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LABOR LAW-COMPULSORY ARBITRATION OF LABOR DISPUTES

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LABOR LAW—COMPULSORY ARBITRATION OF LABOR DISPUTES—In 1947, seven states[1] adopted legislation for compulsory arbitration of labor disputes in public utilities. Four more[2] provide for seizure of such industries in cases of strikes or lockouts, and one[3] prohibits picketing or interference with the service of a public utility. In addition, procedures for conciliation, mediation, or voluntary arbitration with suspension of the right to strike or lockout during such procedures, are provided by still others.[4] Such legislative activity reflects the growing public concern regarding labor disputes and indicates that many state legislators are convinced that to secure industrial peace more is required than the mere imposition of a duty to bargain collectively. While the wave of postwar strikes did not demonstrate that the National Labor Relations Act[5] failed in all its objectives, or that it was poor policy, such strikes did show that it failed to achieve one of its primary objectives, namely,

[1] Fla. Laws (1947) c. 23911; Ind. Acts (1947) c. 341; Mich. Stat. Ann. (1947) § 17.454; Neb. Laws (1947) c. 178; N.J. Laws (1947) c. 75; Pa. Laws (1947) No. 485; Wis. Laws (1947) c. 414. The Michigan act was declared unconstitutional as a violation of the clause in the Michigan Constitution providing for the division of the powers of state government [Mich. Const. (1908) art. 7, § 9]. Local 170, Transport Workers Union of America, C.I.O. v. Gadola, (Mich. 1948) 34 N.W. (2d) 71. The New Jersey act was held not to violate either the state or federal constitutions in State v. Traffic Telephone Workers, (N.J. Ch. 1948) 22 L.R.R.M. 2469.

[2] Mass. Ann. Laws (Michie, Supp. 1947) c. 150B; Mo. Laws (1947) H.B. 180; N.D. Rev. Code (1943) § 37-0106; Va. Acts (1947) c. 9.

[3] Tex. Laws (1947) c. 84.

[4] Colo. Stat. Ann. (1935) c. 97, § 31; Minn. Stat. (1945) c. 179; Ky. Rev. Stat. (1946) § 336.140; Iowa Code (1946) c. 90. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 10, § 20 et seq. requires that an application by a party for government intervention contain a promise to abstain from a strike or lockout for three weeks. Nev. Comp. Laws (Hillyer, 1929) § 2763 et seq. permits voluntary submission of disputes to arbitration with prohibition of strike or lockout during arbitration and three months thereafter.

[5] 49 Stat. L. 449 (1935), 29 U.S.C. (1946) § 151.

industrial peace. This comment will consider some of the legal problems raised by those statutes providing for compulsory arbitration.

I

STATUTORY PROVISIONS

The Florida statute[6] is fairly representative of those providing for compulsory arbitration of disputes arising in public utilities. A public utility employer is defined as one rendering "electric power, light, heat, gas, water, communication or transportation services to the public."[7] If the dispute reaches an impasse and the governor believes that interruption of the service will inflict severe hardship on a substantial number of persons, he may appoint a conciliator who is to attempt to effect a settlement. Strikes and lockouts are prohibited during the settlement procedure and during the effective period of an order of the arbitration board. If the conciliator fails to settle the dispute, the governor may appoint a three-man arbitration board,[8] whose decision binds the parties for one year unless they mutually agree to a change. Both parties have the right to be present during hearings by the board, personally and by counsel, and have the right to present such evidence as the board deems relevant to the issues in controversy. Where wage rates or conditions of employment are in dispute, the board must establish rates and conditions comparable to those prevailing in similar utilities in the same or adjoining labor market areas, and must consider the overall compensation received, taking into consideration wages for time not worked, pension and insurance benefits, and continuity and stability of employment. Either party may petition the circuit court for review within 15 days following the board's order, but only upon the following grounds: (1) lack of reasonable opportunity to be heard; (2) that the decision is not supported by the evidence; (3) that the board exceeded its powers; or (4) that the order was procured by fraud or other unlawful means. Violation of the act by any member of a group of employees acting in concert, or by any employer or officer acting for an employer, or by any other individual, is a misdemeanor punishable by fine up to $1,000, or by imprisonment up to 12 months, or both. Further, the union or utility may be fined for strikes and lockouts up to $10,000 per day for each day's interruption of service. Individuals adversely affected by violations of the act may petition the courts to enjoin such violations; however, no court has power to issue process to compel an individual employee to render labor or service or to remain at his place of employment without

[6] Fla. Laws (1947) c. 23911.

