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CONSTITUTIONAL LAW-DUE PROCESS OF LAW-*Thornhill* REEXAMINED

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—*Thornhill* RE-EXAMINED—In the spring of 1940, the Isle of *Thornhill*[1] emerged from the watery depths and assumed a position in the Sea of American Constitutional Law. The discoverors of this Isle indicated their success was largely due to certain revelations made known three years before by another highly distinguished explorer.[2] The pronouncement in 1940 of the Isle's existence excited great furor and debate among the professional geographers as to its substance and future utility.[3] In the early days of its discovery, *Thornhill's* area and coastline were not precisely or clearly charted, and only through several subsequent voyages have these important facts become clarified. The most recent expeditions,[4] whose findings were announced on May 8, 1950, have led some geographers to assert that few, if any, traces of *Thornhill* remain to break the waves rolling over the position it formerly occupied.[5] It is not the purpose of this article to rejoice or lament the storming waves which have crumbled and eaten away the lands of *Thornhill*, but rather to discover practically what traces remain and to what extent *Thornhill* may be of use to future voyageurs.

[1] Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940), commented on in 29 MICH. L. REV. 110 (1940).

[2] Justice Brandeis, in Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857 (1937). An interesting debate has arisen as to whether Justice Brandeis was properly understood. It is apparently Justice Frankfurter's present opinion that Justice Brandeis had no intention of stating that peaceful picketing was protected by the Fourteenth Amendment. See footnotes 2 and 3 in International Brotherhood of Teamsters, Chauffeurs, Warehousing & Helpers Union, Local 309 v. Hanke, 339 U.S. 470, 70 S.Ct. 773 (1950). It is difficult to reconcile Justice Frankfurter's present view with his statements in Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943).

[3] Teller, "Picketing and Free Speech," 56 HARV. L. REV. 180 (1942); Dodd, "Picketing and Free Speech: A Dissent," 56 HARV. L. REV. 513 (1943); Teller, "Picketing and Free Speech: A Reply," 56 HARV. L. REV. 532 (1943); Jaffe, "In Defense of the Supreme Court's Picketing Doctrine," 41 MICH. L. REV. 1037 (1943).

[4] Building Service Employees International Union, Local 262 v. Gazzam, 339 U.S. 532, 70 S.Ct. 784 (1950); International Brotherhood of Teamsters, Chauffeurs, Warehousing & Helpers Union, Local 309 v. Hanke, 339 U.S. 470, 70 S.Ct. 773 (1950); Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718 (1950).

[5] Gregory, "Constitutional Limitations on the Regulation of Union and Employer Conduct," 49 MICH. L. REV. 191 (1950).

The decision in *Thornhill v. Alabama* possessed such sweeping breadth as to be subject to divergent and conflicting interpretations, each of which found a measure of support in the Court's opinion. An Alabama statute forbidding all peaceful picketing "without a just cause or legal excuse"[6] was there declared unconstitutional as an abridgement of free discussion guaranteed by the Constitution; the theory of the Court equated peaceful picketing with freedom of speech. The *Swing* case[7] quickly followed. A union of beauty workers had picketed the plaintiff's beauty parlor for organizational purposes. The Illinois court enjoined the picketing on the ground that no proximate relationship of employer-employee existed between the picketers and the picketed. The United States Supreme Court ruled: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."[8] It is essential to note that the Court did not deny to the states the power to draw any circle that would exclude workingmen from peacefully exercising the right of free communication. Thus, the rationale of the *Swing* case made possible a future affirmation of a state's power to enjoin peaceful picketing where the circle was not drawn "so small."[9]

The interjection of violence into the process of picketing presented to the Supreme Court a quite different situation. In *Hotel & Restaurant Employees International Alliance, Local 122 v. Wisconsin Employment Relations Board,*[10] the Court held that a state may enjoin violence taking place on the picket line, as manifestly violence does not constitute an expression of free speech. In *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.,*[11] the Court went one step farther and permitted the enjoining of both violence and peaceful picketing when "the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."[12] Neither of these cases represented any qualification of *Thornhill,* provided the factual hypothesis of the survival of fear is assumed for the *Meadowmoor* decision.

