Union Local, 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring in part, dissenting in part); *NLRB v. Fruit & Vegetable Packers, Local 760 ("Tree Fruits")*, 377 U.S. 58, 77 (1964) (Black, J., concurring); *id.* at 93 (Harlan, J., dissenting); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289, *rh'g denied*, 354 U.S. 945 (1957); *Hughes v. Superior Court*, 339 U.S. 460, 464-65 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 n.6 (1949).

53. It is not clear in many of the Court's opinions whether the true vice of the union activity being regulated is the use of picketing or the use of a boycott to achieve some improper purpose. These opinions tend to conflate the two points, although it is clear that, for some justices, the existence of something called picketing is deemed of crucial constitutional

spond to picketing in terms of their general attitude towards labor is not different from the fact that people respond to many forms of expression in terms of their own views or the causes with which the expression is associated. Other forms of communication that are constitutionally protected, such as wearing an arm band, refusing to salute the flag, or holding a Ku Klux Klan rally, may elicit a similar response.

Cases raising the constitutional status of picketing typically have involved its use to promote either a consumer boycott or a concerted refusal by employees of a secondary employer to work on the goods of a party with whom the union has a dispute. In refusing to protect picketing, the opinions rely on both the government's right to regulate picketing and its right to prohibit the spread of strikes and boycotts to secondary employers. Thus, in *NLRB v. Retail Store Employees Union, Local 1001*,⁵⁴ the Court upheld a ban on peaceful picketing aimed at convincing consumers not to purchase a struck product. It dismissed the first amendment claim in a short, conclusory paragraph focusing upon the purpose of the picketing: "Congress may prohibit secondary picketing. . . . Such picketing spreads labor discord by coercing a neutral party to join the fray. . . . [A] prohibition on 'picketing in furtherance of [such] unlawful objectives' [does] not offend the First Amendment."⁵⁵ In *International Longshoremen's Association v. Allied International, Inc.*,⁵⁶ the Court had little problem with the regulation of what it deemed a secondary boycott even though there was an absence of picketing: "We have consistently rejected the claim that secondary picketing . . . is protected activity under the First Amendment. . . . It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment."⁵⁷ The unfair labor practice finding which the Court upheld included both the refusal of the longshoremen to handle Soviet goods and the inducement of such conduct by their president.⁵⁸

Because the Court does not explain the basis upon which the labor

dimension. Thus, both the majority opinion and the concurring opinion by Justice Blackmun in *Retail Store Employees Union*, make arguments directed primarily to the protection of neutral employers and do not focus on the special nature of picketing. But the concurring opinion by Justice Stevens claims, without citation, that "the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea." 447 U.S. at 619 (Stevens, J., concurring).

54. 447 U.S. 607 (1980).

55. *Id.* at 616 (quoting *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951)).

56. 456 U.S. 212 (1982).

57. *Id.* at 226-27.

58. *Id.*, at 214. International Longshoreman's Association President, Thomas Gleason, "ordered ILA members to stop handling cargoes arriving from or destined for the Soviet Union." *Id.*

regulation is upheld, one might conclude that the Court has adopted a general policy denying constitutional protection to picketing and boycotts were it not for the unanimous opinion in *NAACP v. Claiborne Hardware Co.*⁵⁹ *Claiborne Hardware* arose out of a boycott of white owned businesses by black residents of Claiborne County, Mississippi. The boycott was conducted in order to secure compliance with specific demands including "the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, . . . and an end to verbal abuse by law enforcement officers."⁶⁰ The leaders of the boycott enlisted participants by threats and acts of violence; Charles Evers, the Field Secretary of the NAACP, delivered a speech in which he stated that "boycott violators would be 'disciplined' by their own people and warned that the sheriff could not sleep with boycott violators at night."⁶¹ Because the boycott leaders used force, violence, and threats, the Mississippi Supreme Court found that the boycott was a tortious interference with the merchant's business.⁶² The court did not find a violation of the state secondary boycott law only because that statute was enacted two years after the boycott began.⁶³

Holding that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment,"⁶⁴ the Supreme Court reversed. Although the Court did not state explicitly whether the refusal to patronize was protected as "speech, assembly, association, and petition,"⁶⁵ its discussion strongly suggests that the boycott itself was an aspect of the right of association. Moreover, the Court noted that the boycott was furthered by speech and by picketing, which, citing *Thornhill*, it described as being "ordinarily safeguarded by the First Amendment."⁶⁶

The Court rejected the argument that the boycotters' use of vio-

59. 458 U.S. 886 (1982).

