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# PICKETING-FREE SPEECH: THE GROWTH OF THE NEW LAW OF PICKETING FROM 1940 TO 1952

*Joseph Tanenhaus**

On April 22, 1940, the Supreme Court of the United States in *Thornhill v. Alabama,* invalidated a state law prohibiting all picketing.[1] Industrial controversies, wrote Mr. Justice Murphy for the Court, are "matters of public concern," and picketing the only "practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of the employer."[2] Alabama's statute, he continued, since it forbids even picketing peaceably engaged in for the purpose of dissuading persons from dealing with a disputed firm, unconstitutionally restricts freedom of speech.

In one bold move the Court stripped away the fifty-year-old underpinnings of the law of picketing.[3] From 1880 to 1940, that law had rested on a foundation of tort principles. As an intentional act which damaged "property" rights, picketing, unless legally privileged, was actionable at law and enjoinable in equity. The burden of proving justification rested with the pickets, who, in order to establish the lawfulness of their activity, were required to show self-interest. Well-defined rules, both statutory and common law, developed within each jurisdiction separating legitimate picketing activities from those which were not legally recognized. While the Supreme Court of the United States had used its influence to set uniform confines beyond which picketing should not be allowed to go, the states retained considerable freedom in defining the objectives for which picketing could be undertaken.

* See Contributors' Section, Masthead, p. 73, for biographical data.

1 310 U.S. 88 (1940). Justice McReynolds dissented without opinion. In a companion case, Carlson v. California, 310 U.S. 106 (1940) the Court ruled equally invalid an ordinance that, counsel argued, proscribed picketing only "for the purpose of persuading others not to buy merchandise or perform services"—objectives thought the Court implicit in all picketing.

2 310 U.S. at 104.

3 See the writer's forthcoming paper, *Picketing as a Tort,* 14 PITT. L. REV. — (1953).

With the *Thornhill* case, all this was changed. The Court, by commissioning picketing to be a constitutionally protected medium of communication, bestowed upon itself the right to veto any restriction placed on picketing, and thereby assumed, as it were, the power to rewrite the law *de novo*.[4] But how the new law would differ in detail from the old was left largely obscure; the Court's language, in fact, gave ample ground for either a broad or narrow interpretation.

In a well-known passage the Court said:

> Abridgement of the liberty of [peaceful and truthful discussion on matters of public interest] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of the ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious or so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the Alabama law.][5]

This language led many commentators to believe that the court would invalidate any limitations on the right to picket which were not warranted by the clear and present danger test. If, on the other hand, the quoted passage were treated as pure dictum, a more restricted reading of *Thornhill v. Alabama* followed. Confined narrowly to its facts, the case simply held that blanket legislation banning all picketing was unconstitutional, and not that all picketing was constitutionally protected. The Court had taken pains to stress that the adoption of picketing into the free speech family did not preclude limitations on the use and conduct of the picket line. A state has the "power and the duty . . . to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents. . . ."[6] The police power cannot be capriciously used, however, to tamper with freedom of speech. Alabama's anti-picketing law, as it had been construed and applied, left no room for

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[4] The relationship between picketing and free speech had roots reaching deep into the soil of precedent. See the writer's forthcoming paper, *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 PITT. L. REV. — (1953).

[5] 310 U.S. at 104; at page 105 the Court added "no clear and present danger of destruction of life or property, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the fact of a labor dispute involving the latter." Also see *Carlson v. California*, where the Court said:

> The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control.

310 U.S. 106, 113 (1940).

[6] 310 U.S. at 105.

> . . . exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.[7]

Presumably, legislation specifically designed to check untruthful, disorderly, or mass picketing, or to prevent peaceful, truthful picketing undertaken to advance certain socially undesirable purposes (which the court did not attempt to define) would have a good chance of meeting judicial approval.

The ringing phrases of the *Thornhill* decision left a host of crucial questions unanswered. Basically, it remained to be seen whether the broad or narrow interpretation of the holding would prevail. Could stranger picketing be prohibited? Secondary picketing? Picketing to achieve a closed shop or to force the discharge of non-union personnel? Further, what did the court mean by "truthful" and "peaceful"?—the history of picketing had demonstrated beyond cavil that these were vague terms susceptible of widely varying interpretation. It is little wonder that the clarification which the *Thornhill* case demanded and which was certain to come was awaited with anticipation.

## I

In *Thornhill v. Alabama,* the Supreme Court served notice, to vary the metaphor, that it would personally fence off the area of constitutionally protected picketing, and in that decision it drove in the first posts to exclude blanket legislation prohibiting all picketing. Ten months elapsed before the Justices went back to their fence-building. In the interim, the state courts decided a number of picketing cases. Though in some of these decisions, *Thornhill v. Alabama* was completely iguored,[8] its effects on the law of picketing were faced in twenty-odd others.

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[7] 310 U.S. at 99.

[8] Hinchley v. Amal. Meat Cutters, 7 L.R.R.M. 708, 3 CCH LAB. CAS. ¶60,838 (Cal. Super. Ct. 1941); Olson v. Bakery Drivers Local Union, 6 L.R.R.M. 1100 (Cal. Super. Ct. 1940); Stockinger v. Int'l Brotherhood of Teamsters, 7 L.R.R.M. 722 (N.J. Ch. 1940); Sunrise Dairy v. Local Union, 7 L.R.R.M. 722 (N.J. Ch. 1940); Dugan Bros. v. Local Exec. Board, 6 L.R.R.M. 1141 (N.J. Ch. 1940); People v. Muller, 286 N.Y. 281, 36 N.E.2d 206 (1941); Florsheim Shoe Co. v. Retail Shoe Salesmen's Union, 24 N.Y.S.2d 923 (Sup. Ct. Kings County 1940), *aff'd,* 288 N.Y. 188, 42 N.E.2d 480 (1942); Nicholaus v. John Doe, 175 Misc. 530, 24 N.Y.S.2d 258 (Sup. Ct. Schenectady County 1941), *appeal dismissed,* 261 App. Div. 1020, 25 N.Y.S.2d 989 (3d Dep't 1941); Rubin v. Choma, 26 N.Y.S 2d 10 (Sup. Ct. Bronx County 1941); Bloedel Donovan Lumber Mills v. Int'l Union, 4 Wash. 2d 62, 102 P.2d 270 (1940); S & W Fine Foods Inc. v. Retail Delivery Drivers Union, 6 L.R.R.M. 1112 (Wash. Super. Ct. 1940), *rev'd on free speech grounds,* 11 Wash. 2d 262, 118 P.2d 962 (1941), *overruled in* Building Serv. Employees Int'l Union v. Gazzam, 29 Wash. 2d 488, 188 P.2d 97 (1947).

In *Book Tower Garage v. Local Union*,[9] the Supreme Court of Michigan abandoned the state's common law rule that all picketing was intimidatory and therefore illegal. Conditions, reflected the court, have changed since 1898, when, in *Beck v. Railway Teamsters' Protective Union*,[10] it had judged all picketing an act of intimidation which constituted an unwarranted interference with the right of free trade. The factual conclusion of the *Beck* case that picketing in any form was inherently a suggestion that force might be resorted to—"a subterfuge for unspoken threats"—and could not be carried on peacefully, should not, the court argued, control present-day experience which recognized that picketing may be peaceably engaged in as a means of publicizing the facts of a labor controversy. That the legislature had not changed the common law rule of the *Beck* case, the opinion continued, did not compel adherence to that decision because the Supreme Court of the United States has held peaceful picketing to make known the facts of a labor dispute constitutionally protected. The Michigan Court on the same day, reversed a conviction for a misdemeanor based on peaceful picketing on the ground that the law could not prohibit such activity.[11]

*E. L. Kearns Co. v. Landgraf*[12] marked a break in a long line of cases in which New Jersey Equity had enjoined picketing carried on in the absence of a strike between an employer and his employees. The *Kearns* case involved the distribution of boycott circulars miles away from the scene of the "dispute." In reversing an injunction against passing out the pamphlets, the court cited *Thornhill v. Alabama* as establishing the constitutional right to appeal to the public for assistance in raising working standards even though no bona fide strike had been called. But Washington's court of last resort in *Shively v. Garage Employees' Local Union*[13] (three judges dissenting), refused to believe that the Fourteenth Amendment as interpreted by the United States Supreme Court prevented a state from granting injunctive relief against peaceful picketing by a union for a purpose which was illegal at common law,

9 295 Mich. 580, 295 N.W. 320 (1940).

10 118 Mich. 497, 77 N.W. 13 (1898).

11 People v. Bashaw, 295 Mich. 503, 295 N.W. 242 (1940).

12 128 N.J.Eq. 441, 16 A.2d 623 (1940).

13 6 Wash. 2d 560, 108 P.2d 354 (1940), *overruled in* S & W Fine Foods Inc. v. Retail Delivery Drivers Union, 11 Wash. 2d 262, 118 P.2d 488 (1941), which was in turn overruled in Building Serv. Employees Union v. Gazzam, 29 Wash. 2d 488, 188 P.2d 97 (1947). *Accord*: Heine's Inc. v. Truck Drivers, 127 N.J.Eq. 514, 14 A.2d 26 2 (1940), *rev'd*, 129 N.J.Eq. 308, 19 A.2d 204 (1941); Kagan v. Amal. Meat Cutters Union, 7 L.R.R.M. 722 (N.J.Eq. 1940). See Feller v. Local Union, 7 L.R.R.M. 718 (N.J.Eq. 1940) (to force observance of union standards), *rev'd*, 129 N.J.Eq. 421, 19 A.2d 784 (1941).

*i.e.* to compel an employer to sign a union shop agreement. *Thornhill's* case, said the court, recognized that a state may place such reasonable limits on speech.

Oregon's little Norris La Guardia Act, enacted in 1933, had been initially construed to forbid injunctive relief against picketing in the absence of a strike.[14] The statute was amended in 1939 to permit the enjoinder of picketing which was not undertaken in furtherance of a "bona fide controversy in which the disputants stand in the proximate relation of employer and the majority of his employees and which directly concerns matters directly pertaining to wages, hours, or working conditions."[15] Is the *Thornhill* case inapplicable, asked the court, because the Oregon law as amended does not prohibit all picketing? Decidedly not.[16] The statute was aimed at no specific evil and in substance deprived the minority, without justification, of fundamental rights guaranteed to every person. Disorder, the court observed, is no more likely when a majority pickets than when a minority does. A similar stand had been taken in pre-*Thornhill* days in *People v. Gidaly*,[17] but never before had the highest court of a state invalidated as an unconstitutional infringement of freedom of speech a statute which did not ban all picketing.[18]

Wisconsin's legislature in 1939, the year in which it drastically weakened the state's anti-injunction statute, passed the Employment Peace Act which made it an unfair labor practice for employees to picket "unless a majority in a collective-bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."[19] The validity of this limitation on picketing was first argued before the Wisconsin Supreme Court in *Hotel and Restaurant Employees International Alliance v. WERB*.[20] The Board had issued a cease and desist order against picketing by a union which was striking without compliance with the requirements of the act. On appeal, the union attacked the Act as unconstitutionally restricting freedom of speech. The Wisconsin legis-

14 George B. Wallace Co. v. Int'l Ass'n, 155 Ore. 652, 63 P.2d 1090 (1936).

15 Ore. Laws 1939, c. 2, §§ 1-8. See 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 1325-6 (1940).

16 American Federation of Labor v. Bain, 165 Ore. 183, 106 P.2d 544 (1940).

17 35 Cal. App. 2d 758, 93 P.2d 660 (1939).

18 *Cf.* People v. De Julis, 174 Misc. 994, 21 N.Y.S.2d 995 (New Rochelle City Ct. 1940), in which the court held an ordinance prohibiting the display of banners in public could not constitutionally be applied to picketing even in the absence of a strike.

19 Wis. Laws 1939, c. 57, § 111.06, (2) (e).

20 236 Wis. 329, 294 N.W. 632 (1941), *aff'd*, 315 U.S. 437 (1942).

lature, the court pointed out, had written into the Employment Peace Act a clause explicitly denying any intention to impinge upon the right of free speech. Alabama's legislature sought to prohibit picketing entirely, Wisconsin's merely to regulate it in the interest of peace, privacy and property—matters held entitled to protection in *Thornhill's* case. The court then made an ingenious, if totally unconvincing, attempt to distinguish *Hotel and R. E. I. Alliance v. WERB* from *Thornhill v. Alabama*. Freedom of speech, it argued, is not limited by the Act because violations of the law, while unfair labor practices, may not be punished as misdemeanors. A state, in other words, may restrict freedom of speech as long as criminal proceedings are not utilized.[21] Almost as an after thought, the court added that the picketing was unlawful because conducted in large numbers and accompanied by violence. In denying a rehearing, the court[22] with a deft stroke reminiscent of Mr. Justice Taft's revision of *Hitchman Coal and Coke Co. v. Mitchell*[23] in *Truax v. Corrigan*[24] asserted that its opinion in *Hotel & R. E. I. Alliance v. WERB* held the picketing disorderly and did not sanction any limitation on peaceful picketing.

Picketing-free speech proved to be no bar to equitable relief in a number of other cases. Injunctions were granted against picketing engaged in to induce the breach of an agreement between an employer and another union,[25] and to enforce the discharge of non-union employees.[26] Courts restrained picketing to achieve a union shop, a closed shop, and the observance of union standards.[27] Equity prevented a union from establishing a picket line at a time when the certification of an appropriate bargaining agent was pending before the state labor relations

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21 This argument also appears in Van Buskirk v. Sign Painters Local, 127 N.J. Eq. 533, 14 A. 2d 45 (1940); Suchodolski v. A.F. of L., 127 N.J. Eq. 511, 14 A. 2d 51 (1940). See also Judge Blake's dissent in Shively v. Garage Employees Local Union, 6 Wash. 2d 560, 576, 108 P. 2d 354, 361 (1940).

22 236 Wis. 329, 352, 295 N.W. 634 (1941).

23 245 U.S. 229 (1917).

24 257 U.S. 312 (1921).

25 Euclid Candy Co. v. Int'l Union, 6 L.R.R.M. 1139 (Cal. Super. Ct. 1940).

26 Suchodolski v. A.F. of L., 127 N.J. Eq. 511, 14 A. 2d 51 (1940); Schwab v. Moving Picture Operators Local, 165 Ore. 602, 109 P. 2d 600 (1941).

27 Cooper v. Bldg. Trades Council, 7 L.R.R.M. 706, CCH LAB. CAS. ¶66,713 (Cal. Super. Ct. 1941); Heime's Inc. v. Truck Drivers, 127 N.J. Eq. 514, 14 A. 2d 262 (1940), *rev'd*, 129 N.J. Eq. 308, 19 A. 2d 204 (1941); Feller v. Local Union, 7 L.R.R.M. 718 (N.J. Eq. 1940), *rev'd*, 129 N.J. Eq. 421, 19 A. 2d 784 (1941); Kagan v. Amal. Meat Cutters Union, 7 L.R.R.M. 722 (N.J. Eq. 1940); Schwab v. Motion Picture Operators Union, 165 Ore. 602, 109 P. 2d 600 (1941).

board,[28] and at a place removed from the employer's place of business.[29] Picketing was enjoined because it did not publicize the facts of a labor dispute,[30] and, because in the absence of a bona fide dispute, it was a nuisance.[31]

This examination of lower court decisions reveals that, in terms of its immediate effects on the judiciary, *Thornhill v. Alabama* was more dud than bombshell. A surprisingly large number of courts ignored the case completely. Most others, while admitting that *Thornhill v. Alabama* imposed limitations on the power of the states to regulate peaceful picketing, upheld as legitimate a variety of restrictions on its exercise. The broad interpretation of the *Thornhill* case that only the clear and present danger test can justify restrictions on peaceful picketing attracted little support outside of Oregon.