[7] Id. § 2(a).

[8] The employees' representative, the employer, and the governor each designated one member of the arbitration board. The composition of the board varies under the several statutes.

his consent. The right of employees to quit, except in concert with others, is expressly guaranteed.

The compulsory arbitration statutes of the other six states contain substantially the same essential provisions as the Florida act except in the following particulars. The Michigan statute[9] contains no provisions expressly guaranteeing the parties the right to be heard and to present evidence to the board, nor provisions for review of the board's decision by the courts.[10] Neither the Michigan nor the New Jersey[11] act provides standards to guide the board in establishing wage rates or working conditions. While the Michigan act includes hospitals and municipally owned utilities as well as public utilities, it fails to define "utility." All except Michigan and Nebraska[12] provide for fines against the union or utility for interruption of service due to strikes or lockouts. Florida, Indiana,[13] Michigan and Pennsylvania[14] give individuals adversely affected by violations of the statute the right to petition the courts for injunctions. In addition to compulsory arbitration, the New Jersey act authorizes seizure and operation of the utility by the governor. Nebraska makes no provision for conciliation or mediation, but provides that all disputes involving a public utility shall be settled by invoking the jurisdiction of the Court of Industrial Relations. Activities made unlawful generally parallel the Florida act, with variations in the penalties imposed. However, Nebraska makes it unlawful also to aid a strike or lockout by providing funds for the conduct thereof or by paying strike or unemployment benefits to strikers. Wisconsin[15] makes no provision for fines or imprisonment for unlawful activity, and New Jersey provides penalties only where unlawful activity is engaged in by union or utility officials.

II

CONSTITUTIONALITY

A. *Affectation With a Public Interest.* In 1923 the United States Supreme Court, in *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas*,[16] held that a statute requiring compulsory arbitration

[9] Mich. Stat. Ann. (1947) § 17.454, declared unconstitutional in Local 170, Transport Workers Union of America, C.I.O. v. Gadola, (Mich. 1948) 34 N.W. (2d) 71. See Part III E, infra.

[10] However, it is likely that the right to be heard would be implied from the provision that the board shall "hold public or private hearings." Mich. Stat. Ann. (1947) § 17.454(14). See Part III E, infra.

[11] N.J. Laws (1947) c. 75.

[12] Neb. Laws (1947) c. 178.

[13] Ind. Acts (1947) c. 341.

[14] Pa. Laws (1947) No. 485.

[15] Wis. Laws (1947) c. 414.

[16] 262 U.S. 522, 43 S.Ct. 630 (1923).

of a labor dispute in a small meatpacking firm deprived the employer of property and liberty of contract without due process of law. The statute declared that several activities, among which was the manufacture and preparation of food for human consumption, were affected with a public interest. The Kansas Court of Industrial Relations had ordered an increase in wages after finding that, while closure of the plant would not have great effect upon the supply of food in Kansas, the peace and health of the public were imperiled by the dispute. The Supreme Court, speaking through Chief Justice Taft, said: "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. . . . The regulation of rates to avoid monopoly is one thing; the regulation of wages is another. A business may be of such character that only the first is permissible; while another may involve such danger of monopoly on the one hand, and such danger from stoppage on the other, that both come within the public concern and power of regulation."[17]

The Court indicated that *Wilson v. New*,[18] decided in 1917, had gone to the borderline in sustaining, as against due process objections, an act of Congress which temporarily provided for an eight-hour day for railroad workers at compensation not less than that previously paid for ten hours. This legislation was enacted at the request of the President when a general strike of all railroad workers throughout the country had been set for an early day. Chief Justice White, delivering the opinion of the Court, foresaw a situation which "if not remedied, would leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character."[19] He said that "engaging in the business of interstate commerce subjects the carrier to the lawful power of Congress to regulate"; that "by engaging in a business charged with a public interest, all the vast property and every right of the carrier become subject to the authority to regulate possessed by Congress to the extent that regulation may be exerted, considering the subject regulated and what is appropriate and relevant thereto"; and further that the right of the employee "to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition" was "necessarily subject to limitation when employment is accepted in a business charged with a public interest."[20]

