Michigan Law Review

Volume 40 | Issue 8

1942

CONSTITUTIONAL LAW - LABOR LAW - RECENT RAMIFICATIONS OF THE APPLICATION OF FREE SPEECH DOCTRINES TO THE PROTECTION OF PICKETING

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COMMENTS

CONSTITUTIONAL LAW — LABOR LAW — RECENT RAMIFICATIONS OF THE APPLICATION OF FREE SPEECH DOCTRINES TO THE PROTECTION OF PICKETING — When the United States Supreme Court declared that peaceful picketing was protected by the constitutional guaranty of free speech, it raised the interesting question how the doctrines shielding the traditional modes of free speech were to be adapted to the preservation of picketing. A smooth cloaking of the right to picket with the sanctity of a constitutionally protected civil liberty is complicated by various factors such as the ease with which picketing may lead

to violence, the elements of economic coercion inherent in even peaceful picketing, and the detrimental repercussions upon strangers to the controversy.[1] As a result the clash between constitutional right and state police power usually is more severe when freedom of speech takes the form of a picket line than when it is exercised through other mediums.

The pertinent question is whether these difficulties are to be considered the necessary consequence of safeguarding a constitutional right, or whether they are reasons for modifying or altering the free speech doctrines. Some indication of the solution to the problem may be contained in recent Supreme Court decisions, particularly the case of *Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe.*[2]

I.

In the *Thornhill* and *Carlson* cases,[3] which establish picketing as a constitutional right, the Court gave no indication that picketing was to be treated differently from any other method of disseminating information. The danger of injury to private interests was not considered a reason for imposing sweeping restrictions upon the right to picket.[4] State power to preserve the peace was said to justify a restraint upon picketing "only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merit of ideas by competition for acceptance in the market of public opinion."[5]

In *American Federation of Labor v. Swing*[6] the Court reiterated the views of the *Thornhill* and *Carlson* cases by holding that a state's common-law policy condemning picketing in the absence of an employer-employee relationship could not form the basis for a prohibition of peaceful picketing. That the protection of private rights was not a reason for infringing the guarantee of free speech was expressed in the statement that peaceful picketers could not be enjoined "because of concern for the economic interests against which they are seeking to enlist public opinion."[7]

[1] For a presentation of some difficulties arising from extending the free speech guarantee doctrine to picketing, see Gregory, "Peaceful Picketing and Freedom of Speech," 26 A. B. A. J. 709 (1940), and 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 136 (1940).

[2] (U. S. 1942) 62 S. Ct. 607. The other cases are Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, (U. S. 1942) 62 S. Ct. 706, and Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl, (U. S. 1942) 62 S. Ct. 816.

[3] Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736 (1940); Carlson v. California, 310 U. S. 106, 60 S. Ct. 746 (1940). See 39 MICH. L. REV. 110 (1940).

[4] Thornhill v. Alabama, 310 U. S. 88 at 105, 60 S. Ct. 736 (1940). Nor is the fact that the information may be disseminated at places other than the scene of the labor dispute a justification of the restriction.

[5] Id., 310 U. S. at 104-105.

[6] 312 U. S. 321, 61 S. Ct. 568 (1941).

[7] Id., 312 U. S. at 326.

From a prima facie tort requiring justification,[8] these cases elevated picketing to the status of a constitutional right beyond the ordinary exercise of the state police power. A measure which restrains picketing enjoys no presumption of constitutionality,[9] and is subjected to the close judicial scrutiny accorded restrictions upon civil liberties.

An extreme to which the constitutional guarantee does not extend was disclosed in *Milk Wagon Drivers Union v. Meadowmoor Dairies.*[10] The Court held that when blended with violence picketing lost its constitutional immunity, and could be restrained by a blanket injunction in order to preserve the public peace. This decision may be regarded as merely an application of the "clear and present danger test" referred to in the *Thornhill* case,[11] and as involving no departure from the traditional doctrines protecting free speech.