Early in 1941, Mr. Justice Stone, concurring in *United States v. Hutcheson*,[32] stated as one reason for his belief that picketing in a jurisdictional dispute was not a violation of the Sherman Anti-Trust Act:

> . . . the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by an act of Congress.[33]

Mr. Justice Stone's broad reading of *Thornhill v. Alabama* passed largely unnoticed, however, for on the very next Monday the Supreme Court handed down two decisions which, by implication at least, placed a narrower gloss upon the picketing free-speech doctrine: *Milk Wagon Drivers Union v. Meadowmoor Dairies*[34] and *American Federation of Labor v. Swing*.[35]

Meadowmoor Dairies sold milk products to vendors who in turn resold them to retail stores. Members of the union supplied similar products to consumers by door-to-door deliveries. The union claimed that the vendor

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28 Hudson Recreation v. Bowling Employees Union, 39 Pa. D. & C. 655, CCH LAB. CAS. ¶60,300 (1940).

29 Van Buskirk v. Sign Painters Local, 127 N.J.Eq. 533, 14 A.2d 45 (1940).

30 *Ibid.* See also Cooper Co. v. Bldg. Trades Council, 7 L.R.R.M. 706, CCH LAB. CAS. ¶66,713 (Cal. Super. Ct. 1941).

31 Blonder v. United Retail Employees Union, 128 N.J.Eq. 41, 15 A.2d 826 (1940), *rev'd* 129 N.J.Eq. 424, 19 A.2d 786 (1941); Miller's Inc. v. Journeymen Tailors Union, 128 N.J.Eq. 162, 15 A.2d 822 (1940), *rev'd mem. per curiam*, 312 U.S. 658 (1941).

32 312 U.S. 219 (1941).

33 *Id.* at 243.

34 312 U.S. 287 (1941).

35 312 U.S. 321 (1941).

system, by enabling retail stores to sell dairy products at cut-rate prices, was undermining union working standards and jeopardizing the incomes and jobs of its members. Pickets began patrolling the stores and continued until, upon the application of Meadowmoor, a preliminary injunction was issued restraining all picketing. The master in chancery, to whom the case was referred for report, found that, although the picketing itself had been peaceful, the dispute had been accompanied by much disorder and violence, and recommended a permanent injunction forbidding all picketing. The trial court enjoined all acts of violence, but refused to prohibit all picketing on the ground that a complete ban would have violated freedom of speech. The Supreme Court of Illinois, reversing the lower court and holding that, because no "labor dispute" was involved, the picketing sought to accomplish an unlawful purpose, made permanent the preliminary injunction restraining all picketing.[36] The Illinois Court also held the manner of picketing illegal: the storekeepers were intimidated by the banners which, in view of past disorders, signified that non-compliance with the pickets' demands "would possibly be followed by acts of an unlawful character." The Supreme Court of the United States granted certiorari.

Mr. Justice Frankfurter spoke for the majority, which included Mr. Justice Murphy, the author of *Thornhill v. Alabama,* in sustaining the blanket injunction approved by the Illinois Supreme Court. Mr. Justice Black (with Mr. Justice Douglas concurring) and Mr. Justice Reed dissented. By upholding the conclusion of the Illinois court, and at the same time disregarding (over Mr. Justice Black's protest) much of its reasoning, Mr. Justice Frankfurter provided himself with the opportunity to announce an important new principle in the development of picketing-free speech: picketing "enmeshed" with violence is not constitutionally protected.

The question, as he formulated it, was

> . . . whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed.[37]

Free speech, he argued in answering this question affirmatively, was guaranteed because of "faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind," and in order to "avert force and explosions due to restriction upon rational modes of communication." Peaceful picketing is assuredly "the workingman's

[36] 371 Ill. 377, 21 N.E. 2d 308 (1939).

[37] 312 U.S. at 292.

means of communication," but "utterance in a context of violence can lose its significance as an appeal to reason and become an instrument of force."[38] The picket line is protected as long as it asks the public for support in bringing economic pressure to bear against an employer. But once picketing becomes enmeshed in violence it ceases to be an appeal for support and becomes a coercive device:

> The picketing in this case was set against a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful.[39]

A state, in other words, has the power to stop what would otherwise be lawful picketing in order to prevent future intimidation. However, Mr. Justice Frankfurter emphasized,

> . . . the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberation the conclusion that otherwise peaceful picketing has the taint of force. . . . Right to free speech in the future cannot be forfeited because of dissociated acts of past violence.[40]

Although this language would seem to impeach the Court's earlier holding in *American Steel Foundries v. Tri-City Central Trades Council*[41] that a single act of violence can characterize a whole campaign as intimidatory and implies that the Constitution protects more than merely nominal picketing, the Court did not take the position which a broad interpretation of *Thornhill v. Alabama* would seem to have required and insist that only a clear and present danger of disorder could justify the enjoinder of all picketing.

Mr. Justice Frankfurter, despite his utter contempt a decade earlier for a "decree born of a chancellor's conscience,"[42] could see nothing in the Fourteenth Amendment which prevents a state "from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."[43] The injunction here, he argued, is designed to fit a "particular situation" and deals with a "narrow area." It is "the very antithesis of a ban on all discussion." He considered the Illinois injunction narrowly drawn to fit a concrete situation. If an injunction is so misused as to make encroachments on freedom of speech, "the

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38 *Id.* at 293.
39 *Id.* at 294.
40 *Id.* at 293, 296.
41 257 U.S. 184 (1921).
42 FRANKFURTER AND GREENE, THE LABOR INJUNCTION 81 (1930).
43 312 U.S. at 295.

doors of this Court are always open."[44]

Neither Mr. Justice Reed nor Mr. Justice Black felt that the *Meadowmoor* injunction was drawn narrowly enough to avoid infringing upon freedom of speech. Thousands of union members who were in no way responsible for the disorders, they observed, were enjoined from picketing. Said Mr. Justice Black:

> To sanction vague and undefined terminology in drag-net clauses directly and exclusively aimed at restraining freedom of discussion upon the theory that we might later acquit those convicted for violation of such terminology amounts in my judgment to a prior censorship of view.[45]

A court decree, thought Mr. Justice Reed, because it restrains only particular individuals is no less objectionable than a general statute affecting everyone; the Constitution secures the basic freedoms to all.

Both Justices, furthermore, disagreed with the majority view that nothing in the Fourteenth Amendment prevents a state from relying on a "chancellor's decree" in restricting peaceful picketing. Mr. Justice Reed admitted that inexcusable acts of violence had been committed, but he denied that the right to picket peacefully could be destroyed by past disorders:

> If the fear engendered by past misconduct coerces storekeepers during peaceful picketing, the remedy lies in the maintenance of order, not in the denial of free speech.[46]

An injunction against peaceful picketing is, he contended, an absolute prohibition against speech, and

> Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury.[47]

Mr. Justice Black, while agreeing with Mr. Justice Reed that picketing ought not to be lightly enjoined, was not willing to impose such severe limitations on the police power. In his view, freedom of speech could be subjected to prior restraint when a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears. . . ."[48] But neither the findings nor the evidence in the *Meadowmoor* case, in his opinion, disclosed a "clear and present danger" which justified an abridgement of the right to picket.

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[44] *Id.* at 298.
[45] *Id.* at 312.
[46] *Id.* at 319.
[47] *Id.* at 320.
[48] *Id.* at 316-7.

Mr. Justice Black also took exception to Mr. Justice Frankfurter's novel principle that "a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct." He criticized this rule as so sweeping and vague that "it opens up broad possibilities for invasion" of freedom of speech.[49] Repeating Mr. Justice Roberts' suggestion in *Cantwell v. Connecticut*[50] that legislation narrowly drawn to meet a clear and present danger can authorize courts to step where they could not otherwise constitutionally tread, he maintained that the courts in the absence of guiding legislation ought not to be entrusted with the power of enjoining peaceful picketing even when entangled with violence.

On the basis of judicial practices prior to 1933, there seemed good reason to question the wisdom of bequeathing to the courts the power to enjoin all picketing because of past disorders. Courts had for many years seized upon minor incidents as sufficient reason for restraining all picketing.[51] Mr. Justice Frankfurter, it is true, while he did say that "a trivial rough incident," "a moment of animal exuberance," "episodic," "isolated," and "dissociated" acts of past violence could not be considered sufficient ground for enjoining all picketing, laid down no very definite standards. It remained unclear whether courts had to find that past disorders "would possibly be followed by acts of unlawful character," were "so persistent, continuous, wanton, and flagrant as to indicate the danger of continued illegal acts,"[52] or "have been so great and threatening that peaceful picketing is out of the question . . . that no further chance is to be taken."[53] Yet history, the ultimate judge in such controversies, ruled Mr. Justice Black's fears substantially unfounded. An examination of subsequent picketing cases reveals that although heavy reliance was placed upon the *Meadowmoor* rule in justify-

[49] *Id.* at 303.

[50] 310 U. S. 296, 307, 311 (1940). See also Bridges v. California, 314 U. S. 252 (1941), where the Court stated at page 260 that when a legislature "has appraised a particular kind of situation and found a specific danger sufficiently imminent," the Court tends to regard the judgments of the lower courts as "encased in armor wrought by prior legislative deliberation."

[51] See Note, 44 HARV. L. REV. 971 (1931); 132 A.L.R. 1218.

[52] Busch Jewelry Co. v. United Retail Employees' Union, 281 N.Y. 150, 22 N.E. 2d 320 (1939). See Judge Lehman's dissent, *id.* at 160, 22 N.E. 2d at 324. Also see May's Furs Inc. v. Bauer, 282 N.Y. 331, 26 N.E. 2d 279 (1940), *rehearing denied,* 282 N. Y. 804, 27 N.E. 2d 210 (1940); Miller v. Gallagher, 176 Misc. 647, 28 N.Y.S. 2d 606 (1941).

[53] Wise Shoe Co. v. Loewenthal, 266 N.Y. 264, 268, 194 N.E. 749, 750 (1935). *But cf.* Steinkritz Amusement Corp. v. Kaplan, 257 N.Y. 294, 178 N.E. 11 (1931); Nann v. Raimist, 253, N.Y. 307, 174 N.E. 690 (1931); Exchange Bakery v. Rifkin, 245 N.Y. 260, 151 N.E. 130 (1927).

ing blanket injunctions against picketing at some stage of more than a dozen proceedings,[54] in five instances, orders enjoining all picketing were reversed or modified on appeal,[55] and in two others the trial courts themselves modified their restraining orders after periods of three[56] and twenty months.[57] In only a handful of cases is there substantial reason to suspect that the *Meadowmoor* principle was misused.[58]

Nowhere was the basic disagreement between majority and dissenters in *Milk Wagon Drivers Union v. Meadowmoor Dairies* put more pithily than by Justice Reed, when he said, "In the last analysis we must ask ourselves whether this protection against assumed fear of future coercion flowing from past violence is sufficient to justify the suppression of

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[54] Hotel and Restaurant Employees Int'l Alliance v. Greenwood, 249 Ala. 265, 30 So. 2d 396 (1947), *cert. denied,* 332 U.S. 847 (1948); Culinary Workers Union v. Busy Bee Cafe, 57 Ariz. 514, 115 P.2d 246 (1941); Henderson v. Southern Cotton Oil Co., 214 Ark. 456, 217 S.W.2d 261 (1949); Hotel & Restaurant Employees Int'l Alliance v. Jiannas, 211 Ark. 352, 200 S.W.2d 763 (1947); Euclid Candy Co. v. Int'l Longshoremen & Warehousemen's Union, 49 Cal. App. 2d 137, 121 P. 2d 91 (1942); Pezold v. Amal. Meat Cutters, 54 Cal. App. 2d 120, 128 P.2d 611 (1942); Steiner v. Long Beach Local, 123 P. 2d 20 (Cal. Super. Ct. 1942); Moore v. City Dry Cleaners & Laundry, 41 So. 2d 865 (Fla. 1949); Ormerod v. Typographical Workers Union, 27 L.R.R.M. 2508 (Fla. Cir. Ct. 1951); Maywood Farms Co. v. Milk Wagon Drivers Union, 316 Ill. App. 47, 43 N.E.2d 700 (1942); Enterprise Window Cleaning Co. v. Slowuta, 299 N.Y. 286, 86 N.E.2d 750 (1949) (disorderly picketing was only one of the issues involved); Jones v. Int'l Ass'n of Machinists, 75 N.E.2d 446 (Ohio C.P. 1947); Rowe Transfer & Storage Co. v. Int'l Brotherhood of Teamsters, 186 Tenn. 265, 209 S.W.2d 35 (1948); Moulders Union v. Texas Foundaries Inc., 28 L.R.R.M. 2300 (Tex. Civ. App. 1951); International Ass'n of Carpenters and Joiners v. Sharp, 202 S.W.2d 506 (Tex. Civ. App. 1947). In a large number of other cases prayers for blanket injunctions under the Meadowmoor rule were rejected by the trial court as not supported by sufficient evidence. See, *e.g.,* Local 802 v. Asmos, 216 Ark. 694, 227 S.W.2d 154 (1950); Mason and Dixon Lines, Inc. v. Odom, 193 Ga. 471, 18 S.E.2d 841 (1942); Ellingsen v. Milk Wagon Drivers Union, 377 Ill. 76, 35 N.E.2d 709 (1941); Lawrence Avenue Building Corp. v. Van Heck, 377 Ill. 37, 35 N.E.2d 373 (1941); East Lake Drug Co. v. Union, 210 Minn. 433, 298 N.W. 722 (1941); Weyerhauser Timber Co. v. Dist. Council, 11 Wash. 2d 503, 119 P.2d 643 (1941).

[55] Hotel and Restaurant Employees Int'l Alliance v. Greenwood, 249 Ala. 265, 30 So. 2d 396 (1947) (reversed), *cert. denied,* 332 U.S. 847 (1948); Culinary Workers Union v. Busy Bee Cafe, 57 Ariz. 514, 115 P.2d 246 (1941) (reversed); Pezold v. Amal. Meat Cutters, 54 Cal. App. 2d 120, 128 P.2d 611 (1942) (reversed); Rowe Transfer & Storage Company v. Int'l Brotherhood of Teamsters, 186 Tenn. 265, 209 S.W.2d 35 (1948) (modified); Moulders Union v. Texas Foundries Inc., 28 L.R.R.M. 2300 (Tex. Civ. App. 1951) (modified).

[56] Jones v. Int'l Ass'n of Machinists, 75 N.E.2d 446 (Ohio C.P. 1947).

[57] Henderson v. Southern Cotton Oil Co., 214 Ark. 456, 217 S.W.2d 261 (1949).

[58] Hotel & Restaurant Employees Int'l Alliance v. Jiannas, 211 Ark. 352, 200 S.W.2d 763 (1947); Steiner v. Long Beach Local, 19 Cal. 2d 676, 123 P.2d 20 (1942); Maywood Farms Co. v. Milk Wagon Drivers Union, 316 Ill. App. 47, 43 N.E.2d 700 (1942); International Ass'n of Carpenters and Joiners v. Sharp, 202 S.W.2d 506 (Tex. Civ. App. 1947); Moore v. City Dry Cleaners & Laundry, 41 So. 2d 865 (Fla. 1949).

free speech."[59] Justices Frankfurter, Murphy, Stone, Hughes, Jackson, and Roberts voted in the affirmative, with Justices Black, Douglas and Reed, who refused to agree that speech could be constitutionally restricted for so tenuous a reason, in opposition.[60]

Mr. Justice Frankfurter once again spoke for the Court in *American Federation of Labor v. Swing*.[61] Pickets had patrolled before a beauty shop in an effort to unionize its employees. The owner successfully sought an injunction against the picketing as libelous, disorderly, and as an interference with the freedom of his workers to remain unorganized. The Supreme Court, after picking its way through a complex and "none too clear record," decided that the permanent injunction which had finally been issued "rested on the explicit avowal that 'peaceful persuasion' was forbidden in this case because those enjoined were not in Swing's employ."