In the *Wolff* case, Chief Justice Taft grouped businesses affected with a public interest into three categories: (1) those carried on under the authority of a public grant; (2) occupations historically regarded as

[17] Id. at 539.
[18] 243 U.S. 332, 37 S.Ct. 298 (1917).
[19] Id. at 351.
[20] Id. at 352.

exceptional; and (3) those not public at their inception, but which have risen to be such. The first group was public utilities; the second, businesses such as "inns, cabs and grist mills,"[21] was an historical classification which survives today; the third, which alone needed definition, remained indefinite.

The language of Chief Justice White in *Wilson v. New* indicates that compulsory arbitration is due process as applied to businesses affected with a public interest, and since, according to the definition contained in the *Wolff* case, public utilities are affected with a public interest, the conclusion might be drawn that the Court which decided *Wilson v. New* would have sustained a Florida type statute, as decided above. On the other hand, the opinion in the *Wolff* case suggests to some extent that that Court would have considered the danger to the public involved from a work stoppage, that only where such danger was extreme would regulation of wages have been permitted, and that the danger would have had to be at least as great as that presented in *Wilson v. New* to sustain such regulation. Under this approach it appears that the Florida statute would not be due process except as it concerns water and perhaps electric power, since work stoppages in the other utilities covered by that act, while causing much inconvenience, would not involve the extreme danger to the public which Chief Justice White foresaw as a result of a general strike on the railroads.[22]

However, the *Wilson* and *Wolff* cases were decided when the Court's approach to social and economic legislation was very different from what it is today. Thus, a re-examination of the constitutional issues presented by compulsory arbitration is in order.

The first change to be noted in the Court's approach is with respect to price regulation, a problem analogous to compulsory arbitration in its economic implications. At the time of the *Wolff* decision, the permissible range of statutory regulation of prices was measured by the yardstick, "affected with a public interest."[23] In *Tyson & Brother v. Banton*,[24] Justice Sutherland explained the third category of Chief Justice Taft's definition of affectation with a public interest as follows: "The significant requirement is that the property shall be devoted to a use in which the public has an interest."[25] Apparently this explanation was not completely satisfactory, for four justices dissented from the decision holding unconstitutional a New York statute prohibiting resale by brokers of theater tickets in excess of 150 per cent of the price printed on the

[21] See 39 YALE L.J. 1089 (1930).

[22] See Simpson, "Constitutional Limitations on Compulsory Industrial Arbitration," 38 HARV. L. REV. 753 at 775-776, 792 (1925).

[23] 39 YALE L.J. 1089 at 1100 (1930).

[24] 273 U.S. 418, 47 S.Ct. 426 (1927).

[25] Id. at 433.

ticket. Justices Stone, Holmes and Brandeis thought that price regulation was valid if there were circumstances "materially restricting the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences will result to a very large number of members of the community."[26] Justice Sanford claimed that the business involved was affected with a public interest.

Nebbia v. New York[27] held that the concept "affected with a public interest" was not restricted to public utilities or monopolies, but extended to any industry which for adequate reason is subject to control for the public good, the necessity for control being left primarily to the judgment of the legislature. In *Olson v. Nebraska*[28] the Court said that the test of affectation with a public interest had been discarded, and that the wisdom, need and propriety of legislation should be left to the states and to Congress.

Thus it is seen that the nebulous concept of affectation with a public interest as the test of constitutionality of price regulation has been abandoned and this aspect of a contract is now subject to the same due process test applied to other matters of contract; namely, "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[29]

A change in attitude toward price regulation suggests that there may have been a similar change with respect to regulation of the terms of employment.