By emphasizing the fact that the exercise of a constitutional right was enjoined because of past abuses of the right, it is possible to view the Meadowmoor case as introducing an innovation. Precedent for enjoining lawful conduct to insure the prohibition of unlawful activity is contained in several state decisions which recognize peaceful picketing as lawful but enjoin peaceful picketing, as well as the accompanying acts of violence, in order to maintain the public peace.[12] In these cases peaceful picketing was admitted to be a lawful act, but not a constitutional right. While lawful acts can be enjoined in the interest of the public welfare, constitutional rights are on a higher plane. Since there seems to be no other authority for restraining a civil liberty because of past abuses of the right, or because of unlawful acts accompanying the exercise of the right, the *Meadowmoor* case may be regarded as treating a constitutional right on the same footing as a mere lawful act.[13] At least it is a recognition that when the unrestrained exercise of the constitutional right to picket conflicts with the power of a state to preserve the peace and property, more stringent restrictions may be imposed upon this constitutional right than have been placed upon the exercise of other civil liberties.

[8] See Cooper, "The Fiction of Peaceful Picketing," 35 MICH. L. REV. 73 (1936), and 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 114 (1940), for the strict attitude toward picketing assumed by some courts.

[9] See 40 COL. L. REV. 531 (1940).

[10] 312 U. S. 287, 61 S. Ct. 552 (1941).

[11] See note 5, supra, and 1 BILL OF RIGHTS REV. 217 (1941).

[12] 132 A. L. R. 1218 (1941) contains an annotation of the cases enjoining all picketing on the ground that the dispute has been attended by violence or other concededly unlawful conduct, including a discussion of the leading case of Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931).

[13] That peaceful picketing should not be enjoined because of past acts of violence is the basis of Justice Reed's dissent in Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U. S. 287 at 317, 61 S. Ct. 552 (1941).

The *Meadowmoor* case is far from a complete repudiation of the applicability of the constitutional guarantee to peaceful picketing. Picketing cannot be restrained as if it were not a constitutional right. While the prohibition of activity other than a civil liberty may be warranted if the restriction is reasonably adapted to the prevention of an evil such as violence, a stronger justification probably is required to uphold a blanket injunction against picketing.[14] To come within the scope of the *Meadowmoor* case there must be a rather livid record of related acts of violence intermingled with the picketing. There is nothing in the case upon which to justify a prohibition of all picketing because it is accompanied by acts which in themselves are not violent, but which the state fears may lead to violence.[15] An ounce of prevention is not worth a pound of cure when a constitutional right is the subject of regulation.

The state courts have not employed the doctrine of the *Meadowmoor* case as the basis for indiscriminate enjoining of picketing. In but two cases reaching state appellate courts has all picketing been enjoined because of violence,[16] and only one case may be considered as straining the limits of the doctrine.[17] In that decision the California Supreme Court upheld a blanket injunction based on a record of vile and abusive language, and threats of violence, but little if any actual violence. The case would probably be reversed by the United States Supreme Court, unless threats of violence, or acts which tend toward violence, are considered the equivalent of actual violence.

2.

Although there must be a record of considerable violence to warrant the imposition of a blanket injunction against peaceful picketing, considerably less violence is sufficient to justify an injunction which merely restrains the violent acts, but permits peaceful picketing. Such was the holding in *Hotel & Restaurant Employees' International Al-*

[14] See 40 COL. L. REV. 531 (1940) for a comparison of the difference in the attitude of the Court when dealing with a measure restricting a civil right, and with a restriction of an economic right.

[15] It would be difficult to reconcile such a view with the emphasis placed on the many acts of actual violence by the majority opinion, and the vigor of the dissenting opinions.

[16] Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, (Cal. App. 1942) 121 P. (2d) 91; Steiner v. Long Beach Local No. 128, (Cal. 1942) 10 L. R. R. 169. For examples of cases refusing blanket injunction, but granting limited injunction against the unlawful acts, see Isolantite, Inc. v. United Electrical Radio & Machine Workers of America, (N. J. Ch. 1941) 22 A. (2d) 796; Weyerhaeuser Timber Co. v. Everett District Council of Lumber & Sawmill Workers, (Wash. 1941) 119 P. (2d) 643.