> We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> Such a ban of free communication is inconsistent with the guarantee of freedom of speech.[62]

A state's power "to regulate the local problems thrown up by modern industry and to preserve the peace," Mr. Justice Frankfurter maintained, is not "unfettered by the requirements of the Bill of Rights."[63] Neither *legislature* nor *judiciary* can deprive workingmen of the right to speak and picket merely "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."[64] Freedom of speech, he concluded can no more be denied to stranger pickets than to all strikers because all persons engaged in the "same industry" have an "interdependence of economic interest."

*Swing's* case, if *Thornhill v. Alabama* is interpreted narrowly, rep-

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59 312 U.S. at 320.

60 Strong criticism of the *Meadowmoor* rule may be found in Note, 41 COL. L. REV. 726 (1940), and Note, 40 MICH. L. REV. 1200 (1942).

61 312 U.S. 321 (1941).

62 312 U.S. at 325 (1941). Justices Frankfurter, Murphy, Stone, Jackson, and Reed formed the majority. Justices Black and Douglas concurred without separate opinion. Not at all certain that the final decree had not been granted as a result of libelous and disorderly conduct as well, Justices Roberts and Hughes dissented.

63 312 U.S. at 325.

64 *Id.* at 326.

resented a considerable extension of the law. In the *Thornhill* case, the Court had decided that a state could not prohibit picketing per se; in the *Swing* case it added: even in the absence of a dispute between an employer and his employees. Before *Thornhill's* case only five states had permitted picketing in the absence of a strike.[65] After the *Swing* decision a number of state courts overruled their previous decisions prohibiting picketing in the absence of a dispute between an employer and his actual employees.[66]

Considered more broadly, however, *American Federation of Labor v. Swing,* and the *Meadowmoor* case as well, marked a distinct retreat from *Thornhill v. Alabama.* The Supreme Court in *Thornhill's* case had more or less promised to determine the constitutionality of picketing by the clear and present danger test. In neither the *Swing* nor *Meadowmoor* cases did the majority honor that pledge. Justices Black and Douglas were admittedly of the opinion that the danger of intimidation because of past violence was neither clear nor present. There is no readily apparent reason, however, why the Court could not have concluded in the *Meadowmoor* case that the union's conduct created a clear and present danger that all future picketing would intimidate the storekeepers. The clear and present danger test is no judicial litmus paper invariably yielding an indisputable answer. It is at best a useful guide in evaluating facts and in no instance dispenses with the necessity for value judgments. Applied in *Swing's* case, the clear and present danger test could not have led the Court to a different conclusion unless all stranger picketing were held to be a substantive evil. The hasty abandonment of the clear and present danger test, while it probably had no effect on the actual outcome of either the *Swing* or the *Meadowmoor* cases, was,

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65 New York, Oregon, Montana, Colorado, and Wisconsin. Actually Wisconsin by legislation made picketing in the absence of a strike an unfair labor practice in 1939. Although the Act was not so construed until some time after Swing's case had been decided. For citations see 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 357 (1940).

66 See *e.g., Arizona:* Culinary Workers v. Busy Bee Cafe, 57 Ariz. 514, 115 P.2d 246 (1941). *Connecticut*: Loew's Enterprises, Inc. v. Int'l Alliance, 127 Conn. 415, 17 A.2d 525 (1941); *Illinois:* Lawrence Avenue Building Corp. v. Van Heck, 377 Ill. 37, 35 N.E.2d 373 (1941); *Indiana:* Davis v. Yates, 218 Ind. 364, 32 N.E.2d 86 (1941); *Kentucky*: Blanford v. Press Publishing Co., 286 Ky. 657, 151 S.W.2d 440 (1941); *Michigan*: Harper v. Brennan, 311 Mich. 489, 18 N.W.2d 905 (1945) (dictum); *New Jersey*: Heine's Inc. v. Truck Drivers and Helpers' Union, 129 N.J.Eq. 308, 19 A.2d 204 (1941); Feller v. Int'l L.G.W. Union, 129 N.J.Eq. 421 19 A.2d 784 (1941); *Washington*: S & W Fine Foods Inc. v. Retail Delivery Drivers Union, 11 Wash. 2d 262, 118 P.2d 488 (1941), *overruled in* Building Service Employees Int'l Union v. Gazzam, 29 Wash. 2d 488, 188 P.2d 97 (1947); *West Virginia*: Blossom Dairy Co. v. Int'l Brotherhood of Teamsters, 125 W. Va. 165, 23 S.E.2d 645 (1942).

nevertheless, of the greatest significance. A uniform application of the test to picketing, the Court apparently realized, by preventing regulation of the objectives for which picketing could be undertaken, might frequently lead to economically undesirable results. But although it ignored the test, the Court gave no indication that it ceased to consider the picket line a constitutionally protected medium of communication.[67] On the contrary, in *American Federation of Labor v. Swing,* picketing, explicitly because it was a form of free speech, was afforded additional protection.

The proposition of the *Swing* case—that a blanket proscription of stranger picketing was a violation of constitutionally protected speech because all persons "engaged in the same industry" hold some common economic interests—left two matters unresolved. First, the Court made no effort to define with precision "the interdependence of economic interests of all engaged in the same industry." A state clearly could not draw the circle of economic competition so narrowly as to exclude all stranger picketing. Yet, the Court's intention not to insist upon a circle large enough to enable any worker to picket any employer was unmistakable. Without doubt, in the absence of a "proper" economic relationship, the most peaceable picketing could be constitutionally prohibited. A Texas appellate court recognized this in two decisions rendered a few days later.[68] Second, could picketing be prohibited if undertaken for an unlawful objective? In *American Federation of Labor v. Swing,* as in *Thornhill v. Alabama,* the Court studiously avoided any statement concerning the legitimate objectives of picketing. Thus the loophole that enabled courts after *Thornhill's* case to enjoin picketing by finding it to be in furtherance of an unlawful purpose remained just as gaping, and several state courts in the months immediately following the *Swing* decision found peaceable picketing to be enjoinable because conducted in pursuance of illegal ends.[69] A large majority, however, ignored the

[67] The number of free speech cases in which the clear and present danger test, while applicable, was not employed is legion. See Antieau, *The Rule of Clear and Present Danger: Scope of its Applicability,* 48 MICH. L. REV. 811 (1950).

[68] Carpenters & Joiners Union v. Ritter's Cafe, 149 S.W.2d 694 (Tex. Civ. App. 1941), *rehearing denied,* at 698, *aff'd,* 315 U.S. 722 (1942); Borden Co. v. Local 133, 152 S.W.2d 828 (Tex. Civ. App. 1941).

[69] The Supreme Judicial Court of Massachusetts held that picketing to enforce a closed shop contract would require the employer to commit an unfair labor practice in violation of the state's labor relations act, and therefore could be constitutionally enjoined. R.H. White Co. v. Murphy, 310 Mass. 510, 38 N.E.2d 685 (1942). Wisconsin's highest court denied that free speech was infringed by an injunction to compel the signing of an all-union agreement without first complying with the State's Employment Peace Act. Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers Union, 238 Wis. 379, 299 N.W. 31 (1941), *cert. denied,* 316 U.S. 668 (1942). Kentucky's Supreme Court,

pickets' objectives and refused to issue restraining orders against picketing primary employers whether by their own employees or by strangers.[70] Scarcely a year after the *Swing* decision,[71] two cases certified for review, *Carpenters & Joiners Union v. Ritter's Cafe*[72] and *Bakery & Pastry Drivers Union v. Wohl*,[73] offered the Court an opportunity to address itself to the questions of how narrowly a state could confine the circle of economic competition, and whether picketing objectives could be constitutionally outlawed.

The *Ritter* case originated from a controversy between a non-union contractor named Plaster and two building-trades unions. Ritter, a restaurateur who employed union help in his cafe, engaged Plaster to erect a building "wholly unconnected with the business of the Cafe" at a site a mile and a half from it. The unions, objecting to Plaster's use of non-union labor, picketed the cafe in a truthful and peaceful

as dictum, asserted that picketing to further a combination in restraint of trade was unlawful, Blanford v. Press Publishing Co., 286 Ky. 657, 151 S.W.2d 440 (1941), and in Washington the enjoinder of picketing that was part of a conspiracy to force a breach of contract was held not to deprive the pickets of freedom of speech. Sears v. Int'l Brotherhood of Teamsters, 8 Wash. 2d 447, 112 P.2d 850 (1941). Finally, a Texas appellate court approved an order restraining workers on strike against a dairy company from picketing the stores retailing its products. Borden Co. v. Local 133, 152 S.W.2d 828 (Tex. Civ. App. 1941).

70 Equitable relief against picketing for the following purposes was denied: to force a self-employer to maintain union hours, Baker v. Retail Clerks Int'l Protective Ass'n, 313 Ill. App. 432, 40 N.E.2d 571 (1942); to force non-union employees into the union, Denver Local Union v. Buckingham Transp. Co., 108 Colo. 419, 118 P.2d 1088 (1941); Ellingsen v. Milk Wagon Drivers Union, 377 Ill. 76, 35 N.E.2d 349 (1941); Lawrence Avenue Building Corp. v. Van Heck, 377 Ill. 37, 35 N.E.2d 373 (1941); Friedman v. Blumberg, 342 Pa. 387, 23 A.2d 412 (1941); S & W Fine Foods Inc. v. Retail Delivery Drivers & Salesmen's Union, 11 Wash. 2d 262, 118 P.2d 962 (1941); to compel a self-employer to join a union, O'Neil v. Building Service Employees Int'l Union, 9 Wash. 2d 507, 115 P.2d 662 (1941); to force an employer to change his method of doing business because it hurt the union, Edwards v. Teamsters Union, 8 Wash. 2d 492, 113 P.2d 28 (1941); to require stores renting burglar alarms to have them serviced exclusively by the union even though the rental fee included free non-union service, People v. Muller, 286 N.Y. 284, 36 N.E.2d 206 (1941); to make an employer break a collective bargaining agreement with a majority union (not yet certified) and recognize a minority union instead, Weyerhauser Timber Co. v. Dist. Council, 11 Wash. 2d 503, 119 P.2d 643 (1941).

71 During this period the Court in a per curiam memorandum opinion, 312 U.S. 658 (1941), citing the *Thornhill* and *Swing* cases, reversed Miller's Inc. v. Journeymen Tailors Union, 128 N.J.Eq. 165, 15 A.2d 822 (1940), a case in which the New Jersey Court of Chancery held the Constitution does not protect picketing in the absence of a "labor dispute." Similarly, in another per curiam memorandum decision, 313 U.S. 548 (1941), the Court summarily reversed Bakery & Pastry Drivers Union v. Wohl, 284 N.Y. 788, 31 N.E.2d 765 (1940). A petition for rehearing the Wohl case, however, was subsequently granted, 314 U.S. 701 (1941).

72 315 U.S. 722 (1942).

73 315 U.S. 769 (1942).

manner. The Texas Court of Civil Appeals,[74] in a decision which the Supreme Court of the United States sustained by a vote of five to four,[75] held that the picketing was an illegal restraint of trade in violation of the State's anti-trust laws. The Fourteenth Amendment declared Mr. Justice Frankfurter for the Court, does not prohibit a state from localizing an industrial conflict in the manner in which Texas had. The state had prevented unions in controversy with a building contractor from picketing a restaurant owned by a person who contracted with the builder. Under these circumstances the state simply forbade the "conscription of neutrals" having "no relation to either the dispute or the industry in which it arose."[76] The contractor, not the cafe-owner, was the real adversary of the unions. The situation which had been involved in *Bakery & Pastry Drivers v. Wohl,* Mr. Justice Frankfurter pointed out in his *Ritter* opinion, was quite different.[77] In the *Wohl* case, a bakery drivers' union was in dispute with two independent peddlers, Wohl and Platzman. When the peddlers refused to accede to the union's demand that they hire an unemployed union member as a relief worker on one day each week, the union, in order to bring secondary pressure upon them, picketed the manufacturing bakers from whom Wohl and Platzman bought products and threatened to picket the retail stores to which they sold them. The New York Court of Appeals[78] approved an injunction against all picketing on the ground that "no labor dispute" was involved under the state's anti-injunction statute—an injunction which the United States Supreme Court dissolved as an unconstitutional infringement on speech.[79] The businesses picketed in the *Wohl* case, asserted Mr. Justice Frankfurter, were "directly involved in the dispute. In picketing the retail establishments, the union members would only be following the subject-matter of their dispute."[80] Texas, in the *Ritter* case, did not attempt to prevent the unions from picketing "other business enterprises of the building contractor." If it had, other problems would have been involved.

Much of the difficulty which commentators have found in correlating the *Ritter* case with the *Swing* and *Wohl* decisions results, the writer

74 Carpenters & Joiners Union v. Ritter's Cafe, 149 S.W.2d 694 (Tex. Civ. App. 1941), *rehearing denied*, at 698.

75 315 U.S. 722 (1942). Justices Frankfurter, Stone, Byrnes, Jackson and Roberts formed the majority, with Justices Black, Douglas, Murphy, and Reed dissenting.

76 *Id.* at 728.

77 *Id.* at 727.

78 284 N.Y. 788, 31 N.E.2d 765 (1940).

79 315 U.S. 769 (1942).

80 *Id.* at 727.

believes, from interpreting Mr. Justice Frankfurter's designation of Ritter as a neutral to be a vital factor in his decision that Ritter's cafe could not be picketed. Peaceful picketing, the Justice wrote, is one of the media whereby "workingmen communicate their grievances."[81] Nonetheless, picketing is also, in the Justice's pungent term, a method of "conscription" and the states are not required by the Constitution "to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."[82] Mr. Justice Frankfurter, it is suggested, was employing the word "neutral" in the same sense in which he and Greene seem to have used it in *The Labor Injunction:* to refer to anyone not an actual party to a labor dispute.[83] Thus defined, "neutral" implies no necessary conclusion concerning the right to picket a person designated a neutral; third parties are subject to picketing, and whether they may or may not be picketed in a particular case depends upon the character of their economic relation to the primary parties to a labor dispute—the principle which Mr. Justice Frankfurter applied in the *Ritter* decision. Generally, the word "neutral" is used quite differently. Hellerstein, and most others, would treat as neutrals only those (if any there be) who are not in a position to aid either party to a labor dispute and therefore ought to be immune from picketing.[84] When the term is used in this sense, Ritter cannot possibly be considered a neutral and Mr. Justice Frankfurter did not suggest that he could. Texas could constitutionally immunize Ritter from picketing, not because he was unable to exert economic pressure upon the contractor whom he had hired to build his house, but because his relationship to the dispute between the contractor and the union was relatively remote.

The Supreme Court apparently felt that the states[85] ought to be al-

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[81] *Id.* at 727.

[82] *Id.* at 728. In the *Wohl* case Mr. Justice Douglas, concurring, wrote:

> Picketing by an organized group is more than free speech, since it invokes 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.

*Id.* at 776.

[83] FRANKFURTER AND GREENE, THE LABOR INJUNCTION 45 (1930).

[84] See Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 YALE L. J. 341, 354 (1938). Also Cushman and Herrick, *Re-examination of Picketing and Free Speech,* 34 CORNELL L.Q. 81, 86 (1948); GREGORY AND KATZ, LABOR LAW: CASES MATERIALS AND COMMENTS 361 *et seq.* (1948).