That there has been a change in the Court's approach toward labor legislation has been demonstrated repeatedly. This was first indicated by the Court's attitude toward "yellow dog" contracts and other anti-union conduct by employers. In *Adair v. United States*,[30] an act of Congress declaring it a criminal offense against the United States for an officer or agent of an interstate carrier to discharge an employee because of his membership in a labor organization was held to violate the due process clause of the Fifth Amendment. The Court regarded it as the right of the employee to sell his labor upon such terms as he deemed proper, and said that the employer had the same right to prescribe the conditions upon which he would accept such labor; that the employer and employee had equality of right in such particulars and that any legislation disturbing that equality was an arbitrary interference with liberty of contract.

[26] Id. at 451-2.
[27] 291 U.S. 502, 54 S.Ct. 505 (1934).
[28] 313 U.S. 236, 61 S.Ct. 862 (1941).
[29] Nebbia v. New York, 291 U.S. 502 at 525, 54 S.Ct. 505 (1934).
[30] 208 U.S. 161, 28 S.Ct. 277 (1908).

The *Adair* case was reaffirmed in *Coppage v. Kansas*[31] in which was held unconstitutional a Kansas statute making it unlawful for the employer or his agents to coerce or influence any person to enter into an agreement not to join or become or remain a member of a labor organization as a condition of securing or continuing in employment. Holding the statute violative of the Fourteenth Amendment, the Court said that the case could not be distinguished from *Adair v. United States.*

However, in 1930, in *Texas & N.O. R. Co. v. Brotherhood of R. & S. Clerks,*[32] the Court held constitutional the provisions of section 2, Third, of the Railway Labor Act of 1926,[33] which provided that representatives of employers and employees should be designated by the respective parties without interference, influence or coercion by either party over the self-organization or designation of representatives of the other. The *Adair* and *Coppage* cases were said to be inapplicable because the act "does not interfere with the normal exercise of right of the carrier to select its employees or to discharge them."[34] In *Virginian R. Co. v. System Federation No. 40*[35] the 1934 Amendment of the Railway Labor Act,[36] requiring the railroads to bargain collectively with the certified representatives of their employees, was held not to deny the employer due process. The Court said that the purpose of the act was to secure uninterrupted service of interstate railroads and that "it was for Congress to make the choice of the means by which its objective" was to be secured, and that the means chosen were "appropriate to the end sought and hence are within the congressional power."[37] Again the *Adair* and *Coppage* cases were said to have no application since the act neither compelled nor precluded the making of any contract with the individual employees and constituted no interference with the normal exercise of the right of the carrier to select or discharge its employees.

The *Adair* and *Coppage* cases were similarly distinguished in *N.L.R.B. v. Jones & Laughlin Steel Corp.*,[38] which sustained the National Labor Relations Act as a constitutional exercise of congressional power, and affirmed the board's order that the employer cease and desist from discriminating against union members with regard to hire and tenure of employment and from interfering with the employees' right

[31] 236 U.S. 1, 35 S.Ct. 240 (1915).

[32] 281 U.S. 548, 50 S.Ct. 427 (1930).

[33] 44 Stat. L. 577 (1927), 45 U.S.C. (1946) § 152.

[34] Texas & N.O.R. Co. v. Brotherhood of R. & S. Clerks, 281 U.S. 548 at 571, 50 S.Ct. 427 (1930).

[35] 300 U.S. 515, 57 S.Ct. 592 (1937).

[36] 48 Stat. L. 1185 (1934), 45 U.S.C. (1946) § 151-163.

[37] Virginian R. Co. v. System Federation No. 40, 300 U.S. 515 at 553-4, 57 S.Ct. 592 (1937).

[38] 301 U.S. 1, 57 S.Ct. 615 (1937).

of self-organization. In 1941, in *Phelps Dodge Corp. v. N.L.R.B.*,[39] the Court sustained the power of the board to issue back-pay orders for workers refused employment solely because of their affiliation with a labor union. The Court said: "The course of decisions in this Court since *Adair v. United States* . . . and *Coppage v. Kansas* . . . have completely sapped those cases of their authority."[40]