[17] Steiner v. Long Beach Local No. 128, (Cal. 1942) 10 L. R. R. 169.

liance, Local No. 122 v. Wisconsin Employment Relations Board.[18] The Court sustained an injunction based on the Wisconsin Employment Peace Act[19] which, as interpreted by the Wisconsin court,[20] declared that violent acts of picketing were enjoinable as unfair labor practices. The Supreme Court carefully pointed out that neither the statute nor the restraining order prohibited peaceful picketing.[21]

Attributing such a meaning to a statute, which says that it is unlawful to co-operate in picketing unless a majority of the employees have voted to call a strike[22] is the result of some judicious interpretation on the part of the Wisconsin court. Since the majority vote provision is a nullity if the act is limited to violent picketing,[23] it seems clear that the legislature hoped the statute would be constitutionally applicable to the peaceful picketing by a minority of employees. The Employment Relations Board undoubtedly thought it was enjoining peaceful picketing as evidenced by its order to desist from "engaging in promoting or inducing picketing."[24] Thus the Wisconsin court sacrificed legislative and administrative objectives for the sake of constitutionality.

Since the Supreme Court must accept the state court's interpretation of its statutes and court orders, the decision is sound, and is no impingement upon the doctrine of the *Thornhill* and *Carlson* cases. But as a practical matter, before the Wisconsin court determined that the statute and the injunction were to be given a meaning other than that indicated by the normal interpretation of the statutory language, the

[18] (U. S. 1942) 62 S. Ct. 706.

[19] Wis. Laws (1939), c. 57, Stat. (1941), § 111.01 et seq. See 28 VA. L. REV. 265 (1941) for a discussion of some state labor relations acts, including the Wisconsin act. Annotations on the validity of ordinances against picketing are found in 130 A. L. R. 1303 (1941); 125 A. L. R. 963 (1940).

[20] Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 236 Wis. 329, 294 N. W. 632, 295 N. W. 634 (1941).

[21] Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, (U. S. 1942) 62 S. Ct. 706 at 708. It is reiterated in Justice Reed's dissenting opinion in Carpenters & Joiners Union v. Ritter's Cafe, (U. S. 1942) 10 U. S. L. W. 4293 at 4295:2.

[22] Wis. Laws (1939), c. 57, Stat. (1941), § 111.06(2): "It shall be an unfair labor practice for an employe individually or in concert with others. . . (e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

[23] A majority vote could not authorize violent picketing, and so interpreted the act does not apply to peaceful picketing even in the absence of a majority vote.

[24] The injunction is set out in note 1 of the Supreme Court decision, (U. S. 1942) 62 S. Ct. 706 at 707.

injunction and statute constituted "an overhanging and undefined threat to free utterance." [25]

The latest Supreme Court pronouncements upon the constitutional right to picket are the decisions in *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl*,[26] and *Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe*.[27] By a unanimous opinion, the first case reversed a decision of the New York Court of Appeals [28] sustaining an injunction which, in addition to restraining a bakery drivers union from picketing the manufacturing bakers who sold to peddlers against whom the union was making demands, also prohibited the union from picketing the retailers who purchased from the peddlers. The objective of the union was to induce the peddlers, who hired no employees and owned their own trucks, to employ a helper one day a week. In a short opinion the New York court had granted the injunction solely on the ground that there was no "labor dispute" within the ban of the state anti-injunction act. The New York decisions contained no discussion of picketing as protected by the right of free speech.

In view of the holding in the *Swing* case that the definition of a labor dispute cannot be so narrowly drawn as to infringe upon the right to picket,[29] it is not surprising that the Supreme Court struck down an injunction granted by a state court because there was no labor dispute as defined by state law. The *Wohl* case is primarily a reminder to state courts that the imposition of restraints on picketing involves a federal question as well as problems of state law. A state decision which grants a blanket injunction should show some consideration for the right to picket as guaranteed by the Fourteenth Amendment.

Perhaps the most significant statement in the case is the recognition of Justice Douglas in his concurring opinion that

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

[25] The quotation is taken from Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U. S. 287 at 292, 61 S. Ct. 552 (1941), where the Court compares the merits of the injunction in question with the abstract statute.

[26] (U. S. 1942) 10 U. S. L. W. 4287.

[27] (U. S. 1942) 10 U. S.L. W. 4293.

[28] Wohl v. Bakery & Pastry Drivers & Helpers Local 802, (S. Ct. 1939) 14 N. Y. S. (2d) 198, affd. 259 App. Div. 868, 19 N. Y. S. (2d) 811 (1940), affd. 284 N. Y. 788, 31 N. E. (2d) 765 (1940). In both decisions of the case the court sustained the injunction with the mere statement that there was no labor dispute under the anti-injunction act. Further history of the case is contained in the Supreme Court decision.