[85] New York Courts have developed a "unity of interest" doctrine whereby they decide whether the economic relationship between pickets and those picketed is close enough to foreclose equitable relief. See the leading case of Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 307 (1937). A short history of "unity of interest" may be found in

lowed the power to prevent pickets from levelling economic pressure against third parties having no close relationship to a particular controversy. At the same time it denied the power to draw the circle of economic competition so narrowly as to insulate parties vitally associated with a labor controversy from the pressures of the picket line. But, the criteria for applying the *Ritter* formula remained elusive indeed. As Mr. Justice Reed stressed in his dissent, the Court had not made clear the method for determining whether the necessary interdependence of economic interest exists or even what it meant by "industry."[86]

The decision in the *Wohl* case was written by Mr. Justice Jackson. The New York Courts, he argued, cannot prevent a union from picketing merely because no "labor dispute" is involved:

> . . . 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 by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.[87]

The Court in the above sentence gave cause for suspicion that peaceful picketing could be enjoined if undertaken for a purpose labeled "unlawful." The probability that this was exactly what the Court intended was immeasurably increased by the dictum which followed. Respondents had argued that the New York Court of Appeals did in fact consider that the picketing had been conducted for an unlawful purpose, and pointed to that court's language in *Opera on Tour v. Webber*[88] in substantiation. Mr. Justice Jackson, however, dismissed the *Webber* dictum as lacking "the deliberation and formality of a certification."[89] To this rather strong hint that the Court might well consider picketing for an unlawful purpose devoid of constitutional protection,[90] the

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Barnard and Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 137, 155 (1940). Also see Hellerstein, 47 YALE L. J. 341, 354; Editor's Note, 15 GEO. WASH. L. REV. 327, 329 (1947).

86 315 U. S. 722, 739.

87 315 U. S. 769, 774.

88 285 N. Y. 348, 34 N.E. 2d 349 (1941), where the court said:

> So, too, in a case unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week.

*Id.* at 357, 34 N.E. 2d 349, 353 (1941).

89 315 U. S. at 774.

90 On the same day the Court in Allen-Bradley Local No. 1111 v. WERB, 315 U. S. 740 (1942), sustained an injunction approved by the Supreme Court of Wisconsin enjoining among other things picketing the homes of non-striking employees during a labor dispute.

Justice appended a somewhat confusing conclusion. Its upshot seems to be this: peaceful picketing, if it seriously affects the interests of third parties, loses its constitutional immunity. This prompted Mr. Justice Douglas, who with Justices Black and Murphy urged resuscitation of the clear and present danger test,[91] to protest:

> 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*. . . .[92]

In *Ritter* and *Wohl*, as in *Meadowmoor* and *Swing*, the majority ignored the clear and present danger test. Application of the test, although it would no more have altered the result in *Bakery and Pastry Drivers Union v. Wohl* than in *American Federation of Labor v. Swing*, would most probably have caused a reversal of *Carpenters & Joiners Union v. Ritter's Cafe*. The Court in the *Wohl* and *Ritter* cases preferred to assay the validity of restraints upon all picketing within a given area by what has been aptly designated the "reasonable basis" test.[93] According to this test, whether or not a state could ban all picketing within a particular area would depend on a careful balancing of community interests—of which speech was one and the confining of the scope of economic conflict another. Picketing, in the absence of a close economic relationship between the parties involved, would fall outside

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[91] Mr. Justice Douglas wrote:

> While we recognized that picketing could be regulated, we stated [in Thornhill v. Alabama] (p. 104-105): "Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of the ideas by competition for acceptance in the market of public opinion." And we added (p. 105): "But no clear and present danger of destruction of life or property, or invasion of the right of privacy or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." For that reason we invoked the test, employed in comparable situations (Cantwell v. Connecticut, 310 U.S. 296, 307; Bridges v. California, 314 U.S. 252) that the statute which is the source of the restriction on free speech must be "narrowly drawn to cover the precise situation giving rise to the danger." p. 105. . . . But the [New York] statute is not a regulation of picketing *per se*—narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the Thornhill case are to survive, I do not see how New York can be allowed to draw that line.

315 U.S. at 776-77. Cf. the words of Mr. Justice Reed, dissenting in the *Ritter* Case:

> The decision withdraws federal constitutional protection from the freedom of workers outside an industry to state their side of a labor controversy by picketing. So long as civil government is able to function normally for the protection of its citizens, such a limitation upon free speech is unwarranted.

315 U.S. 722, 739.

[92] 315 U.S. at 775.

[93] See Stapleton v. Mitchell, 60 F. Supp. 51 (D. C. Kan. 1945). The court applied the phrase to the rationale of the *Ritter* case alone.

the area of constitutionally protected speech. The *Wohl* decision precluded blanket prohibition of picketing which followed an "unfair" product; the *Ritter* case held picketing a third party (merely because he happened to be in a position to exert economic pressure upon an actual party to a dispute) outside the pale of immunity. But rather than lay down a rule of thumb for determining in future cases whether the relationship between picketer and picketed was integral enough to forbid the interdiction of all picketing, the Court seemed resolute to proceed cautiously from case to case. The validity of prohibitions on the scope of picketing which did not lie within the areas already demarcated by the *Ritter* and *Wohl* cases would be determined by evaluating community interests and by deciding whether the restrictions were reasonable. If a "reasonable basis" test were to be substituted for the clear and present danger test, or the "same industry" rule, there is much to justify the way in which both the *Wohl* and *Ritter* cases were decided. But certainly Mr. Justice Frankfurter overstated the logic of the Court's position when he insisted in the *Ritter* case that to hold that the Constitution forbids "Texas to draw the line which has been drawn here . . . would be to transmute vital constitutional liberties into doctrinaire dogma."[94] The narrow rulings in *Thornhill v. Alabama* and *American Federation of Labor v. Swing* remained good law: no total prohibition of picketing whether by bona fide employees or strangers was permissible.

Some months later the Court, in *Cafeteria Employees Union v. Angelos*,[95] applied both the *Meadowmoor* principle, allowing the complete prohibition of peaceful picketing enmeshed with violence, and the *Ritter-Wohl* rationale that where a close economic relation exists between the picketer and the picketed no total ban on picketing is constitutionally permissible, to upset an injunction against picketing granted by the New York courts. Members of a union had paraded before a cafeteria operated by its several partner-owners without the help of employees. The New York Court of Appeals sustained the lower courts' findings that the pickets had misrepresented the partners and had insulted their customers.[96] Even were this not the case, equitable relief could be properly granted because no "labor dispute" existed under the provisions of Section 876-a of the Civil Practice Act. The United States Supreme Court, through Mr. Justice Frankfurter, held that the injunction violated

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94 315 U.S. 722, 728.

95 320 U.S. 293 (1943).

96 Angelos v. Mesevich, 289 N.Y. 498, 46 N.E.2d 903 (1943).

free speech. The picketing could not be enjoined as improperly conducted:

> . . . to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist"—is not to falsify facts.[97]

There is no constitutional right to misrepresent and coerce, but such conduct can not cause the forfeiture of the right to picket. States under the *Meadowmoor* doctrine may prohibit picketing in order to prevent future coercion, but "the right to picket itself [cannot] be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."[98] Nor was the absence of a "labor dispute" as defined by state law of significance. Once again the oft-cited magic words appear: a state cannot outlaw picketing simply "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."[99] Here no "neutrals" or third parties were involved, and the economic relationship between the self-employers and the union which would like to relieve them of their functions as laborers was presumably a close one. Picketing self-employers was as much constitutionally protected against a blanket ban as stranger picketing for organizational purposes and the following of an "unfair" product.

## II

After the *Angelos* decision, the Justices retreated to the isolation of their chambers for more than half a decade and left the states to interpret the Court's picketing-free speech opinions as they saw fit.[100] Two possible courses of action remained open to states desirous of regulating peaceful picketing. A state might limit the scope of permissible picketing by prohibiting all patrolling in areas of labor controversy in which

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[97] 320 U.S. at 295.

[98] *Id.* at 296.

[99] *Id.*

[100] The Court, while it did hear arguments in a potentially important picketing case in 1947, United States v. Petrillo, 332 U.S. 1 (1947), neatly side-stepped for a time the necessity for subjecting its picketing-free speech pronouncements to a searching reappraisal. In 1946, Congress amended the Communications Act of 1934 by making it a criminal offense to coerce a licensee into submitting to featherbedding and similar practices. The United States District Court for the Northern District of Illinois offered as one reason for invalidating the law its conviction that the statute abridged free speech by outlawing peaceful picketing. The Supreme Court reversed. The Court, in refusing to hold the statute invalid on its face, pointed out that the word "picketing" did not appear in the amendment. The law, the Court argued, had not yet actually been applied and the Justices had no intention of deciding whether the law was invalid as a district attorney *proposed* to apply it.

the Supreme Court had declared or was likely to declare that no close interdependence of economic interest existed between the pickets and those picketed. Or, a state might maintain that until the Supreme Court made a definite pronouncement to the contrary, peaceful picketing for "unlawful objectives" could be prohibited: the *Swing, Ritter, Wohl,* and *Angelos* cases all had been concerned with the question, "Who may picket whom?" and the answer to the other important question, "For what purposes may picketing be undertaken?" remained obscure. The lower courts' decisions in the years after the *Wohl* and *Ritter* cases may be said to follow one or the other of the foregoing alternatives in limiting peaceful picketing. It would be inaccurate, however, to insist that all the lower courts explicitly recognized this division and consciously took one path or the other. Consequently, some decisions must be arbitrarily placed in one category or the other.

*Blanket Restrictions on the Scope of Picketing*

The cases in the first category, the regulation of picketing by means of blanket restrictions on its scope, arose in two ways.

1) *Constitutionality of Legislation Curtailing Picketing:* State labor legislation resulted in a group of cases challenging the constitutionality of new statutory limitations which curtailed the scope of picketing. The Supreme Court of Colorado found that the state's Labor Peace Act which limited picketing to members of incorporated unions an infringement of free speech.[101] California's broadly drafted "hot cargo act,"[102] which permitted the enjoinder of picketing directly or indirectly resulting in a boycott of third parties, and a similar section of the Pennsylvania Labor Relations Act,[103] were struck down as so vague and sweeping as to violate the constitutional right to disseminate the facts of a labor controversy. Missouri's Madison Act, a June 30, 1947, amendment to the Pennsylvania Labor Relations Act, and Article 515f of the Texas Civil Statutes prohibited picketing in the absence of a dispute

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101 American Federation of Labor v. Reilly, 113 Colo. 9, 155 P.2d 145 (1945).

102 CAL. LAB. CODE §§ 1131-1136 (Deering 1944); *In re* Blaney, 30 Cal. 2d 643, 184 P.2d 892 (1947). The court said:

> The legislature manifestly sought, in the instant case, to prohibit every form of boycott, including some kinds which are occasionally characterized as "primary". . . . Only by a carefully drawn statute which separately treats the various forms of concerted action loosely termed "secondary boycotts" can the legislature hope to accomplish the object of regulating those forms which may ultimately be held within its constituted power.

*Id.* at 658, 184 P.2d at 902.

103 PA. STAT. tit. 43, § 211 *et seq.* (1941); Labor Relations Board v. Counties Union, 361 Pa. 246, 64 A.2d 834 (1949).

between an employer and his employees. The Supreme Court of Missouri found such a provision unconstitutional,[104] and the Texas[105] and Pennsylvania[106] Supreme Courts followed suit. Observed the Pennsylvania court:

> . . . [the statute] . . . leaves room for no exceptions based upon the lawfulness of the purpose of the picketing, its peaceful character, or the circumstances that the picketers have a legitimate economic interest to advance thereby, arising from their employment in the industry affected.[107]

The Utah Labor Relations Act declared picketing an unfair labor practice unless conducted by a certified union in connection with a strike approved by a majority of the workers on a secret ballot. Her court of last appeal, rather than invalidate the statute, virtually rewrote it.[108] A clause in the law piously proclaiming the legislature's intention not to interfere with free speech clearly indicated, felt the court, that the limitations on picketing applied only to such picketing as was not constitutionally protected. In Florida, the legislature passed a law making it illegal "to participate in any strike, walkout, or cessation of work or continuation thereof without the same being authorized by a majority vote of the employees to be governed thereby. . . ."[109] This provision was held, in *Whitehead v. Miami Laundry Co.*,[110] not to ban picket lines because picketing as a form of speech is constitutionally protected even in the absence of a legal strike. In *Lash v. State*,[111] the Alabama Supreme Court, while it refused upon receipt of a certified question to void an apparently blanket prohibition of picketing, did issue a warning that the act must not be applied in contravention of the Fourteenth Amendment.

On the other hand, several decisions upholding blanket prohibitions on peaceful picketing without regard for the interdependence of economic interest seem incompatible with the *Wohl* and *Ritter* cases. The highest court of Wisconsin with but slight deference to the decisions of the United States Supreme Court, accepted the state's Employment

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104 *Ex parte* Hun, 257 Mo. 256, 207 S.W.2d 468 (1948).

105 International Union of Operating Engineers v. Cox, 148 Tex. 42, 219 S.W.2d 787 (1949).

106 See note 103 *supra*.

107 361 Pa. 246, 263, 64 A.2d 834, 841-42 (1948).

108 International Union v. Utah Labor Relations Board, 115 Utah 183, 203 P.2d 404 (1949).

109 FLA. STAT. ANN. § 481.09 (3) (1941).

110 160 Fla. 667, 36 So.2d 382 (1948).

111 244 Ala. 48, 14 So.2d 229 (1943). *Accord:* Sachs Quality Furniture, Inc. v. Hensley, 269 App. Div. 264, 55 N.Y.S. 2d 450 (1st Dep't 1945). *Cf.* Society of New York Hospital v. Hanson, 185 Misc. 937, 59 N.Y.S. 2d 91 (Sup. Ct., N.Y. County 1945), which was not decided on free speech grounds.

Relations Act at face value.[112] Despite the picketing-free speech cases, the Wisconsin court maintained, picketing not in furtherance of a strike authorized by a majority of a firm's employees can be enjoined. And the Supreme Court of Colorado sustained a section of the Colorado Labor Peace Act which restricted the picketing of an employer to those of his employees who had been organized into a "collective bargaining unit."[113] An appeal to the United States Supreme Court was denied, Justices Black and Murphy dissenting, "because of the inadequacy of the record."[114] A dictum in a Texas case is also worth mentioning in this connection.[115] The Court of Civil Appeals thought that the legislature could not constitutionally prohibit peaceful picketing accompanying a strike approved by a majority of a company's workers; the implication remained that peaceful picketing in the absence of these conditions could be enjoined.

2) *State court interpretation of "a close interdependence of economic interest":* The remaining cases in the first category reflect efforts of the courts to apply new facts to the *Wohl-Ritter* pattern. One New York Court held that a striking newspaper writer who picketed a bakery which continued to advertise in the struck paper was guilty of disorderly conduct.[116] Another enjoined a union in dispute with a gasoline corporation from picketing one of its firm's customers on the ground that no unity of economic interest existed between union and customer.[117] An Ohio court restrained a union on strike against one company from carrying placards reading "This Plant is Doing Our Work" before a company which accepted orders from the first.[118] The court found, that although there was a clear economic connection between the two firms, the volume of work sublet by the struck firm did not increase during the labor dispute. An intermediate New York court, in *Enterprise*

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112 Retail Clerks Union v. Wisconsin Employment Relations Board, 242 Wis. 26, 6 N.W.2d 698 (1942).