[6] Alabama State Code of 1923, §3448.

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

[8] Id. at 326.

[9] Such an affirmation is exemplified by Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807 (1942).

[10] 315 U.S. 437, 62 S.Ct. 706 (1942).

[11] 312 U.S. 287, 61 S.Ct. 552 (1941).

[12] Id. at 294.

Thornhill was further tested in the *Wohl*[13] and *Angelos*[14] cases. In each of these cases, the United States Supreme Court ruled that the right to picket as protected by the Fourteenth Amendment was not dependent upon the existence of a "labor dispute" as defined by state law. This delineation of the scope of *Thornhill* was only partially revealing, for no indication was given as to whether the constitutionally protected privilege of peaceful picketing was restricted by some broader definition of "labor dispute" than chosen by the state courts in those cases.[15] However, viewing the developments of the past years from the vantage point of 1950, *Thornhill* reached the summit of its powers in the *Wohl* case. For those who had enthusiastically acclaimed a broad application of *Thornhill,* the succeeding years and developments contained only sorrow and disillusionment.

In *Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe,*[16] the Court discovered the proper vehicle to express more fully what it had hinted at in *Wohl* as a possible restriction on peaceful picketing. Ritter had contracted with Plaster for construction of a home; Plaster hired nonunion labor. A union of carpenters picketed a cafe owned by Ritter to induce him to require Plaster to hire union labor. The cafe business suffered a sixty percent decline in patronage. The United States Supreme Court upheld an injunction issued by a court of Texas against such peaceful picketing on the grounds that the restaurant business of Ritter was "wholly outside the economic context of the real dispute";[17] there was no "interdependence of economic interest of all engaged in the same industry."[18] The State of Texas had drawn a proper circle in which to confine the activity of peaceful picketing without infringing constitutional rights. In *Wohl,* there were beauty workers picketing a beauty parlor; in *Ritter,* there were carpenters picketing a restaurant. The circle drawn by Texas was calculated on an economic dimension which permitted peaceful picketing within the circumference of each industry only.

[13] Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters v. Wohl, 315 U.S. 769, 62 S.Ct. 816 (1942).

[14] Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943).

[15] Indeed, it has never been clarified as to whether peaceful picketing must be an incident to the labor-management scene to fall within the range of Thornhill, or whether picketing for such purposes as lower prices or rents is similarly protected. See, "Non-Labor Picketing and Thornhill," 41 COL. L. REV. 89 (1941); 98 UNIV. PA. L. REV. 545 (1950).

[16] 315 U.S. 722, 62 S.Ct. 807 (1942).

[17] Id. at 726.

[18] Id. at 727.

The decision in *Giboney v. Empire Storage & Ice Co.*[19] cut completely across this industry-measured circle of protected peaceful picketing with the introduction of the unlawful purpose doctrine. In this case, the union was seeking to unionize peddlers of ice and therefore requested of Empire, a wholesaler in ice, not to sell to nonunion peddlers. When Empire refused, it was picketed. Over eighty percent of Empire's peddlers were union men, so they stopped deliveries to and from Empire. The United States Supreme Court held that such peaceful picketing was enjoinable by the state on the theory that "all of appellants' activities . . . constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony."[20] Other portions of the Court's opinion appeared to state that the peaceful picketing, even though not in itself a violation of Missouri's anti-restraint of trade law, was nevertheless enjoinable because it sought to induce Empire to violate this law. In any case, two factors in *Giboney* should be noted: (1) The State of Missouri had declared the illegality of the trade practices through its legislature, and (2) Empire could not accede to the union's demands without violating Missouri law. Several writers, in commenting on *Giboney*, reasoned that picketing for a purpose unlawful at common law, as distinguished from statutory law, would not be enjoinable.[21] The three decisions of May 8, 1950, have proved their predictions inaccurate.