[29] American Federation of Labor v. Swing, 312 U. S. 321 at 326, 61 S. Ct. 568 (1941).

seminated. Hence those aspects of picketing make it the subject of restrictive regulation."[30]

This is the first clear-cut declaration by the Supreme Court that picketing may create difficulties warranting special regulatory measures, which probably are not justified when freedom of speech is exercised in other ways.

The five-four decision in *Carpenters & Joiners Union v. Ritter's Cafe* ranks in significance with the *Meadowmoor* case in marking out the limits of the right to picket. The case upholds a Texas injunction restraining a carpenters union from peacefully picketing a restaurant because the owner had contracted for the construction of another restaurant with a contractor who used nonunion labor. The state court had enjoined the picketing as a violation of the state antitrust act.[31] A majority of the Court upheld the injunction on the ground that a state can draw a line "in confining the area of unrestricted industrial warfare" so as to "localize industrial conflict by prohibiting the exertion of concerted economic pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants."[32] The Court expressly approves what it terms the prevailing policy of the states to prohibit the disputants from conscripting neutrals having no relation to either the dispute or the industry in which it arose.

3.

These recent developments warrant a brief review of the present status of the constitutional right to picket. What limitations may be imposed upon the right in addition to measures necessary for the preservation of the peace, and how does picketing compare in this respect with the traditional modes of free speech?

Any discussion of the subject probably should be prefaced by a determination of the activities which are included within the constitutional right to picket. Not every activity which may be classified as picketing is an exercise of the right of free speech. The *Thornhill* and subsequent cases state that the Constitution guarantees "the dissemination of information concerning the facts of a labor dispute," and picketing when employed for this purpose is within the guarantee.[33] Not

[30] (U. S. 1942) 10 U. S. L. W. 4287 at 4289:1.

[31] Carpenter & Joiners Union of America v. Ritter's Cafe, (Tex. Civ. App. 1941) 149 S. W. (2d) 694.

[32] (U. S. 1942) 10 U. S. L. W. 4293 at 4294:1.

[33] "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Thornhill v. Alabama, 310 U. S. 88 at 102, 60 S. Ct. 736 (1940). This statement is quoted in the subsequent picketing cases.

every picket has to carry a placard, since the presence of a picket indicates the existence of a labor dispute. But pickets in excess of a number reasonably necessary to impart the facts of a dispute may not be a means of exercising the right of free speech.[34] Similarly, the "synthetic" picketing enjoined by a California court was not for the purpose of disclosing the facts of a dispute, so undoubtedly was not within the Fourteenth Amendment.[35] That the primary objective of the picketing was not the promulgation of information concerning the controversy may explain the Supreme Court's denial of certiorari in the case of *Carpenter Baking Co. v. Bakery Sales Drivers' Local*,[36] in which an evenly divided Wisconsin court upheld an injunction based on findings that the union had attempted to persuade persons not to deal with a certain employer. The Supreme Court might have reacted differently if the union had been disseminating the facts of a labor dispute which had merely the incidental effect of dissuading customers.

Judicial statements such as the one in the *Ritter's Cafe* case can best be explained on the ground that certain picketing activities are not free speech. In that case Justice Reed, although dissenting, said,

> ". . . We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required."[37]

Such restrictions certainly are not justifiable as necessary to the prevention of violence, so are not within the doctrine of the *Meadowmoor* and *Hotel Employees* cases.[38] Permitting the imposition of any regulatory measures upon picketing provided they do not interfere with disseminating the facts of a dispute is just another way of saying that

[34] Thornhill v. Alabama, 310 U. S. 88 at 99, 60 S. Ct. 736 (1940), states that the statute in question "leaves room for no exceptions based upon . . . the number of persons engaged." Justice Reed's dissent in Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U. S. 287 at 319, 61 S. Ct. 552 (1941), says that the number of pickets may "be limited, let us say, to two or three individuals at a time. . . ." People v. Levner, (N. Y. City Ct. 1941) 30 N. Y. S. (2d) 487, states that 250 pickets transcends dissemination of information.

[35] Crandell v. Thrifty Drug Stores Co., (Cal. Super. 1941) 5 LAB. CAS., ¶ 60,846. The pickets proceeded a short distance ahead of delivery trucks, picketing retail stores until the trucks passed, on the excuse that to enter the stores would necessitate crossing a picket line.