113 Denver Milk Producers, Inc. v. Int'l Brotherhood of Teamsters, 116 Colo. 389, 183 P.2d 529 (1948).

114 International Brotherhood of Teamsters v. Denver Milk Producers, Inc., 334 U.S. 529 (1947).

115 Alamo Express v. Int'l Brotherhood of Teamsters, 215 S.W.2d 936 (Tex. Civ. App. 1948).

116 People v. Fleishman, 36 N.Y.S.2d 559 (N.Y. City Ct. Sp. Sess. 1942).

117 Gulf Oil Corp. v. Int'l Brotherhood of Teamsters, 185 Misc. 409, 57 N.Y.S.2d 24 (Sup. Ct. Queens County 1945), *aff'd*, 270 App. Div. 129, 58 N.Y.S.2d 495 (2d Dep't 1945); *accord*, Florsheim Shoe Co. v. Retail Salesmen's Union, 288 N.Y. 188, 42 N.E.2d 480 (1942) (decided in part on other grounds).

118 Ridge Mfg. Co. v. United Elec., Radio & Machine Workers Local, 77 N.E.2d 248 (Ohio C.P. 1947).

*Window Cleaning Co. v. Slowuta,*[119] decided that pickets could be prevented from following the window washers employed by a window-washing firm with whom the union was in dispute. A strong dissenting opinion maintained that the economic relationship of the union and the window washers was a close one, and pointed to the similarities between these circumstances and "following a product." In still another case, resembling *Bakery & Pastry Workers v. Wohl,* a union was permitted to picket a hotel reselling to the public for profit bread purchased by it from an "unfair" bakery.[120] The Supreme Court of Minnesota, in a case decided some months before *Cafeteria Employees Union v. Angelos,* arrived at essentially the Supreme Court's conclusion: the Fourteenth Amendment prevents a blanket prohibition of all peaceful picketing undertaken to force a self-employer to let union men do the work he is doing with his own hands.[121] At least one court completely ignored the mandate of *American Federation of Labor v. Swing* and enjoined picketing on the ground that no dispute existed between an employer and his employees.[122] In no case in which the proper scope of picketing was discussed (whether arising from state labor legislation or sets of facts not clearly on all fours with one of the Supreme Court's decisions) did a court suggest that peaceful picketing, even during a "bona fide" labor dispute, was constitutionally protected regardless of purpose. On the contrary, it apparently was agreed that picketing to be constitutionally protected had to be conducted for lawful objectives.

*Picketing For Unlawful Objectives*

By far the largest share of the picketing cases following the *Wohl* and *Ritter* decisions falls into the second category: the regnlation of picketing by establishing objectives for which it could not be undertaken. The Supreme Court, while it would brook no general prohibition against picketing a party to a labor controversy, had refused to rule that picketing regardless of purpose was constitutionally protected. "It is significant," remarked the Supreme Court of Oregon, "that in those cases where the Supreme Court identified picketing with free speech no unlawful purpose of the picketing was involved."[123] Declared the Supreme Judicial Court of Massachusetts, "Until we are more positively directed

119 273 App. Div. 662, 79 N.Y.S.2d 91 (1st Dep't 1948).

120 People v. Briesblatt, 34 N.Y.S.2d 184 (County Ct. Sullivan County 1942).

121 Glover v. Minneapolis Bldg. Trades Council, 215 Minn. 533, 10 N.W.2d 481 (1943).

122 Dallas General Drivers Union v. Oak Cliff Baking Co., 203 S.W.2d 586 (Tex. Civ. App. 1947).

123 Peters v. Cent. Labor Council, 179 Ore. 1, 10, 169 P.2d 870, 874 (1946).

to the contrary we prefer to think [that picketing may be prohibited when] the defendants' method of speaking involves an otherwise unlawful combination for an unjustified objective. . . ."[124] Thus it remained possible for the states to accomplish indirectly what constitutionally they could not attempt directly. The lower court cases treating the objectives for which picketing might not be conducted may be divided into two major groups: 1) cases in which the picketing was held to cause, force, or result in the violation of a statute; and 2) those in which the picketing was held to cause, force, or result in practices that judges more or less without the benefit of legislative guidance deemed improper or undesirable.

1) *Violation of a statute as an unlawful objective:* In one series of cases, picketing was enjoined as illegal because its objective was to bring about violations of anti-trust and monopoly laws, or legislation regulating the conduct of common carriers.[125] In several instances, however, so little evidence appears of union intention to violate the laws that court enjoinder of picketing for this reason is suspect as a mere sham for restricting picketing.[126] Other courts found that in similar situations such legislation was inapplicable,[127] one going so far as to observe that if the anti-trust laws did apply to picketing simply because third parties out of deference to the picketers refused to cross the picket lines, the laws would be unconstitutional.[128]

Where the violation of labor legislation was the claimed unlawful

[124] Saveall v. Demers, 322 Mass. 70, 75, 76 N.E. 2d 12, 15 (1947).

[125] Burlington Transp. Co. v. Hathaway, 234 Ia. 135, 12 N.W. 2d 167 (1943); Harper v. Brennan, 311 Mich. 489, 18 N.W. 2d 905 (1945); Empire Storage & Ice Co. v. Giboney, 357 Mo. 671, 210 S.W. 2d 55 (1948), *aff'd,* 336 U.S. 490 (1949); Rogers v. Poteet, 355 Mo. 986, 199 S.W. 2d 378 (1947); Hobbs v. Poteet, 357 Mo. 152, 207 S.W. 2d 501 (1947); Mayer Brothers Poultry Farmers v. Meltzer, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1st Dep't 1948); Ridge Mfg. Co. v. Elec. Workers Local, 77 N.E. 2d 248 (Ohio C.P. 1947); Dickson v. North East Texas Motor Freight Lines, 210 S.W. 2d 660 (Tex. Civ. App., 1948), *modified,* 219 S.W. 2d 795 (1949); Turner v. Zanes, 206 S.W. 2d 144 (Tex. Civ. App. 1947) (dictum). See also Northwestern Pacific R.R. v. Lumber & Sawmill Workers Union, 31 Cal. 2d 441, 189 P. 2d 277 (1948) (original injuction modified on appeal).

[126] Burlington Transp. Co. v. Hathaway, 234 Ia. 135, 12 N.W. 2d 167 (1943); Harper v. Brennan, 311 Mich. 489 18 N.W. 2d 905 (1945); Dickson v. North East Motor Freight Lines, 210 S.W. 2d 660 (Tex. Civ. App. 1948), *modified,* 148 Tex. 35, 219 S.W. 2d 795 (1949); Turner v. Zanes, 206 S.W. 2d 144 (Tex. Civ. App. 1947), *overruled on this point in Ex parte* Henry, 147 Tex. 315, 215 S.W. 2d 588, 595 (1948).

[127] Koss v. Continental Oil Co., 222 Ind. 224, 52 N.E. 2d 614 (1944); Caldwell v. Anderson, 357 Mo. 1199, 212 S.W. 2d 784 (1948); *Ex parte* Henry, 147 Tex. 315, 215 S.W. 2d 588 (1948). See also Schivera v. Long Island Lighting Co., 296 N.Y. 26, 69 N.E. 2d 233 (1946); International Brotherhood of Teamsters v. Missouri Pacific Freight Transp. Co., 220 S.W. 2d 219 (Tex. Civ. App. 1949).

[128] *Ex parte* Henry, 147 Tex. 315, 215 S.W. 2d 588 (1948).

objective, judges generally held it unlawful to picket for the purpose of forcing an employer to sign a contract which would interfere with his employees' statutory right not to join a union.[129] Most likewise proved ready to prevent minority or rival unions from picketing employers who were engaged in bargaining with unions certified by national or state labor relations boards or who were abiding by valid contracts with certified unions.[130] Picketing to frustrate majority rule as fostered by law, they argned, is illegal. "There is no interference with free speech," declared a New York Court, "when an injunction seeks only to sustain the orderly processes of and mandates issued by and under the constituted authority of the national government. . . ."[131] The highest court in Oregon, however, was not as ready to see the picketing-free speech doctrine eroded away, and refused to sanction an injunction against a union even though the contract it sought would have forced an employer to violate the National Labor Relations Act.[132] The pickets, maintained the court, had legal as well as illegal objectives. When both are involved, picketing must be considered privileged. At the other extreme, the Wisconsin Supreme Court, in a case previously cited, found that picketing in connection with a strike which was unauthorized by statute was enjoinable because undertaken for an unlawful purpose.[133] And a Texas court long distingnished for its hostility toward picketing went even further.[134] A union picketed a crew engaged in moving a

129 Consumer Sand & Gravel Co. v. Kalamazoo Bldg. & Trades Council, 321 Mich. 361, 32 N.W. 2d 531 (1948); Silkworth v. Local 575, 309 Mich. 746, 16 N.W. 2d 145 (1944); Wilbank v. Hotel & Restaurant Employees Union, 360 Pa. 48, 60 A. 2d 21 (1948); Fred Wolferman Inc. v. Root, 355 Mo. 986, 199 S.W. 2d 378 (1947), *cert. denied,* 333 U.S. 837 (1948). *But cf.* Standard Grocer Co. v. Local 406, 321 Mich. 276, 32 N.W. 2d 519 (1948). In Gazzam v. Bldg. Serv. Union, 29 Wash. 2d 488, 188 P. 2d 97 (1947), *aff'd,* 339 U.S. 532 (1950), the Supreme Court overruled earlier decisions in which peaceful picketing had been held constitutionally protected regardless of objective.

130 Dinny & Robbins, Inc. v. Davis, 290 N.Y. 101, 48 N.E. 2d 280 (1943), *cert. denied,* 320 U.S. 811 (1943); Florsheim Shoe Co. v. Retail Salesmen's Union, 288 N.Y. 188, 42 N.E. 2d 480 (1942); Gulf Oil Corp. v. Int'l Brotherhood of Teamsters, 185 Misc. 409, 57 N.Y.S. 2d 24 (Sup. Ct., Queens County 1945), *aff'd,* 270 App. Div. 129, 58 N.Y.S. 2d 495 (2d Dep't 1945); Serval Slide Fasteners v. Molfetta, 188 Misc. 787, 70 N.Y.S. 2d 411 (Sup. Ct., Queens County 1947); Markham & Callow Co. v. Int'l Woodworkers, 170 Ore. 517, 135 P. 2d 727 (1943); Swenson v. Seattle Central Labor Council, 27 Wash. 2d 193, 177 P. 2d 873 (1947). *But cf.* Sachs Quality Furniture, Inc. v. Hensley, 269 App. Div. 264, 55 N.Y.S. 2d 450 (1945); State v. Superior Court, 24 Wash. 2d 314, 164 P. 2d 662 (1945).

131 Serval Slide Fasteners v. Molfetta, 188 Misc. 787, 791, 70 N.Y.S. 2d 411, 415 (Sup. Ct., Queens County 1947).

132 Peters v. Central Labor Council, 179 Ore. 1, 169 P. 2d 870 (1946).

133 Retail Clerks' Union v. Wisconsin Employment Relations Board, 242 Wis. 21, 6 N.W. 2d 698 (1942). See note 112 *supra.*

134 Construction & General Labor Union v. Stephenson, 221 S.W. 2d 375 (Tex. Civ. App. 1949), *modified,* 148 Tex. 434, 225 S.W. 2d 958 (1950).

building to accomplish any one of three things: to force the contractor to replace some of his non-union workers with union members, or to encourage these non-union workers to form a union of their own, or to enroll the non-union employees in the picketing union. All three objectives, said the court, were illegal under Texas' anti-secondary boycott law.

2) *Judicially declared "unlawful practices" as unlawful objectives:* The absence of statutory provisions defining illegal labor objectives proved no deterrent to a host of courts. Many judges considered themselves as fully qualified as the legislature to separate worthwhile labor objectives from the anti-social and the undesirable and the Supreme Court had not made the slightest move to inform them otherwise. More than one court approved an injunction against picketing which tended to induce a breach of contract.[135] *Hughes v. Superior Court,*[136] a decision subsequently affirmed by the United States Supreme Court, held that picketing for the purpose of persuading a company to hire Negro help proportionate to its Negro trade was enjoinable. The Supreme Judicial Court of Massachusetts stood firm against every challenge to its half-century old position that the several varieties of union security arrangements were illegal picketing objectives.[137] Obiter dicta suggested this state of mind was not peculiar to the Bay State.[138] Courts in Ohio, Indiana, and California, however, continued in the absence of legislation to the contrary to regard the "closed shop" as a proper objective of picketing.[139] The Supreme Court of California, nevertheless, in two

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135 Gulf Oil Corporation v. Int'l Brotherhood of Teamsters, 185 Misc. 409, 57 N.Y.S.2d 24 (Sup. Ct. Queens County 1945); Sterling & Welch Co. v. Duke, 67 N.E.2d 24 (Ohio C.P. 1946); International Ass'n of Machinists v. Downtown Employees' Ass'n., 204 S.W. 2d 685 (Tex. Civ. App. 1947). *Contra:* Blossom Dairy Co. v. Int'l Brotherhood of Teamsters, 125 W. Va. 165, 23 S.E.2d 645 (1942). *Cf.* Koss v. Continental Oil Co., 222 Ind. 224, 52 N.E.2d 614 (1944); State v. Superior Court, 24 Wash. 2d 314, 164 P.2d 662 (1945).

136 32 Cal. 2d 850, 198 P.2d 885 (1947), *aff'd,* 339 U.S. 460 (1950).

137 Davis Bros. Fisheries v. Pimental, 322 Mass. 499, 78 N.E.2d 93 (1948); Colonial Press v. Ellis, 321 Mass. 495, 74 N.E. 1' (1947); Fashioncraft v. Halpern, 313 Mass. 385, 48 N.E.2d 1 (1943).

138 Spickelmier v. Chambers, 113 Ind. App. 470, 47 N.E.2d 189 (1943); Peters v. Cent. Labor Council, 179 Ore. 1, 169 P.2d 870 (1946). But see the subsequent decision of the Indiana Supreme Court in Retail Clerks' Union v. Parker, 222 Ind. 209, 51 N.E.2d 628 (1943).

139 Park & Tilford Import Corp. v. Int'l Brotherhood of Teamsters, 27 Cal. 2d 599, 165 P.2d 891 (1946); Retail Clerks' Union v. Parker, 222 Ind. 209, 51 N.E.2d 628 (1943); Iocomini's Restaurant Inc. v. Hotel & Restaurant Employees' & Bartenders' Local, 85 N.E.2d 534 (Ohio C.P. 1948); Lubbers v. Hurst, 78 N.E.2d 580 (Ohio C.P. 1946). See also Hotel & Restaurant Employees' Int'l Alliance v. Greenwood, 249 Ala. 265, 30 So.2d 696 (1947), *cert. denied,* 332 U.S. 847 (1948) (dictum).

carefully-written and important decisions refused blanket approval of the "closed shop" under all circumstances.

In *Bautista v. Jones*[140] the court sustained a permanent injunction restraining a union which would not admit independent milk peddlers to membership from picketing to achieve a closed shop agreement with a milk company. A group of workers, reasoned the court, ought not to be permitted both a closed shop agreement and a closed union. *James v. Marinship Corporation*[141] turned on an essentially similar point. The right to picket for a closed shop was denied a union because it restricted Negroes to its auxiliary, an unequal and ineffective branch of the organization proper. A California Appellate court applied this kind of reasoning to a far from analogous set of facts—a suit seeking to prevent the Journeymen Barbers, Hairdressers, and Cosmetologists' Union from picketing to force master barbers to become non-voting members of the union or forfeit their union shop display cards.[142] Such picketing, insisted the court, was unlawful because its objective was to force master barbers either to accept "sterile" membership or go out of business.