60. *Id.* at 889.

61. *Id.* at 902.

62. *Id.* at 893-97. For the text of the Mississippi Supreme Court's opinion, see *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290 (1980). The Mississippi Supreme Court stated:

If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other. All of these factors are here present, and the boycott was illegally operated and we do not need to examine into its type, whether primary or other.

Id. at 1301, *quoted in part in* 458 U.S. at 895.

63. 458 U.S. at 894 (citing *Claiborne Hardware*, 393 So. 2d at 1300).

64. *Id.* at 915 (footnote omitted).

65. *Id.* at 911.

66. *Id.* at 909 (citing *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940)).

lence subjected them to state regulation. Citing labor cases dealing with federal preemption, it limited the state's jurisdiction to matters directly and specifically related to the threat and use of violence.⁶⁷ In delineating the state's limited role, the Court found that Evers' speeches were beyond the state's power to regulate even though his comments included an implicit threat: "If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable."⁶⁸ Because no violence immediately followed Evers' speech, however, the Court found it to be protected by a "'profound national commitment' that 'debate on public issues should be uninhibited, robust and wide open.'"⁶⁹ In lines likely to be oft-quoted, it stated that

[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.⁷⁰

CRITIQUE OF THE POLICY OF LIMITED EXPRESSION

Both unions and employers have cause to be confused and offended. Why is their speech and speech-related conduct judged by such different standards? Why is the policy of robust debate so rarely mentioned and replaced instead by the "delicate balance," the "laboratory," the policy of "peacefully resolving disputes," and the easy assumption of coercion? The majority opinion in *Claiborne Hardware* offers an explanation. In labor cases, the regulation of speech is permissible because of the "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on the rights of speech and association."⁷¹ Thus, "secondary boycotts and picketing by labor unions may be prohibited."⁷² Such activity is distin-

67. Relying upon the rulings in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), the Court held that "[w]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." 458 U.S. at 918.

68. *Id.* at 928.

69. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

70. *Id.*

71. *Id.* at 912.

72. *Id.* (citing *NLRB v. Retail Store Employees' Union Local 1001*, 447 U.S. 607, 617-18 (1980), and *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 224 (1982)).

guishable from that found in cases like *Claiborne Hardware*:

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values."⁷³

The distinction drawn between the economic activity involved in the labor cases and the political activity relating to public issues is analytically unsound, historically inaccurate, and culturally myopic. Of the boycotts presented to the Court, the longshoremen's boycott seems most clearly political because it lacked the intermediate goal of economic gain for the participants that was present in *Claiborne Hardware*. But, far from aiding the longshoremen's constitutional claim, the lack of an intermediate goal was viewed as a factor further justifying regulation:

[I]t is "more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived . . . under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."⁷⁴

What distinguishes the retail store employees' appeal to the public for support, when picketing Safeco Title Insurance, from the public issue that the Court recognized in the *Clairborne Hardware* boycott? Both cases involved appeals aimed at achieving immediate economic benefits for a limited group, and both appeals were ultimately premised on a broader goal of redistributing economic benefits: to blacks in one case, to labor in the other. To suggest that one goal is of greater public concern than the other is to view labor through the Court's artificially created prism by which collective bargaining becomes dissociated from any broader, nobler, more enduring purpose.⁷⁵

The Court in *Claiborne Hardware* characterized the boycott as including "elements of criminality and elements of majesty,"⁷⁶ but there is no recognition of nobility for the longshoremen who risked losing their jobs to protest the Soviet invasion of Afghanistan. Rather, there is a

73. *Id.* at 913.

74. *International Longshoremen's Ass'n*, 456 U.S. at 225-26 (1982) (quoting *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1378 (1st Cir. 1981)).

75. For cases exemplifying this view of collective bargaining, see generally *id.*; *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

76. 458 U.S. at 888.

tone of annoyance that the union butted into areas outside of its legitimate interests. The Court seems to appreciate the ennobling features of racial protest but to view the protest of labor with unease. Yet, what cause has been a greater source of human commitment, heroism, political agitation, or scholarly inquiry? What cause has been more often the subject of literature, meeting, song, and drama in all of history than the idea of working class solidarity? *Claiborne Hardware* and *International Longshoremen's Association* can be distinguished by focusing on the immediate objective in one case and the long range objective in the other. Moreover, the concept of coercion is treated differently in the two cases. In *International Longshoremen's Association* it refers to the boycott itself; in *Claiborne Hardware*, it refers only to the manner in which people are enlisted.