[36] (Wis. 1941) 299 N. W. 30, cert. den. Bakery Sales Drivers Local Union No. 344 v. Carpenter Baking Co., (U. S. 1942) 62 S. Ct. 904.

[37] (U. S. 1942) 10 U. S. L. W. 4293 at 4296:1.

[38] Unless the Court extends the doctrine of these cases to include activities which *tend* toward violence.

the constitutional guarantee only covers picketing which makes known the facts of a controversy.

Requiring picketing to impart information before it deserves the protection of the Constitution is not imposing any discriminatory restrictions upon picketing. The same is true of other modes of expression. That free speech does not include all verbal utterances is indicated in the recent Supreme Court case of *Chaplinsky v. New Hampshire*,[39] in which the Court said that certain classes of speech are not within the constitutional guarantee because "such utterances are no essential part of any exposition of ideas."

Of course, conveying information by picketing is subject to the same restrictions as any other exercise of free speech. Fraudulent or slanderous statements when published by picketing may be the basis of a damage action and the fraudulent elements probably are enjoinable, just as if the statements were published in a newspaper.[40] The *Thornhill* case expressly states that the "character and the accurateness of the terminology used in notifying the public of the facts of the dispute" are subject to regulation.[41]

4.

Assuming that the picketing is a sufficient dissemination of information, is truthful, and is peaceful, what limitations may be imposed? The question probably can be reduced to the proposition of what relationship, if any, must exist between the pickets and the person picketed before the picketing is sheltered by the Constitution.

It is not certain whether the picketing guaranteed by the Constitution is just that carried on in connection with a labor dispute,[42] or whether it is picketing in the furtherance of any cause.[43] If the former, the relationship of the parties is the primary factor in determining the existence of a labor dispute. If the Fourteenth Amendment encom-

[39] (U. S. 1942) 62 S. Ct. 766 at 769.

[40] Equity finds some difficulty in enjoining publication although the publication is sufficiently defamatory to ground a damage action. See Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 (1916). Some courts will issue an injunction where there is damage to a property right, 36 MICH. L. REV. 1206 (1938), and picketing certainly impinges upon property rights. The question is more one of the policy of a particular equity court than a constitutional question, since the Supreme Court in the Meadowmoor case did not point out any threats to free speech inherent in an injunction. See also 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 126 (1940).

[41] Thornhill v. Alabama, 310 U. S. 88 at 99, 60 S. Ct. 736 (1940).

[42] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 67 (1941 supp.), claims that the constitutional guarantee applies only to picketing in connection with a labor dispute.

[43] 41 COL. L. REV. 90 (1941) states that the doctrine of the Thornhill case applies to nonlabor picketing as well as to that in connection with a labor dispute.

passes nonlabor picketing as well, there probably must be some relationship between the pickets and the picketed to justify the singling out of a particular person to bear the brunt of the burden created by another's exercise of a constitutional right.[44] In either event, the relationship of the parties may be regarded as the essence of the problem.

In the *Swing* case, the Court decided that there need not be an employer-employee relationship to justify the picketing. The *Meadowmoor* case inferred that, if done peacefully, a union could conduct a secondary boycott by picketing the retailers of the product manufactured by the firm against whom the union had asserted its demands.[45] The *Wohl* case reversed the granting of an injunction against secondary picketing, which indicates that such picketing is within the constitutional guarantee.[46] Although the *Wohl* case may be a weak authority because of the New York court's summary treatment of the question, any doubt as to the legality of secondary picketing is dispelled by the portion of the *Ritter's Cafe* case in which the majority distinguishes the *Wohl* case by pointing out that the retailers in the latter decision were directly involved in the dispute.[47]

Before the *Ritter's Cafe* case, there was no authority with which to refute the proposition that there was sufficient relationship between the parties if the union believed that the picketing of the particular person was necessary to promote its interest. This is the view expressed by Justice Black in his dissenting opinion in the *Ritter's Cafe* case, where he stated that there is

> ". . . no reason why members of the public should be deprived of any opportunity to get information which might enable them to

[44] A union undoubtedly could not picket a place of business which was a total stranger to the claims of the union, even though such picketing disseminated facts of some other dispute, and the union made no false statements about the place picketed. In this extreme form, the situation is academic, but illustrates the point that there at least must be some remote relationship between the picketers and the place of business which has been singled out as the scene of the picketing.