Peaceful picketing to induce an employer to maintain union standards was enjoined in another instance as an illegal attempt to regulate the details of his business,[143] and still another court suggested through dictum that picketing a self-employer to make him join a union would be unlawful.[144] Several decisions betray the severe curtailment of picketing possible by means of the unlawful objective doctrine. Picketing is permissible, declared an Ohio court, only if conducted for the purpose of disseminating information.[145] In this case, it continued, in an idiom smacking strangely of the pre-*Thornhill* era, the pickets' "purpose was to persuade or to intimidate or to coerce the non-striking employees to desist from working and to join the strikers."[146] One Texas court approved injunctive relief against picketing as a suitable means

140 25 Cal. 2d 746, 155 P.2d 343 (1944).

141 25 Cal. 2d 721, 155 P.2d 329 (1945).

142 Riviello v. Journeyman Barbers Int'l Union, 88 Cal. App. 2d 499, 199 P.2d 400 (1948). *Cf.* Rainwater v. Trimble, 207 Ga. 306, 61 S.E.2d 420 (1950).

143 Saveall v. Demers, 322 Mass. 70, 76 N.E. 2d 12 (1947). *Contra:* Pezold v. Amal. Meat Cutters & Butchers Workmen of North America, 54 Cal. 2d 120, 128 P.2d 611 (1942).

144 Dinoffria v. Teamsters Union, 331 Ill. App. 129, 72 N.E.2d 635 (1947). *Contra:* Naprowa v. Chicago Flat Janitors' Union, 315 Ill. App. 328, 43 N.E.2d 198 (1942); Coons v. Journeymen Barbers' Union, 222 Minn. 100, 23 N.W.2d 345 (1946).

145 Pipe Machinery Co. v. DeMore, 76 N.E.2d 725 (Ohio App. 1947); *appeal dismissed,* 149 Ohio St. 582, 79 N.E.2d 910 (1948). See also Construction & General Labor Union v. Stephenson, 221 S.W.2d 375 (Tex. Civ. App. 1949), *modified,* 225 S.W. 958 (1950).

146 76 N.E.2d at 726.

of maintaining the status quo until the merits of the dispute could be argued in the courtroom,[147] and another ordered picketing enjoined because the union had given no prior notification of its intentions to the employer and offered him no opportunity to negotiate.[148]

The unlawful objective approach, as these decisions reveal, proved far from satisfactory. "Unlawful objective" is a wonderfully plastic concept. Its pliant qualities enabled the states to regulate picketing in ways which the picketing-free speech doctrine on its face seemed to forbid. Not a few courts displayed an acute awareness of the difficulty inherent in such an elastic yardstick. Unions establish picket lines for multiple motives. Almost invariably one objective is to better the economic condition of union members. Rarely did a court maintain that the dissemination of information was not at least one objective of a particular picket line.[149] Another, almost always present, is to bring economic pressure against an employer by inducing third parties through persuasion or "coercion" to cease dealing with him. But even if these objectives are classified as secondary or remote—and the logic of such a step is decidedly questionable—the problem of mixed objectives does not always magically vanish. Is a union, which would like to represent a firm's workers, picketing to force it to violate the state's anti-trust laws, to sign an illegal closed shop agreement, to become an organizer for the union, *or* is the union picketing to win converts from among the firm's employees, *or* by informing others of the facts of the dispute to induce them not to deal with an "unfair" company? Some courts, recognizing this difficulty as an integral part of the unlawful objective rationale, floundered for possible solutions. The Supreme Court of Oregon, as previously noted, on one occasion announced its intention of permitting picketing if one of the union's objectives was lawful.[150] Others, apparently conscious of the several objectives present in the case under consideration, tended to single out one objective as all-important.[151]

147 Dallas General Drivers Local v. Oak Cliff Baking Co., 203 S.W.2d 586 (Tex. Civ. App. 1947).

148 North East Texas Lines v. Dickson, 148 Tex. 35, 219 S.W.2d 795 (1949). See also Hotel & Restaurant Employees' Int'l Alliance v. Greenwood, 249 Ala. 265, 30 So. 2d 696 (1947), *cert. denied,* 332 U.S. 847 (1948).

149 But see Berger v. Sailors' Union of the Pacific, 29 Wash. 2d 810, 189 P.2d 473 (1948).

150 Peters v. Cent. Labor Council, 179 Ore. 1, 169 P.2d 870 (1946). See also Spickelmier v. Chambers, 113 Ind. App. 470, 47 N.E.2d 189 (1943).

151 Park & Tilford Import Corp. v. Int'l Brotherhood of Teamsters, 27 Cal. 2d 599, 165 P.2d 891 (1946); Standard Grocer Co. v. Local Union, 321 Mich. 276, 32 N.W.2d 519 (1948); Glover v. Bldg. Trades Council, 215 Minn. 533, 10 N.W.2d 481 (1943); Rogers v. Poteet, 355 Mo. 986, 199 S.W.2d 378 (1947), *cert. denied,* 331 U.S. 847 (1947), *rehearing denied,* 332 U.S. 786 (1947); Gulf Oil Corp. v. Int'l Brotherhood of Teamsters,

An interesting solution offered was that the lawful and unlawful objectives be separated and picketing for the former permitted. If the union proved itself incapable of pursuing the lawful objective without at the same time achieving the unlawful, presumably all picketing would have to be prohibited.[152]

Basically the motives, purposes, and objectives of picketers did not in themselves really interest the states. Their concern lay with the effects and consequences of picketing. Many states were no longer anxious to afford the picket line the protection they had been so willing to grant it during the first years of the New Deal[153]—and the unlawful objectives doctrine provided a convenient way of circumventing the rigorous limitations the picketing-free speech decisions seemed to place upon efforts to deal with the far-reaching economic repercussions which frequently followed in picketing's wake. But application of the unlawful objectives rationale was not by nature confined to those circumstances in which a pressing likelihood existed that the picketing would result in serious economic consequences. Quite the contrary, unless the Supreme Court was willing to intervene there was every reason to believe that some states were ready to bar picketing almost entirely by one or both of the following devices: 1) declaring it an illegal objective to picket an employer in the absence of a strike authorized by a majority or an even larger number of his employees; 2) declaring it an unlawful objective to establish a picket line tending to deter third parties from dealing with the picketed firm.

It seemed inevitable that sooner or later the Court would have to cope with the reigning confusion which resulted from the mass of "unlawful objectives" cases. Three possibilities were open. First, it was not yet too late for the Justices to stand firm against any further

185 Misc. 409, 57 N.Y.S.2d 24 (Sup. Ct. Queens County 1945), *aff'd*, 270 App. Div. 129, 58 N.Y.S.2d 495 (2d Dep't 1945); Pipe Machinery Co. v. DeMore, 76 N.E.2d 725 (Ohio App. 1947), *appeal dismissed*, 149 Ohio St. 582, 79 N.E.2d 910 (1948); Pennsylvania Labor Relations Board v. Employees' Union, 361 Pa. 246, 64 A.2d 834 (1949). *Compare:* State v. Superior Court, 24 Wash. 2d 314, 164 P.2d 662 (1945), *with* Swenson v. Seattle Central Labor Council, 27 Wash. 2d 193, 177 P.2d 873 (1947).

152 This position is most fully presented in Society of New York Hospital v. Hanson, 185 Misc. 937, 59 N.Y.S.2d 91 (Sup. Ct. N.Y. County 1945). See also Whitehead v. Miami Laundry Co., 160 Fla. 667, 36 So.2d 382 (1948); Fred Wolferman Inc. v. Root, 356 Mo. 976, 204 S.W.2d 733 (1947), *cert. denied*, 333 U.S. 837 (1948); Sterling & Welch Co. v. Duke, 67 N.E.2d 24 (Ohio C.P. 1946); Sachs Quality Furniture, Inc. v. Hensley, 269 App. Div. 264, 55 N.Y.S.2d 450 (1st Dep't 1945); Dickson v. North East Texas Motor Freight Lines, 210 S.W.2d 660 (Tex. Civ. App. 1948), *modified*, 148 Tex. 35, 219 S.W.2d 795 (1949); Turner v. Zanes, 206 S.W.2d 144 (Tex. Civ. App. 1947).

153 A brief survey of the shift in state attitudes from 1937-1947 is presented in MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 316-344 (1950).

inroads on peaceful picketing by holding picketing objectives to be irrelevant. Second, the Court could in effect completely abandon its picketing-free speech position by permitting the states to ban picketing simply upon the finding that it was conducted for any illegal purpose. Third, the Court could take a middle road by deciding that picketing could be prohibited for certain objectives but not for others. On April 4, 1949, the Supreme Court emerged from its cloistered retreat and, in *Giboney v. Empire Storage & Ice Company*,[154] announced its unanimous decision to follow the middle course.

III

The Ice and Coal Drivers and Handlers Local Union No. 953, A. F. of L. numbered among its members 160 of the two hundred retail ice peddlers in Kansas City. To better wages and working conditions, the union undertook to sign up the non-union peddlers. As the organizational drive flagged, the union, in an effort to bolster it, asked every wholesale ice distributor in the area to stop selling ice to non-union peddlers. When Empire alone refused, the union threw a picket line around its plant. Eighty-five percent of the truck drivers servicing Empire carried union cards. All were prevailed upon to honor the picket line, with the result that Empire immediately lost eighty-five percent of its business. Empire sought an injunction restraining further picketing on the ground that any agreement not to sell ice to non-union peddlers would be in restraint of trade and that the union's efforts to compel it to make such an agreement therefore violated the Missouri anti-trust law. The union defended its actions contending that picketing was a constitutionally protected form of speech. The trial court enjoined the picketing. The Missouri Supreme Court, in affirming the injunction, ruled that the picketing had been undertaken for the unlawful purpose of seeking to coerce an employer into joining a combination in restraint of trade.[155]

In appealing to the United States Supreme Court, the union levelled a double-barreled attack upon the state court's position. Picketing, argued the appellants, is a method for publicizing the facts of a labor dispute and cannot be enjoined "merely because a state chooses to regard the consequences of such picketing as restraint of trade."[156] In any case, they continued, whatever the effects of the picketing upon trade,

154 336 U.S. 490 (1949).

155 357 Mo. 671, 210 S.W.2d 55 (1948).

156 Brief for Appellants, p. 27, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

they were entirely incidental. The purpose of the picket line was not to violate the law, but to improve wages and working conditions by increasing union membership. To sustain the Missouri Court, they argued, would constitute a return to the old English law forbidding picketing to raise wages because of its incidental effects on trade.[157] The questions posed then were these: Is the constitutional right to publicize the facts of a labor dispute by picketing lost because the picketing tends to result in violation of state law? In general, do a union's objectives have any effect upon its constitutional right to picket? The Supreme Court in a careful opinion written by Mr. Justice Black, gave a qualified answer to each of these issues.

Mr. Justice Black heavily stressed both the importance of anti-trust statutes and the effectiveness of the picketing against Empire. Brushing aside the union's contention that its primary purpose in picketing was to improve wages and working conditions by winning new members, he four times characterized the union's conduct as motivated by a "sole, immediate objective—" to violate the state's anti-trust law. The picketing was not merely an attempt to publicize the facts of a labor dispute, but part of an "integrated" unlawful course of action:

> . . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[158]

Yet Mr. Justice Black took great pains to emphasize that Missouri's law was not directed at a slight public inconvenience or annoyance. It was passed for the important purpose of "affording all persons an equal opportunity to buy goods." The union's conduct, he argued, created a

> . . . clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter insofar as purchases by nonunion men were concerned. Appellants' power with that of their allies was irresistible. And it is clear that appellants were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade. . . . [T]his is not a case in which it can be assumed that injury from appellants' conduct would be limited to this single appellee. . . . Missouri, acting within its power, has decided that such restraints of trade as petitioners sought are against the interests of the whole public.[159]

The Court, in other words, while sanctioning the enjoinder of peaceful

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[157] Appellants Brief in Opposition to Motion to Dismiss or Affirm, pp. 20-21, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[158] 336 U.S. at 502.

[159] *Id.* at 503.

picketing which was intended to and did in fact result in the violation of a state law, seemed to add four caveats. Pickets would not lose an otherwise constitutional immunity to publicize the facts of a labor dispute unless, first, there was evidence which proved their conduct to be part of an "integrated" course of action whose sole immediate objective was to cause a violation of state law. Second, the law had to be directed against injury to the *public*. The language of the *Thornhill* case still stood:[160]

> It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. . . . [T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may be persuaded to take action inconsistent with its interests.[161]

The law, thirdly, cannot be aimed at "slight inconveniences or annoyances." Lastly, the picketing must constitute a clear and present danger of violating a valid statute. For the first time since *Thornhill v. Alabama* the majority opinion in a picketing-free speech decision involved the clear and present danger test. The *Giboney* case, because of these caveats strongly underscored in its ratio decidendi, gave at least an appearance of breathing new life into the picketing-free speech doctrine. But, how accurately Mr. Justice Black's reasoning represented the consensus of the Court remained to be seen. There was little likelihood, for example, that Justices Frankfurter and Jackson had suddenly been won over to an unqualified endorsement of the clear and present danger test in picketing cases. *Giboney v. Empire Storage & Ice Company,* nonetheless, acted as a sharp reminder that the Supreme Court was not yet ready to abandon the doctrine of picketing-free speech.

Not many months elapsed before the Supreme Court again spoke on the subject of picketing-free speech. During the interim, enough cases were decided to give some indication of the impact on the judiciary of the *Giboney* holding that a state can, if it observes the special limitations outlined in Mr. Justice Black's opinion, prohibit picketing undertaken to advance certain objectives. Iguoring Mr. Justice Black's reasoning and adopting only the conclusion of the *Giboney* decision, courts continued to enjoin picketing for unlawful objectives, as they had in previous years. Several injunctions restrained unions from picket-

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160 *Id.* at 503-4.

161 Thornhill v. Alabama, 310 U.S. 88, 104 (1940). The quotation itself is not reproduced in the opinion of the Court in the *Giboney* case.

ing to force employers to act in violation of state law.[162] The Supreme Court of Washington, in a case quickly certified for review by the United States Supreme Court, judged it an unlawful objective to picket self-employed used car dealers for the purpose of making them adopt union shop standards.[163] In other cases, however, the effect of Mr. Justice Black's reasoning in the *Giboney* decision is much in evidence. Three injunctions were dissolved in the absence of proof that the union actually sought an illegal closed shop, or conspired to restrain trade.[164] An Ohio court, in refusing an injunction against a picket line which caused union members to walk off a construction job, held the secondary effects of the picketing incidental.[165] And one court even invoked the clear and present danger test.[166] Unlawful objective cases, however, did not entirely eclipse litigation concerning the areas from which all picketing could be constitutionally excluded. A building trades union was enjoined from advertising via the "sandwich man" its dispute with the City of Los Angeles because, thought the California courts, there is no constitutional right to picket a government.[167]

Whether a majority of the Supreme Court had actually accepted Mr. Justice Black's reasoning in *Giboney v. Empire Storage & Ice Co.* beyond the narrow holding of the case that peaceful picketing for certain objectives can be constitutionally prohibited remained open to question. An unequivocal answer was not long in coming. Thirteen months after the *Giboney* decision, the Court read three more picketing-free speech decisions: *Hughes v. Superior Court,*[168] *International Brother-*

[162] Local Union v. Robertson, 44 So.2d 899 (Fla. 1950); Dayton Co. v. Floor Decorators' Union, 229 Minn. 155, 39 N.W. 2d 183 (1949); Phillips v. United Brotherhood of Carpenters & Joiners, 362 Pa. 78, 66 A.2d 227 (1949); Pacific Navigation & Trading Inc. v. Nat. Organization of Masters, Mates & Pilots, 33 Wash. 2d 675, 207 P.2d 221 (1949); WERB v. Barbers' Union, 256 Wis. 77, 39 N.W.2d 725 (1949). *But cf.* Baker Community Hotel Co. v. Hotel & Restaurant Employees & Bartenders Int'l League, 187 Ore. 58, 207 P.2d 1129 (1949), where it was held that the state's anti-injunction law prevented enjoinder of picketing to force an employer to make his employees join the union.