Concerning minimum wage legislation the Court has similarly reversed its earlier position. In *Adkins v. Children's Hospital*,[41] citing *Adair v. United States* and *Coppage v. Kansas*, the Court held unconstitutional a statute providing for fixing minimum wages for women and children in the District of Columbia, and said that the class of cases "where property is devoted to a public use" and "the owner thereby in effect grants to the public an interest in the use which may be controlled by the public for the common good" were inapplicable since "the statute does not depend upon the existence of a public interest in any business to be affected."[42] The *Adkins* case was overruled in 1937 in *West Coast Hotel v. Parrish*,[43] holding constitutional a Washington statute providing for fixing standards of wages and conditions of labor for women and minors. It was argued that this case differed from the *Adkins* case in that the business of an innkeeper was affected with a public interest, but the Court refused to base its decision upon that distinction. In delivering the majority opinion Chief Justice Hughes said, regarding liberty of contract: "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people" and "is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[44]

In 1941, the wage and hour provisions of the Fair Labor Standards Act[45] were sustained by a unanimous Court in *United States v. Darby Lumber Co.*,[46] Justice Stone saying: "it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . . Similarly the statute is not objectionable because applied alike

[39] 313 U.S. 177, 61 S.Ct. 845 (1941).
[40] Id. at 187.
[41] 261 U.S. 525, 43 S.Ct. 394 (1923).
[42] Id. at 546-547.
[43] 300 U.S. 379, 57 S.Ct. 578 (1937).
[44] Id. at 391.
[45] 52 Stat. L. 1060 (1938), 29 U.S.C. (1946) § 201 et seq.
[46] 312 U.S. 100, 61 S.Ct. 451 (1941).

to both men and women."[47] The *Darby* case expressly overruled *Hammer v. Dagenhart*,[48] which had held that Congress was without power to exclude the products of child labor from interstate commerce, the Court saying in the *Darby* case that in the exercise of the power of Congress to regulate interstate commerce "it may choose the means reasonably adapted to the attainment of the permitted end."[49]

Thus it appears that, as with price regulation, so with wage, hour, and other labor legislation, the test of "affectation with a public interest" is no longer applied, but rather that such legislation is due process as long as it is not arbitrary and as long as it has a reasonable relation to a proper public end.

B. *The Test of Reasonableness.* Compulsory arbitration, obviously restricts the contractual liberty of the disputing parties, and it is necessary to determine whether such legislation is arbitrary or unreasonable. The test of reasonableness requires weighing the beneficial effects of the statute against the restrictions imposed. Inquiry should be directed to the need for the legislation, its probable effectiveness to correct the existing evil, and the possibility of achieving the same result by other means imposing less restriction upon individual freedom.

The need for legislation which will reduce work stoppages seems indisputable in view of the wave of strikes in essential industries following the end of World War II. More difficult questions are whether compulsory arbitration would correct the evil, and whether a less drastic measure could achieve the objective. Statutes requiring the filing of strike notices with government officials or commissions, and those providing for conciliation or mediation seem mainly to have resulted only in postponement of strikes; not in settlement of disputes. While it is improbable that compulsory arbitration would end all strikes, just as statutes punishing larceny do not end all stealing, the legislative conclusion that it would materially reduce the number of strikes appears not unreasonable.[50] The success or failure of peacetime compulsory arbitration can be determined accurately only by trial. The argument of theorists that such legislation would result in more strikes is entitled to no more weight than opposing arguments that such legislation is the panacea.

[47] Id. at 125.

[48] 247 U.S. 251, 38 S.Ct. 529 (1918).

[49] United States v. Darby Lumber Co., 312 U.S. 100 at 121, 61 S.Ct. 451 (1941).

[50] This conclusion is supported by the experience of the federal government with compulsory arbitration during World War II. The operations of the National War Labor Board were based on a no-strike, no-lockout pledge by labor and industry representatives in December, 1941, thus preserving a token of voluntarism. From a legal standpoint, however, there was no contractual obligation to arbitrate. While the wartime strike record was good, it is questionable whether this was due to a patriotic desire not to obstruct the war effort or to compulsory arbitration. See 12 LAW & CONTEM. PROB. 217 (1947); UPDEGRAFF & MCCOY, ARBITRATION OF LABOR DISPUTES 9 (1946).

With such a balance of opposing unproven arguments,[51] it is submitted that the Court should respect the legislative choice.