[45] Maywood Farms Co. v. Milk Wagon Drivers' Union, (Ill. App. 1942) 9 L. R. R. 718, says that the Meadowmoor case did not definitely decide that a court cannot enjoin a peaceful secondary boycott, but then points out that subsequent Illinois cases have held that a boycott is not secondary unless there is violence.

[46] The injunction restrained the union from picketing either the place of business of manufacturing bakers who sold to the respondent or the places of business of their customers.

[47] "The line drawn by Texas in this case is not the line drawn by New York in the Wohl case. The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments the union members would only be following the subject-matter of their dispute." Carpenters & Joiners Union v. Ritter's Cafe, (U. S. 1942) 10 U. S. L. W. 4293 at 4294:1-2. This is similar to the New York "unity of interest" doctrine. See Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937), and 131 A. L. R. 1068 (1941).

use their influence to tip the scales in favor of the side they think is right. . . .

"Whatever injury the respondent suffered here resulted from the peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building."[48]

Thus, three and probably four members of the Court[49] are of the opinion that the only necessity for a relationship between the pickets and the picketed is that the promulgated facts relate to the picketed person. In other words, the picketed person is sufficiently connected with the controversy if the disseminated facts of the dispute can truthfully accuse him of directly or indirectly violating some interest of the union.

However, the majority decision, in the *Ritter's Cafe* case, that the guarantee of free speech does not prevent the confining of picketing "to the area of the industry within which a labor dispute arises,"[50] established the requirement that the picketer and the person picketed be related to the same industry, and share interdependent economic interests. Such a relationship is lacking where the picketer is in the building trade, and the picketed person is engaged in the restaurant business. According to the majority, each industry constitutes a separate sphere for the purposes of picketing, and both parties to a dispute must be in the same sphere. In contrast, Justice Black holds that the proper sphere for picketing is the entire nationwide controversy between union and nonunion systems of employment.[51]

The principal difficulty in the *Ritter's Cafe* case is discovering the exact basis for the limitation imposed by the majority. A possible explanation is that a union is not justified in picketing a particular person who is not the primary disputant, unless he is sufficiently connected with the controversy to warrant being burdened with the picketing. This theory fails to explain why it is permissible to picket the retailers of the product manufactured by the person against whom the union is making demands, while it is not permissible to picket the person who has contracted with the one against whom the union is asserting its demands. The retailer of a nonunion product may obtain the advantage of acquiring the product at a lower price which may enable him to undersell retailers of the union product. But he who contracts with a person using nonunion labor may receive the benefit of a lower price resulting from

[48] Carpenters & Joiners Union v. Ritter's Cafe, (U. S. 1942) 10 U. S. L. W. 4293 at 4296:2, 4297:1.

[49] Justices Douglas and Murphy concurred with Justice Black's dissent. Justice Reed wrote a separate dissent which is very similar to that of Justice Black.

[50] Carpenters & Joiners Union v. Ritter's Cafe, (U. S. 1942) 10 U. S. L. W. 4293 at 4294:2.

[51] Id. 4296:2.

lower nonunion wages. Similarly, both contribute to the continuation of the condition the union desires to remedy. If no one sells the nonunion product, the nonunion competition will be eliminated, but the same will be true if nobody contracts with a user of nonunion labor.

Consequently, the personal demerit of the person picketed cannot be the primary factor in justifying a limitation upon the permissible area of picketing. In spite of Justice Black's statement to the contrary,[52] the majority opinion in the *Ritter's Cafe* case does not hold, in repudiation of the *Thornhill* case, that private injury is a reason for restricting a constitutional right. The Court's attitude is expressed by the statement,

> ". . . Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations in behalf of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of 'liberty,' the question always is whether the state has violated 'the essential attributes of that liberty.'" [53]

When acting in the interest of the public, the state can restrict picketing provided the constitutional right, in the opinion of the Court, is not substantially impaired. But the same limitation imposed as a protection of private rights may not be justified. If the appellant had appealed the Texas court's first decision in the *Ritter's Cafe* case,[54] in which an induced breach of a private contract was the basis of the injunction, the Supreme Court might have held differently.