[163] Hanke v. Int'l Brotherhood of Teamsters, 33 Wash. 2d 646, 207 P.2d 206 (1949), *aff'd,* 339 U.S. 470 (1950). *Accord:* Cline v. Automobile Drivers & Demonstrators Local, 33 Wash. 2d 666, 207 P.2d 216 (1949), *aff'd,* 339 U.S. 470 (1950).

[164] Local No. 802 v. Asimos, 216 Ark. 694, 227 S.W.2d 154 (1950); Gruet Motor Car Co. v. Briner, 229 S.W.2d 259 (Mo. 1950); International Brotherhood of Teamsters v. Best Motor Lines, 229 S.W.2d 912 (Tex. Civ. App. 912, 1950), *rev'd,* 237 S.W.2d 589 (1951).

[165] W. E. Anderson Sons, Co. v. Local Union, 94 N.E.2d 633, (Ohio App. 1950); *rev'd,* 156 Ohio St. 541, 104 N.E.2d 22 (1952).

[166] State *ex rel.* Culinary Workers Union v. Eighth Judicial District, 66 Nev. 166, 207 P.2d 990 (1949), *rehearing denied,* 66 Nev. 202, 210 P.2d 454 (1949).

[167] Los Angeles v. Bldg. & Construction Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1949).

[168] 339 U.S. 460 (1950).

*hood of Teamsters v. Hanke,*[169] and *Building Service Employees Union v. Gazzam.*[170] Of the three, the *Gazzam* case most resembled *Giboney.*

The Washington Supreme Court had affirmed an injunction restraining the union from picketing Gazzam, the operator of a hotel, to compel him to sign a contract "coercing his employees' choice of bargaining representative" in violation of state law.[171] On appeal, the United States Supreme Court, in an opinion by Mr. Justice Minton, upheld the Washington court. In sustaining the injunction, Mr. Justice Minton took great pains to demonstrate that the union's objective in picketing was to force the employer to act against the state's policy as declared through its legislature. It was immaterial that the employer could not have been subjected to any penalty had he coerced his workers into selecting the union as bargaining agent. The legislative declaration guaranteeing workers the right freely to choose their bargaining representatives, the Justice maintained, is not a trivial and capricious policy, but "an important and widely accepted one." Only picketing for the purpose of flouting this policy was enjoined: "there is no contention that picketing directed at employees for organization purposes would be violative of that policy."[172] The injunction in brief, "was tailored to prevent a specific violation of an important state law."[173]

Mr. Justice Black concurred, indicating only that he believed the case to be "controlled by the principles announced in *Giboney v. Empire Storage & Ice Company.*"[174] While it would be presumptuous on the basis of Mr. Justice Black's austere statement to state categorically his precise objections to Mr. Justice Minton's reasoning, one difference between the *Giboney* and *Gazzam* opinions is marked. The latter makes no mention of the clear and present danger test. Yet the $500 awarded Gazzam by the Washington courts for damages suffered while the illegal patrolling took place, offered proof enough that the test could have been convincingly applied had Mr. Justice Minton elected to do so. Not even Mr. Justice Black, it is interesting to note, was willing to attach significance to another difference between the two cases. In the *Giboney* case the employer could not have acceded to the union's demand without subjecting itself to a possible penalty for violating the state's anti-trust law. Gazzam, of course, ran no such risk because the

169 339 U.S. 470 (1950); *rehearing denied,* 339 U.S. 991 (1950).
170 339 U.S. 532 (1950); *rehearing denied,* 339 U.S. 991 (1950).
171 34 Wash. 2d 38, 207 P.2d 699 (1949).
172 339 U.S. at 539.
173 *Id.* at 541.
174 *Id.* at 541.

legislature's declaration of public policy did not impose any sanctions against infringement. Mr. Justice Minton explicitly rejected the validity of this distinction; Mr. Justice Black could not have endorsed it without dissenting.[175]

In *Hughes v. Superior Court*,[176] Mr. Justice Frankfurter for the fifth time wrote the Court's opinion in a picketing-free speech case. A group of persons in California had been convicted of contempt for violating a state court injunction forbidding them to picket a grocery store for the purpose of compelling it to hire Negro help in proportion to its Negro trade. The picketers, alleging deprivation of their constitutional rights to free speech, appealed to the Supreme Court. Mr. Justice Frankfurter pointed to the long hostility of the California judiciary to color discrimination. He emphatically rejected the contention frequently raised in free speech cases that judicial declarations of public policy are not entitled to fully as much respect as legislative enactment:

> In charging its courts with evolving law instead of formulating policy by statute, California has availed itself of the variety of law-making sources, and has recognized that in our day as in Coke's "the law hath provided several weapons of remedy." . . . California chose to strike at the discrimination inherent in the quota system by means of the equitable remedy of injunction to protect against unwilling submission to such a system. It is not for this Court to deny to California that choice from among all "the various weapons in the armory of the law."[177]

Discriminatory employment practices, the Justice argued at length, are matters of great importance and certainly within the state's power to regulate. The appellants, he demonstrated by the following quotation from the state's court of last appeal, were restrained from picketing to compel discriminatory hiring and for this purpose alone:

> The controlling points are that the injunction is limited to prohibiting picketing for a specific unlawful purpose and that the evidence justified the trial court in finding that such narrow prohibition was deliberately violated. . . .[178] [The State Court had added the following sentence which Mr. Justice Frankfurter did not quote.] It may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective.[179]

Justices Black, Minton, and Reed concurred. Mr. Justice Reed in two sparse sentences explained,

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[175] For a discussion of situations in which this distinction might legitimately be considered see Fraenkel, *Peaceful Picketing—Constitutionally Protected*, 99 U. OF PA. L. REV. 1 (1950).

[176] 339 U.S. 460 (1950).

[177] *Id.* at 467.

[178] *Id.* at 462.

[179] Hughes v. Superior Court, 32 Cal. 2d 850, 855, 198 P.2d 885, 888 (1948).

> I read the opinion of the Supreme Court of California to hold that the pickets sought from Lucky Stores, Inc. discrimination in favor of persons of the Negro race, a discrimination unlawful under the California law. Such picketing may be barred by a State.[180]

Justices Black and Minton simply said they were "of the opinion that this case is controlled by the principles announced in *Giboney v. Empire Storage & Ice Co.*"[181]

Since the eight Justices who took part all voted to sustain the injunction, it must have been either to Mr. Justice Frankfurter's reasoning or to his language that Justices Black, Minton, and Reed took exception. Mr. Justice Frankfurter's opinion actually met the same three of the four principles laid down in the *Giboney* case as did Mr. Justice Minton's opinion in the *Gazzam* case. The injunction undeniably was directed at an evil both public and important. There can be no reason to suppose that Justices Black, Minton, and Reed strenuously objected to public policy being declared by judiciary rather than legislature; otherwise they could not have concurred. No reliance, however, was placed by the majority upon Mr. Justice Black's fourth criterion, the clear and present danger test. This could explain Mr. Justice Black's concurrence, but in view of the *Gazzam* decision, not that of either Mr. Justice Minton, or Mr. Justice Reed. One is, then, necessarily led to suspect that all three took exception to Mr. Justice Frankfurter's language, and yet it is hard to find anything very specific to which they might have objection. This very fact may be an important explanation for their failure to write concurring opinions.

Certain subtle differences between the *Giboney* and *Gazzam* opinions on the one hand, and the *Hughes* case on the other, are nonetheless detectable. Mr. Justice Frankfurter, for example, suggested that the language of the *Thornhill, Swing, Wohl,* and *Angelos* cases might have been "general or loose", and inveighed against the fallacy of equating picketing and other forms of speech—perhaps above and beyond the demands of the particular case. The Justice referred, though only in passing, to the "reasonable basis" rationale he espoused in his *Ritter* opinion—since free speech is only one of many important interests of a society, the constitutionality of restrictions upon speech can best be determined by carefully balancing the various interests involved. Finally, Mr. Justice Frankfurter lashed out against the use of generalizations and efforts to establish a set of principles upon which to decide future picketing cases:

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180 *Id.* at 469.

181 *Id.* at 469.

> [T]he Constitution does not forbid "cautious advance, step by step, and the distrust for generalities." . . . Generalizations are treacherous in the application of large constitutional concepts.[182]

The *Hughes* opinion, in short, did not, as did the *Gazzam* case, and to a much greater extent the *Giboney* decision, convey the impression that the facts under consideration were rare exceptions to an extremely important rule. The refusal of Justices Reed, Minton, and especially Black to endorse the majority opinion is perhaps best explained by their objection to the casual substitution of the "reasonable basis" test for the painstakingly drafted *Giboney* formula.

The third case, *International Brotherhood of Teamsters v. Hanke,* was by all odds the most important.[183] A union picketed the Hankes, self-employed used car dealers in Seattle, to induce them to keep union hours. In a companion case, Cline, another self-employed used car dealer, was picketed to compel him to observe union hours and also to induce him to hire a union salesman. The Washington Supreme Court, affirming a permanent injunction against the picketing issued by the trial court, declared that under the circumstances these objectives were illegal.[184] All but ten of the 115 used car dealers in Seattle were, like Cline and Hankes, self-employers without employees. Emphasizing this fact, the Washington Court argued,

> . . . the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such a policy.[185]

The United States Supreme Court affirmed in a five to three decision written by Mr. Justice Frankfurter.

A state, in determining the permissibility of restrictions on picketing in a particular case may weigh such community interests as free communications, effective unions, and the welfare of small businessmen. Assessing such important interests as these is always a difficult task, the Justice argued, and many may think the conclusions of Washington's court unwise. Yet, he continued,

> . . . when one considers that issues not unlike those that are here have been

182 *Id.* at 469.

183 *Id.* at 470.

184 Hanke v. Int'l Brotherhood of Teamsters, 33 Wash. 2d 646, 207 P. 2d 206 (1949); Cline v. Automobile Drivers & Demonstrators Local, 33 Wash. 2d 666, 207 P. 2d 216 (1949).

185 33 Wash. 2d 646, 659-60, 207 P. 2d 206, 213 (1949).

> similarly viewed by other States and by the Congress of the United States, we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution.[186]

Reasoning along these lines carried the Court off on an entirely new tack. The Court, in the *Giboney, Gazzam,* and *Hughes* cases, had sustained the enjoinder of picketing whose purpose was to induce employers to act in a way not consonant with public policy, whether legislatively or judicially formulated. In the *Swing, Wohl, Ritter,* and *Angelos* cases, the majority blocked out the general scope of permissible picketing by marking off areas within which blanket prohibitions could or could not be placed upon picketing. But in *Hanke's* case, the Washington court had done neither. It did not enjoin the picketing because its objective was to induce action in violation of public policy, nor because state policy excluded self-employers from the area of allowable economic conflict. Rather, picketing was prevented because its consequences in the particular case were considered to contravene the community's best interests. This rationale might be termed the "community interest" rule.

The Washington injunctions, Mr. Justice Frankfurter warned, banned picketing under very special circumstances; the Court's action in sustaining these restrictions must not be interpreted as sanctioning limitations on picketing one mote broader. Endorsing the rationale of the Washington court, nevertheless, was virtually tantamount to giving courts the authority to enjoin "undesirable" picketing. Unless the Supreme Court established more specific standards to guide lower court evaluations of community interests than the vague "reasonable basis" test, courts could under the *Hanke* rule enjoin picketing at will without fear of violating the Constitution. All they needed to do was find that picketing in particular cases was contrary to the public interests.

Mr. Justice Minton, joined by Mr. Justice Reed, contributed a provocative dissent. The picketing-free speech cases, argued the Justice, established a pattern from which *International Brotherhood of Teamsters v. Hanke* departed. According to his thesis, only "abusive" picketing (a new term in the extensive picketing-free speech glossary) had ever been enjoined. No "abuses" were present in the *Thornhill, Swing,* and *Wohl* cases. The picketing in *Meadowmoor,* on the other hand, was enmeshed in violence, and in *Giboney* and *Gazzam,* pickets sought to

[186] 339 U.S. at 478-9.

force employers to violate state law and public policy. The *Hanke* and *Cline* injunctions ought to have been dissolved because they constituted a permanent enjoinder of peaceful picketing without distinguishing "between what is legitimate picketing and what is abusive. . . . [T]he decrees here are not directed at any abuse of picketing but at all picketing."[187]

Mr. Justice Minton's analysis of the Court's picketing decisions is grossly oversimplified and patently inaccurate, but it cannot be lightly dismissed. Indeed, one cannot but suspect he was fully conscious of its logical flaws. His approach, though it would have forced the Court to retract a good many embarrassing paragraphs and frequently cited passages, and perhaps overrule the *Ritter* case as well, offered the states a workable and decidedly attractive method for dealing with picketing-free speech problems. States, even if the "abusive picketing" test were adopted, could regulate the anti-social potentialities of picketing through labor relations acts or common law development. Picketing which sought to induce violation of public law and policy could be enjoined as abusive under the *Giboney-Gazzam-Hughes* principles. The Supreme Court, consequently, would be able to abandon largely to states the task of defining the allowable area of economic conflict. Moreover, the Supreme Court, if it could once and for all lay down some such general formula would go far in creating a semblance of the clarity and stability so foreigu to the law of picketing. Lastly, the master in equity would not be able, as is now possible under the *Hanke* rationale, to prohibit picketing simply because in his opinion it contravenes the public interest. Had Mr. Justice Minton's "abusive picketing" approach been accepted, the Court's only major function in picketing-free speech cases would have been to decide whether the public policy in opposition to which picketing could not be directed, was important enough to justify the restriction of speech.

The Court's rejection in *Hanke's* case of the "abusive picketing" thesis in favor of a "community interest" rule offered the states a third method of restricting peaceful picketing. Courts, whose equitable powers had not been clipped, it has already been observed, could use the "community interest" rule to enjoin any instance of "undesirable" picketing. The Michigan courts proceeded to do just this.[188] Arkansas' Supreme Court, in *Boyd v. Dodge*,[189] moved in a direction the United States Supreme Court

[187] 339 U.S. at 484.

[188] Midwest Properties Co. v. Hairdressers Union, 330 Mich. 478, 47 N.W. 2d 703 (1951); Cohen v. Joint Board Amal. Clothing Workers, 327 Mich. 606, 42 N.W. 2d 830 (1950); Woods v. Detroit Chefs Union, 327 Mich. 612, 42 N.W. 2d 833 (1950).

[189] 217 Ark. 919, 234 S.W. 2d 204 (1950).

can conceivably take if it decides to establish some limitations on the application of the "community interest" rationale. An injunction against picketing was granted by a trial court because it believed the disruption of telephone service against the public interest. The state's highest court thought the justification for the injunction too insubstantial and dissolved it.