C. *The Thirteenth Amendment.* It is sometimes asserted that prohibition of strikes imposes involuntary servitude in violation of the Thirteenth Amendment. However, the existing statutes expressly preserve the right of the worker to quit, indicating a legislative distinction between quitting and striking. There are in fact at least these differences: (1) while strikes involve cessation of work in concert with others, quitting may be done individually; (2) the striker intends to return to his job and he considers himself, as the Taft-Hartley Act considers him,[52] as remaining in the employ of the business, while one who quits has no intent to return to the job; (3) the purpose of the strike is to close the plant for the purpose of enforcing through economic coercion the demands of the workers, whereas the quitting employee severs all connection with his employer and ceases to have any further interest in the employer's business.

Regarding differentiation on the basis of the presence or absence of concerted activity, it is often asserted that illegality cannot be found from the mere fact of concert; that what one may do alone, he also may do jointly with others. Yet the distinction is well established at common law, and is given current recognition in the anti-trust laws.[53]

Suspension of the right to strike does result in some restraint upon the freedom of the worker, but it is only the complete restraint of the individual resulting from compulsory service when the right to quit is suspended that is prohibited by the Thirteenth Amendment, not limitations upon the manner of exercising that right resulting from suspension of the right to strike.[54]

It is thus possible to distinguish striking from quitting, although it must be conceded that this distinction is not razor sharp. For example, the Florida statute gives the individual adversely affected by a strike in a public utility the right to petition for injunction. The court order would undoubtedly enjoin union officers to end the strike, thus aiming at concerted activity. If the union officers should decide in obedience to the injunction to order the men back to work, there would result a restraint upon individual action achieved by indirection. However, the employee could still exercise his right to quit without violating either the injunction or the union command, thus again emphasizing the dis-

[51] See JENSEN, COMPULSORY ARBITRATION OF LABOR DISPUTES (1945).

[52] P.L. 101, 80th Cong., 1st sess., c. 120, § 2(3).

[53] Hogan v. O'Neill, 255 U.S. 52, 41 S.Ct. 222 (1921); Commonwealth v. Judd, 2 Mass. 329 (1807); State v. Hickling, 12 Vroom (41 N.J.L.) 208 (1879); State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

[54] See Parkinson, "Constitutional Aspects of Compulsory Arbitration," 7 ANNALS 44 (1917).

tinction between striking and quitting. It is submitted that the Court should give legal recognition to these distinctions and hold that prohibition of strikes does not constitute involuntary servitude.[55]

Even if it were impossible to distinguish between striking and quitting, prohibition of strikes in certain industries should not be held to violate the Thirteenth Amendment. While the text of the Thirteenth Amendment contains no express exceptions, it is recognized that it does not prevent compulsory service by seamen,[56] by citizens on public highways,[57] or by soldiers.[58] There is little reason why an exception should not be made covering strike action in those businesses in which strikes would seriously endanger the public health or safety, a condition present in certain, but not necessarily all, utility services.

D. *Picketing and the Right to Strike.* The question remains whether the right to strike is one of the liberties protected by the Fourteenth Amendment. *Thornhill v. Alabama*[59] held that there is a constitutional right to engage in peaceful picketing. The rationale of the decision was that picketing is free speech, but the Court intimated that it could be enjoined if violent or if the publication were inaccurate, and in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,[60] an injunction against all picketing was affirmed because of a background of violence. The test applied was apparently something less than a showing of clear and present, grave and immediate, danger to the public welfare which has been said to be necessary to restrict freedom of speech.[61] Thus the Court does not accord picketing the same protection as other free speech, and since the principal purpose of picketing is economic coercion, it is possible to interpret the *Thornhill* case as extending constitutional protection, not to free speech as such, but to the use of economic force by labor as a means of enforcing demands in a labor dispute.

But even under this interpretation, the constitutional guarantee is not absolute. In *Carpenters and Joiners Union v. Ritter's Cafe*,[62] where a cafe owner had contracted for the erection of a building not commercially connected with his restaurant business, and where the cafe was picketed because nonunion labor was employed by the building contractor, there being no dispute between the cafe employees and the owner, the Court affirmed an injunction prohibiting picketing of the

[55] See GREGORY, LABOR AND THE LAW 421 (1946) and Parkinson, "Constitutional Aspects of Compulsory Arbitration," 7 ANNALS 44 (1917), for opposing views concerning whether abolition of strikes imposes involuntary servitude.