The opinion in *International Longshoremen's Association* emphasizes the power that unions derive from the labor laws, but the Court did not explain why the system of labor regulation makes a union boycott less permissible. In *Claiborne Hardware*, the Court did not consider the possibility that the complex and comprehensive legislation aimed at combating racial discrimination made that boycott less worthy of protection. In *First National Bank v. Bellotti*, the Court rejected the claim that a corporation's first amendment rights may be limited because corporations are creatures of the law.⁷⁷ It concluded that the crucial variable in first amendment analysis is nature of the speech, not the speaker. If this analysis applies to corporations, which owe their very existence to statutes making them more economically advantageous than other forms of business, it certainly should apply to unions, which are sometimes protected and frequently restricted by legal doctrine.

It might be argued that the special feature of labor law that makes restricting union speech legitimate is the doctrine of exclusivity which allows a recognized union to speak for all employees in a bargaining unit.⁷⁸ But current secondary boycott rules draw no distinction between incumbent and non-incumbent unions or between appeals to workers, which might gain strength from the doctrine of exclusivity, and appeals to customers, which do not. Moreover, the doctrine of exclusivity does not give a union the right to insist that its members participate in a boycott. Even if secondary activity is held to be within the first amendment, such activity will not, thereby, be protected against employer response: employees who engage in it may be legally discharged. As a

77. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 775-86 (1978).

78. *Cf. International Longshoremen's Ass'n*, 456 U.S. at 225-26 (1982); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, *rh'g denied*, 433 U.S. 915 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dep't v. Hanson*, 351 U.S. 225 (1956).

practical matter, no-strike clauses will prohibit the vast majority of incumbent unions from engaging in secondary strikes. Finally, for every union whose power is increased by the doctrine of exclusivity there are several for whom the doctrine has functioned as an insuperable barrier to recognized status and, hence, makes them too weak to participate in a strike.⁷⁹

The other bases suggested by the Court's opinions also fail to offer a persuasive reason for distinguishing labor boycotts from political boycotts. Although most union activity is aimed at influencing private parties rather than a governmental entity, that was not true of the longshoremen in *International Longshoremen's Association*. Moreover, the Court in *Abood v. Detroit Board of Education*⁸⁰ rejected the idea that efforts to influence the government have a claim to first amendment protection greater than efforts to influence the citizenry.⁸¹

CONCLUSION

One is forced to conclude that the Court's special treatment of labor relations is based on something other than constitutional text, analytic precision, or a commitment to the doctrine of stare decisis. Can the policy of limited expression be explained as an aspect of labor relations common to both employers and unions? At first blush, the cases dealing with employer speech are far different from those dealing with picketing and union boycotts. One set of cases involves pure speech or speech plus conduct and employees as victims. In the cases dealing with picketing and boycotts, the employees are seen as aggressors. The same employees whose timidity in the face of suggested reprisal is the justification for protective governmental regulation become, once organized, intimidators whose picket line, no matter how peaceful, interferes with the free choice of customers and other workers.

Nevertheless, the cases have several common themes. The most obvious theme is the oft-mentioned "delicate balance" of labor law regulation by which each restriction that is imposed upon one party is used, in the name of neutrality, to justify a limitation upon the other. The cases also manifest a common, stereotyped, and paternalistic vision of workers

79. Over the past 30 years, unions have been consistently losing much of the strength that they enjoyed "[i]n their halcyon days of the early 1940's" Weiler, *supra* note 51, at 1775. Professor Weiler's study shows "that the number of employees successfully organized each year has dropped from 750,000 to fewer than 200,000." *Id.* at 1776. While the union victory rate in certification elections was 74% in 1950, in 1980 it was only 48%. *Id.* If the employees do not strongly support the unions, it is unlikely that, once organized, they will support a union-called strike.

80. 431 U.S. 209, *rh'g denied*, 433 U.S. 915 (1977).

81. *Id.* at 230-32.

as people whose decisions are not made on the basis of ideas and persuasion but on the basis of fear, coercion, and discipline. It is as though the Court imagines labor relations to be a realm in which the free expression of ideas is unimportant because they are not the basis upon which actions are taken, votes cast, or picket lines observed. Labor relations is also a realm in which the limited value of speech is thought to be outweighed by the harmful consequences that would follow from the vigorous application of first amendment policies: If employer speech were not carefully regulated, employees would be constantly coerced into voting against unionization. If peaceful picketing and boycotts were treated as forms of protected expression, industrial disputes would be spread willy-nilly throughout society causing economic loss and physical damage, enmeshing neutrals,⁸² and coercing both employers and employees.