The two other methods for restricting picketing, so widely used in the years following *Wohl* and *Ritter,* lost none of their popularity. First, courts continued to consider the scope of constitutionally protected picketing and the areas in which blanket prohibitions could be instituted.[190] One case, *Edwards v. Commonwealth,*[191] deserves special mention. A Virginia statute restricted the picketing of a business or industry to its bona fide employees. The state's Supreme Court of Appeals, in invalidating the law, said:

> It could be applied to make it a crime for any person not employed by a business or industry to publish, by word or sign, his opinion as to the morality, the decency or the danger of what is being done by or said within any business or industry, *e.g.,* to picket or participate in picketing the showing of a moving picture considered by the picketer to be corruptive of good morals.[192]

Second, the bulk of picketing-free speech litigation, as previously, consisted of unlawful objective cases. Courts repeatedly enjoined pickets from pressuring employers to violate state law[193] and less frequently from participating in unlawful conspiracies in restraint of trade.[194] Injunctions were denied in some cases on the ground that certain consequences of the picketing were not actual objectives but incidental to its primary purpose.[195] Dicta in others in which picketing was

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190 Holt v. Heine, 223 P.2d 881 (Cal. App. 1950), *cert. denied,* 340 U.S. 893 (1950); Outdoor Sports Corp. v. A.F. of L., 6 N.J. 217, 78 A.2d 69 (1951); Grossman v. MacDonough, 28 L.R.R.M. 2240 (N.Y. Sup. Ct. Kings County 1951); Tenzer v. Eisen, 27 L.R.R.M. 2482 (N.Y. Sup. Ct. Kings County 1951); National Shoes, Inc. v. Lawson, 27 L.R.R.M. 2247 (N.Y. Sup. Ct. N.Y. County 1951); Edwards v. Commonwealth, 191 Va. 272, 60 S.E.2d 916 (1950).

191 191 Va. 272, 60 S.E.2d 916 (1950).

192 60 S.E.2d at 923.

193 Self v. Taylor, 217 Ark. 953, 235 S.W.2d 45 (1950); Kincaid-Webber Motor Co. v. Quinn, 241 S.W.2d 886 (Mo. 1951); La Manna v. O'Grady, 278 App. Div. 77, 103 N.Y.S.2d 476 (1st Dep't 1951); Harber & Fink, Inc. v. Jones, 277 App. Div. 176, 98 N.Y.S.2d 393 (1st Dep't 1950); Tamagno v. Waiters Union, 27 L.R.R.M. 2593 (Pa. C.P. 1951); Sheet Metal Workers Local v. Walker, 236 S.W.2d 683 (Tex. Civ. App. 1951).

194 Best Motor Lines v. Int'l Brotherhood of Teamsters, 237 S.W.2d 589 (Tex. 1951). See Missouri Cafeteria v. McVey, 362 Mo. 583, 242 S.W.2d 549 (1951).

195 Missouri Pacific Railroad v. Brick Workers, 218 Ark. 707, 238 S.W.2d 945 (1951);

actually enjoined upheld the same point of view.[196]

## IV

The most recent picketing cases decided by the Supreme Court[197] arose under the Labor-Management Relations Act of 1947.[198] After twelve years of strenuous efforts, the opposition to the National Labor Relations Act of 1935 gathered enough momentum to alter that law drastically.[199] Among the Act's most significant emendations was a Section 8 (b) (4) (A), (B), (C), and (D)[200] which, while no "model of draftsmanship",[201] was clearly intended to outlaw "secondary" boycotts.[202] In Senator Taft's words:

> All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.[203]

Picketing as the most important instrument for effectuating "secondary" boycotts was thereby severely curtailed. Actually rather than limit

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Boyd v. Deena Artware, 239 S.W.2d 86 (Ky. 1951) (dictum); Palace Knitwear Inc. v. Knitgoods Workers, 28 L.R.R.M. 2006 (N.Y. Sup. Ct. N.Y. County 1951); Dummermuth v. Hykes, 95 N.E.2d 32 (Ohio C.P. 1950); Alamo Motor Lines v. Int'l Brotherhood of Teamsters, 229 S.W.2d 112 (Tex. Civ. App. 1950).

196 La Manna v. O'Grady, 278 App. Div. 77, 103 N.Y.S.2d 476 (1st Dep't 1951); Harber & Fink, Inc. v. Jones, 277 App. Div. 176, 98 N.Y.S.2d 393 (1st Dep't 1950); Kincaid-Webber Motor Co. v. Quinn, 241 S.W.2d 886 (Mo. 1951).

197 NLRB v. Int'l Rice Milling Co., 341 U.S. 665 (1951); NLRB v. Denver Bldg. & Construction Trades Council, 341 U.S. 675 (1951); International Brotherhood of Elec. Workers v. NLRB, 341 U.S. 694 (1951); Local 74, Brotherhood of Carpenters and Joiners v. NLRB, 341 U.S. 707 (1951).

198 61 STAT. 136, 29 U.S.C. § 151 (Supp. 1952).

199 MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 271-392 (1950).

200 61 STAT. 141-2; 29 U.S.C. § 158 (b) (4) (A), (B), (C), and (D) (Supp. 1952).

201 Printing Specialties & Paper Converters Union v. La Baron, 171 F.2d 331, 335 (9th Cir. 1948).

202 Few terms in the history of the law have caused so much confusion and been used in so many different senses as "secondary boycott." See Editorial Note, 15 GEO. WASH. L. REV. 327 (1947); Barnard and Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 137 (1940). The latter adds:

> It is in the treatment of those cases involving labor's most utilized weapon—the picket—that the analytical treatment of the "secondary boycott" has sunk to its lowest ebb.

*Id.* at 149. For a comprehensive discussion of secondary boycott cases arising under the Act before June of 1950, see Dennis, *The Boycott Under the Taft-Hartley Act*, THIRD ANNUAL CONFERENCE ON LABOR 367-460 (1950).

203 93 CONG. REC. 4198 (1947).

the scope of picketing as such, Congress made certain picketing objectives unfair labor practices.

According to Section 8 (b) (4) picketing which induced employees of an employer *in the course of their jobs* to engage in a *concerted* refusal to perform any services was an unfair labor practice if one of the following was among its objectives:

1) forcing any employer or *self-employer* to join a union or employer's organization;

2) forcing any person to cease doing business with any other person;

3) forcing *another* employer to deal with a noncertified union;

4) forcing an employer to deal with one union when another is certified;

5) forcing an employer to give work to a particular group rather than to some other group unless the employer was violating a Board order.

Virtually all picketing involves at least one of these objectives, and, consequently, would have been rendered unlawful had not Congress appended to Section 8 (b) (4) a proviso underscoring its intention not to interfere with primary picketing undertaken by a majority union in connection with an authorized strike simply because it had the incidental effect of causing a "secondary" boycott. A subsequent Section of the Act, 8 (c), furthermore declared:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[204]

Two basic questions were immediately asked: 1) Does 8 (c) in any way qualify the sweeping restrictions of Section 8 (b) (4)? 2) If not, does Section 8 (b) (4) infringe in any way upon freedom of speech? Some months before *Giboney v. Empire Storage & Ice Co.* had been decided, cases requiring a categorical answer to these questions reached two United States Courts of Appeals almost simultaneously.[205] Both decisions denied that either 8 (c) or the Constitution limited Section 8 (b) (4) (A).[206] Shortly thereafter, but still prior to the *Giboney* decision, the National Labor Relations Board, in *United Brotherhood*

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204 61 STAT. 142, 29 U.S.C. § 158(c) (Supp. 1952).

205 Printing Specialties & Paper Converters Union v. Le Baron, 171 F.2d 331 (9th Cir. 1948); United Brotherhood of Carpenters v. Sperry, 170 F.2d 863 (10th Cir. 1948).

206 While the specific questions in these cases concern Section 8 (b) (4) (a), the same principles are involved in Sections 8 (b) (4) (B), (C), and (D).

*of Carpenters* (Wadsworth Building, Inc.),[207] discussed the same questions at length. The Board members were badly divided. The majority opinion first pointed out that the constitutionality of the Act was not for the Board to decide. Interpreting the meaning of the Act, on the other hand, assuredly was; and "the task of choosing between the broad language of Section 8 (b) (4) (A) and the equally broad language of Section 8 (c) is not a simple or enviable one."[208] They concluded after an examination of the Act's legislative history that 8 (c) does not modify Section 8 (b) (4) (A). Chairman Herzog entertained such serious doubts about the constitutionality of the restrictions on picketing that he felt constrained to express his misgivings in a concurring opinion. Members Houston and Murdock dissented. Section 8 (c), they maintained, does limit Section 8 (b) (4) (A). They were convinced that Congress included 8 (c) because it was quite aware Section 8 (b) (4) (A), if unqualified, would be judged unconstitutional. The legislative history, they argued, supported this contention.

With the Supreme Court's *Giboney* decision virtually all chance that Taft-Hartley's restrictions on peaceful picketing would be invalidated evanesced. *Giboney* "seems to make it plain" said the United States Court of Appeals, for the Second Circuit, that Section 8 (b) (4) (A) is constitutional.[209] No subsequent court expressed a contrary opinion.

The Supreme Court of the United States on June 4, 1951 announced its decision in four cases involving Section 8 (b) (4).[210] Mr. Justice Burton, spoke for the Court in each instance. In one case, *International Brotherhood of Electrical Workers v. National Labor Relations Board,*[211] the free speech issue was squarely faced. Mr. Justice Burton first endorsed the Board's ruling that Section 8 (c) does not limit Section 8 (b) (4).

> To exempt peaceful picketing from the reach of § 8(b)(4) would be to open the door to the customary means of enlisting the support of employees to bring economic pressure to bear on their employer. . . . The legislative history does not sustain a congressional purpose to outlaw

207 81 N.L.R.B. 802 (1949).

208 *Id.* at 814.

209 NLRB v. Wine, Liquor, & Distillery Workers Union, 178 F.2d 584 (2d Cir. 1949). See also NLRB v. United Brotherhood of Carpenters, 184 F.2d 60 (10th Cir. 1950), *cert. denied,* 341 U.S. 947 (1951); NLRB v. Local 74, United Brotherhood of Carpenters, 181 F. 2d 126 (6th Cir. 1950), *aff'd,* 341 U.S. 707 (1951); Douds v. Confectionery & Tobacco Jobbers Employees, 85 F. Supp. 191 (D.C. S.D.N.Y. 1949); Le Baron v. Los Angeles Building & Construction Trades Council, 84 F. Supp. 629 (D.C. S.D. Cal. 1949); Le Baron v. Printing Specialties & Paper Converters Union, 75 F. Supp. 678 (D.C. S.D. Cal. 1948).

210 For citations see note 197 *supra.*

211 341 U.S. 694 (1951).

> secondary boycotts under § 8(b)(4) and yet in effect to sanction them under § 8(c).[212]

He then disposed of appellants' constitutional arguments in summary fashion.

> The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgement of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. The constitutionality of § 8(b)(4)(A) is here questioned only as to its possible relation to the freedom of speech guaranteed by the First Amendment. This provision has been sustained by several Courts of Appeals. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise.[213]

Mr. Justice Burton, in *Local 74, United Brotherhood of Carpenters & Joiners of America v. National Labor Relations Board*[214] brushed off the free speech question even more cavalierly:

> We have considered the remaining questions raised by petitioners, based on constitutional or other grounds, and have resolved them in favor of sustaining the Board and the court below.[215]

Finally, the Justice strongly emphasized that picketing may be characterized as unlawful if only one of its objectives has been proscribed.

## V

The law of picketing-free speech as it now stands may be stated as follows:

1) No blanket prohibitions on the scope of picketing within certain areas are permissible. A state may not outlaw all stranger picketing, picketing a self-employer, or picketing which follows "unfair" products. States may, however, confine picketing to areas within which a close economic relationship exists between picketers and picketed. Any blanket interdiction of picketing not falling within the areas already delineated must be justified by showing such a restriction to be "reasonable."

2) Picketing may be banned if undertaken in support of unlawful objectives. Objectives to be validly made unlawful must be aimed at substantive evils. Whether evils are substantive enough to warrant

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212 *Id.* at 703-4.

213 *Id.* at 705.

214 341 U.S. 707 (1951).

215 *Id.* at 715.

limitations on picketing is presumably to be determined by means of the "reasonable basis" test.

3) Picketing may be enjoined if its conduct is inconsonant with the best interests of the community. Once again the standard for evaluating the validity of restrictions upon picketing seems to be the "reasonable basis" test.

The Court, while it has to a considerable extent spelled out the permissible scope of blanket restrictions on picketing, has no more than faintly sketched the limitations the Constitution places on use of the "unlawful objective" and "community interest" doctrines. States, if some concrete bounds are not placed upon application of the "unlawful objective" doctrine, can largely circumvent the constitutional limitations announced in the *Thornhill, Swing, Wohl,* and *Angelos* cases, and outlaw most picketing by imposing sweeping restrictions upon the legality of its objectives. Extensive use of the "community interest" rationale, unless stringently regulated, could turn the law of picketing into a highly personalized equation devoid of standards in the least degree objective and uniform. If the Court is to prevent picketing-free speech from passing into the graveyard of judicial dogma, fossilized and discarded, it is within these latter areas that future decisions are to be expected.

## VI

Several observations about picketing-free speech are perhaps in order at this point.

1) Each inroad upon picketing-free speech in recent years has provoked in labor circles protests that the "common law" was being resuscitated. If these objections were simply a way of saying that the states have been permitted to restrict picketing in a fashion *Thornhill v. Alabama* seemed to forbid, then they are indeed justified. Momentous developments in the law have certainly taken place since *Thornhill's* case was decided in the spring of 1940: the clear and present danger test has bowed out in favor of the "reasonable basis" test; judicial restrictions upon picketing have been blessed with the full respect and validity afforded legislative regulations; the "unlawful objective" and "community interest" doctrines have been established. All of these developments have worked to the discomfiture of labor. Nevertheless, if the argument that the "common law" has been resurrected implies picketing-free speech has been abandoned and tort doctrines revivified, they are wide of the mark. Tort doctrine regarded picketing as illegal unless justified; free speech doctrine considers restraints upon picketing un-

constitutional unless justified. The burden of proof still rests, as it has since *Thornhill's* case, on the shoulders of those who seek to limit picketing.

2) There is considerable merit, on the other hand, to the contention that the contents of permissible picketing may, if present trends continue, be only slightly distinguishable from the contents of picketing under the tort doctrine in the years after 1921. Whether picketing will in the future be confined to nominal patrolling in support of primary strikes will depend upon two factors: the political interests and pressures which formulate state and national labor policy; and the Supreme Court's decision whether to intervene through additional picketing-free speech decisions. Ultimately the consideration of greatest importance will be the former. Actually the primary difficulty with the law of picketing in the years before the New Deal was neither the tort basis of the law, nor the more or less unfriendly attitude of many judges. Rather it centered in the weakness of organized labor. Had labor in the early decades of the century been as powerfully organized as it is today nominal picketing would have proved fully as effective a weapon as it does now. And picketing-free speech played little part in building labor's strength.

3) Perhaps the strangest facet of the entire picketing story is that when labor was weak, and nominal picketing essentially a form of persuasion carrying a relatively small economic impact, the judiciary shrank from it in deathly fear. It was at the very time when the peaceful picket line began to take on menacing proportions that the Supreme Court characterized it as a form of speech entitled to constitutional protection. But the Court speedily came to recognize that in picketing-free speech it had a raging lion by the tail. With each successive picketing-free speech decision, the Court displayed an increasing awareness of economic facts. The resemblances between picketing and conventional speech seemed ever hazier. It is no small tribute to Justice Frankfurter, one may add, that, after devoting many years in an uphill struggle for "labor's rights", he was among the first to recognize the "new picketing" for what it was. It takes uncommon fortitude, even for men shielded by the majesty of the Supreme Court's secluded chambers, to brave charges of betrayal for the sake of "justice".

4) Finally, one cannot help in wading through the maze of picketing-free speech cases but be amused, and sometimes disturbed, by the continual invocation of the First and Fourteenth Amendments and what they "obviously" do or do not command in regard to picketing-free

speech. It is refreshing from time to time to recall Mr. Justice Holmes' dissent in *Truax v. Corrigan*[216] "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words. . . ."[217]

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[216] 257 U.S. 312 (1921).

[217] *Id.* at 344.