[56] Robertson v. Baldwin, 165 U.S. 275, 17 S.Ct. 326 (1897).

[57] Butler v. Perry, 240 U.S. 328, 36 S.Ct. 258 (1916).

[58] Selective Draft Law Cases, 245 U.S. 366, 38 S.Ct. 159 (1918).

[59] 310 U.S. 88, 60 S.Ct. 736 (1940).

[60] 312 U.S. 287, 61 S.Ct. 552 (1941).

[61] Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945).

[62] 315 U.S. 722, 62 S.Ct. 807 (1942).

cafe because the restaurant business had no connection with the building dispute. Thus, the constitutional protection is restricted to the area of the industry within which the labor dispute arose.

As striking, like picketing, is a means of enforcing demands in a labor dispute by economic coercion, it can be argued that the Court should extend to the strike the same constitutional protection given picketing.[63] However, it is hardly to be supposed that the Court will concede that the picketing decisions rest on this dubious basis. The attempt, rather, may be to tie the strike to the picketing cases by asserting that a strike also involves an element of publication. This would clearly be specious. A strike involves publicity, to be sure, but its dominant purpose is to inflict economic injury. Picketing can much more easily, although still with difficulty, be regarded as primarily a means of publicizing the facts of the dispute, the injury to the employer being incidental, although perhaps actionable, depending upon tort principles. If striking were the only effective means of publication, the argument that it should be accorded the same constitutional protection as picketing would have more force. However, the propriety of considering alternative means of publication was recognized in *Cox v. New Hampshire*[64] in which a statute prohibiting parades without special license was sustained against the contention that it constituted a deprivation of freedom of speech. The Court thought it significant that the statute prescribed no measures for suppressing other means of publication such as speech, writing, and display of placards.

E. *Procedural Due Process and State Constitutions.* While the above discussion indicates this writer's opinion that compulsory arbitration would survive the substantive test of constitutionality under the Federal Constitution, questions concerning procedural due process and the effect of state constitutions remain. The Michigan act, which pro-

[63] The following in Stapleton v. Mitchell, (D.C. Kan. 1945) 60 F. Supp. 51 at 61, seems to support such argument: "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community.... Kansas has not only conditioned these rights, but expressly prohibited them and made their exercise a criminal offense. In this setting we think it is the inherent prohibitions of the statute standing alone which impose the unconstitutional restraint, and those against whom the statute is plainly directed should not be required to abide the processes of criminal justice in order to obtain the redress to which they are entitled under the Federal Constitution." The statute involved in the case made it a misdemeanor 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, and provided for fine up to $500, or imprisonment for six months, or both, for violations. Upon action brought by a labor union, the court enjoined enforcement of the statute.

[64] 312 U.S. 569, 61 S.Ct. 762 (1941).

vided for appointment of a circuit judge as chairman of an arbitration board, was declared unconstitutional as a violation of the clause contained in the Michigan Constitution providing for the division of the powers of state government.[65] In the same case a portion of the Michigan Court thought that the failure of the legislature to provide standards to guide the arbitration board in establishing wages and conditions of labor afforded a second ground of invalidity. However, the New Jersey act, which similarly fails to provide such standards, was held constitutional as against the attack that it constituted an unlawful delegation of legislative power.[66] Another serious constitutional question concerning the Michigan act would seem to exist in the lack of provisions for review of the board's decision.

Where the business concerned is engaged in interstate commerce, another, and perhaps the most difficult, question remains concerning the impact of the Taft-Hartley Act upon state jurisdiction over labor relations.[67]

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[65] Local 170, Transport Workers Union of America, C.I.O. v. Gadola, (Mich. 1948) 34 N.W. (2d) 71.

[66] State v. Traffic Telephone Workers, (N.J. Ch. 1948) 22 L.R.R.M. 2469.

[67] See Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 (1948); Watt, "The New Deal Court, Organized Labor, and the Taft-Hartley Act," 7 LAW. GUILD REV. 193 (1947).