To the extent that the Court's opinions are ultimately based upon such a vision, they are attributable to the ignorance of labor relations that afflicts both the Board and the courts. If the Court would recognize employer's free speech rights in organizational campaigns by holding that ambiguous statements could not be treated as threats,⁸³ campaign behavior and outcome would change little if at all.⁸⁴ Currently if the proper *form* of words is chosen, permissible employer speech is practically indistinguishable in *content* and *impact* from the statements outlawed by *Gissel*.⁸⁵ Moreover, for tactical reasons, employers are unlikely to use flagrant threats of reprisal. Even employer representatives who are not motivated by ethical considerations generally recognize that threats may convince employees that they need a union. Those who do utilize fear almost always prefer to leave some ambiguity about the way in which harm will occur. Employees who get the message of employer retaliation are not motivated thereby to vote against unionization.⁸⁶

If union picketing and boycotts were evaluated by the standards of *Claiborne Hardware*, little would be lost and much possibly gained. The secondary boycott rules which would be overturned are highly technical, economically irrational, and rarely applied against strikes of significant economic impact. Because of its technicality, ambiguous drafting,

82. See *supra* text accompanying notes 54-55.

83. Such was the view so clearly expressed by Judge Wisdom in *Exchange Parts*, 304 F.2d at 375, *reprinted supra* note 27.

84. See *NLRB v. Village IX Inc.*, 723 F.2d 1360 (7th Cir. 1983).

85. See generally *LAW & REALITY*, *supra* note 30 (an extensive study on campaign behavior and election outcome).

86. *Id.*

and confused interpretation, secondary boycott law more resembles an intellectual rubble heap piled haphazardly with conflicting rules riddled with exceptions, doctrines randomly applied, and terms given different meaning in similar cases than it does a delicate balance; anything a union might do can be justified by one doctrine and prohibited by another. Treating union boycotts as forms of expression would eliminate technicality and confusion and would not have serious economic effect:

1. Such boycotts would be rarely employed—they are cumbersome, expensive tactics that most weak unions can not afford, and that strong unions do not need because they can cut off the product at its source.
2. For most incumbent unions, a concerted response to another union's dispute would be unlawful, even without section 8(b)(4),⁸⁷ because it would violate their no-strike pledge.
3. Concerted support outside the construction industry would generally be difficult to obtain, even without a no-strike pledge, because it would make the secondary union members vulnerable to discharge.⁸⁸
4. The concept of neutrality in secondary boycott cases is an ambiguous one. Unions rarely, if ever, seek to apply pressure against an employer who has not supported or chosen to deal with the primary target.
5. Most secondary boycotts take place in the construction industry. But the economics of this industry are such that a policy allowing wider appeals than are currently permitted would still fail to achieve the economic impact on neutral employers which is easily achieved by a primary strike in other industries.
6. The cases in which a secondary activity seems unfair and unconscionable are almost always cases in which it is being used to obtain recognition improperly.⁸⁹ Such activity could and

87. Labor Management Relations (Taft-Hartley) Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). Section 8(b)(4) regulates secondary and primary activity involving certain prohibited means or objectives.

88. A somewhat unique situation exists in the construction industry:

If the general contractor and the subcontractor are viewed as the same employer, or at the very least as occupying some sort of ally status, then the union's pressure creates no problem from a legal standpoint. The union, in demanding that the general contractor not hire a nonunion subcontractor, can be viewed as merely putting pressure on the offending (primary) employer, the general contractor.

J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN, JR. & E. SILVERSTEIN, 1 LABOR RELATIONS AND SOCIAL PROBLEMS: A COURSE BOOK 751 (1978).

89. *See, e.g.*, NLRB v. Denver Bldg. Council, 341 U.S. 675 (1951); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 759 (1942). *See also* Labor Management Relations (Taft Hartley) Act

should continue to be unlawful.

Because so little is understood about the real impact of secondary boycott laws and union organizing regulations, and because the Court is lacking in labor expertise, it seems to shrink from the consequences of robust debate and freedom of association in labor relations in ways it would recognize as shameful in other contexts.

§ 8(b)(7), 29 U.S.C. § 158(b)(7) (1976) (making it an unfair labor practice for a union to picket or threaten to picket where the object “is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees”).