While the Texas antitrust act may be important as an indication that the picketing is being restricted in the public interest, the fact that the picketing violates the statute is not in itself a justification for the injunction. If picketing such as that in the *Swing* case were held to be a breach of the antitrust act, the Texas court could not enjoin it.[55] The Supreme Court has not adopted the end or object test for determining the legality of picketing.[56] In fact, a statutory basis for a restriction of

[52] Id. at 4297:1.

[53] Id. at 4294:1.

[54] Carpenters & Joiners Union of America v. Ritter's Cafe, (Tex. Civ. App. 1940) 138 S. W. (2d) 223.

[55] The holding in the New York case of People v. Masiello, 177 Misc. 608, 31 N. Y. S. (2d) 512 (1941), is undoubtedly erroneous. The court enjoined a union of newspaper dealers, who had demands against several newspapers, from picketing dealers of the newspapers on the ground that it was a breach of the state anti-injunction act.

[56] In the Wohl case the Court expressly avoided passing on the effect of an unlawful objective by holding that the New York court had not adequately certified that such was the basis of the injunction. On the objectives test in general, see 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 114 (1940); 90 UNIV. PA. L. REV.

picketing may not be necessary. The Texas injunction probably would have been upheld if it had been granted for the public good under the inherent power of equity, although it is possible that the Court may require a legislative mandate before it will sanction a restriction on picketing short of a prevention of violence.

This distinction between the promotion of a public interest and the protection of private rights may establish a theoretical rather than a practical limitation. If the Supreme Court abides by such a distinction, a state court can comply with it by specifically basing the injunction on the attainment of public good, since any picketing which injures a private right also has community-wide repercussions. The incidental benefit to the involved private property interests will be just as complete as though this were stated to be the sole objective of the restriction.

Any consideration of the *Ritter's Cafe* case makes it apparent that there is no precise solution for the question why the Court held that the constitutional right to picket can be confined to a particular economic area. The only possible answer is that a majority of the Court was of the opinion that the dictates of sound public policy preclude the constitutional sanctity from extending beyond picketing in a controversy in which both the picketers and the parties picketed are members of the same general industry. What is to be the test for determining the boundaries of particular industries is not contained in the decision.

The holding cannot be explained by pointing to parallel situations of restraints upon free speech exercised through means other than picketing. The necessity for such a restriction had never before arisen because the demands of one person upon another made through ordinary mediums of speech do not have the far-reaching effect upon third persons that results from an assertion of the demands by picketing. Consequently, the decision in effect is a recognition on the part of the majority of the Court that picketing creates problems which are nonexistent in the exercise of the traditional forms of free speech. Furthermore, the majority holds that these difficulties warrant the imposition of limitations upon a constitutional right hitherto not considered necessary. While the minority, as exemplified by Justice Douglas,[57] recognizes that picketing raises peculiar problems, it is less ready to use them for justifying the restriction of picketing, and is more likely to regard

201 at 209-211 (1941). An authority for the proposition that free speech may be restricted because it advocates the breach of a statute (an illegal purpose) the breach of which would not constitute a clear and present danger, is found in the case of Fox v. Washington, 236 U. S. 273, 35 S. Ct. 383 (1915). In that case Justice Holmes upheld a prosecution under a statute making it unlawful to publish inducements to violate laws. The statute in question prohibited indecent exposure.

[57] See note 30, supra.

the difficulties as merely the consequences which must be endured in the interest of maintaining a constitutional right.[58]

At least the majority opinion is evidence that picketing is not an absolute right which can only be restricted when it constitutes a clear and present danger to the existence or peace of the state. Even the minority hints that there may be some interest of the state, short of the prevention of violence, which may warrant reasonable restrictions.[59] But neither the majority nor the minority present any clear guides for predicting the basis and extent of additional permissible limitations upon the right to picket.

William H. Kinsey

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[58] As evidenced by Justice Black's statement in his dissent in the Ritter's Cafe case, 10 U. S. L. W. 4293 at 4297:1, "Whatever injury the respondent suffered here resulted from the peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building."

[59] Justice Black intimates that the state can regulate picketing in the interest of regulating the use of its streets. Carpenters & Joiners Union v. Ritter's Cafe, (U. S. 1942) 10 U. S. L. W. 4293 at 4297:1. See also quotation from Justice Reed at note 37, supra.