The case of *Gazzam v. Building Service Employees International Union* 262[22] will be considered first, for it represents only a moderate extension of the *Giboney* rationale. Each of the other two cases, in the order treated, constitutes a further step toward narrowing *Thornhill's* operative scope. In *Gazzam*, the union was seeking to organize the employees in plaintiff's hotel. The employees expressly informed the plaintiff they did not wish to join the union. Thereafter, when the plaintiff refused to sign a contract with the union containing either a closed or union shop provision, the union placed pickets about the hotel. The Washington court enjoined the picketing on the grounds that under state statute and the common law of the state, it was unlawful for an employer to coerce or compel his employees to join a union. Thus, under *Giboney* theory, picketing to induce an employer to violate state law is enjoinable. The United States Supreme Court,

[19] 336 U.S. 490, 69 S.Ct. 684 (1949).
[20] Id. at 498.
[21] 62 HARV. L. REV. 1402 (1949); 44 ILL. L. REV. 714 (1949).
[22] 339 U.S. 532, 70 S.Ct. 784 (1950).

in affirming the state court's decision, stated, "An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative."[23] It was thereby clarified that picketing by itself did not have to violate some law of the state; it was sufficient if the picketing sought to induce the employer to commit an illegal act. *Gazzam* further demonstrated that the statute on which the state relies to establish the illegality of the employer's act need not possess criminal sanctions for violations thereof. The statute in *Gazzam* which forbade the employer to interfere with his employees' selection of a bargaining representative was merely a statement of policy in the state labor disputes act. In a fairly practical sense, the employer was free to accede to the union's demands without fear of legal repercussions.

In *International Brotherhood of Teamsters, Chauffeurs, Warehousing & Helpers' Union, Local 309 v. Hanke,*[24] the plaintiff, a partnership which dealt in auto repair work and the sale of used cars, had no employees. The local automobile salesmen's union made an agreement with the Independent Automobile Dealers' Association to the effect that showrooms and lots would be closed after 6:00 P.M. on week days and entirely closed on Saturdays, Sundays, and holidays. The plaintiff, not a member of this association, was requested to respect the scheduled working hours, but declined. A single picket was placed at plaintiff's business location and the business declined substantially. The Washington Supreme Court affirmed the issuance of an injunction restraining such picketing on the authority of the *Gazzam* case. *Gazzam's* similarity is highly questionable. There the employer could not accede to the union's demand without violating state law, admittedly only hortatory. In *Hanke,* the employer possessed complete legal freedom to grant the union's requests. Each case spoke of "unlawful coercion," but this term referred to quite different acts in each case. In *Gazzam,* the unlawful coercion was the employer compelling his employees to join a union. In *Hanke,* the unlawful coercion was the peaceful picketing itself, which had been elevated to a constitutional right by *Thornhill.* The United States Supreme Court, in affirming the issuance of the injunction, found the question to be of "The power of the State to declare a policy in favor of self-employers and to make conduct restrictive of self-employment unlawful. . . ."[25] The Court's conclusion was, ". . . we cannot conclude that Washington, in holding the picketing in

[23] Id. at 539.
[24] 339 U.S. 470, 70 S.Ct. 773 (1950).
[25] Id. at 480.

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."[26] The enunciation of this test in the "free speech" area is surprising considering the usual tests applied by the Court when a state law is challenged as violative of First Amendment rights. The negative form (so inconsistent with rooted traditions of a free people) is more consistent with tests of the constitutionality of the exercise of state power in the economic area.

The case of *Hughes v. Superior Court*[27] should demonstrate beyond any doubt the resolute intention of the United States Supreme Court to withdraw itself as an active force from the process of shaping the permissible scope of peaceful picketing. A nontrade organization of Negroes picketed certain stores urging the owners to hire Negro clerks in proportion to Negro patronage. These stores, located in Negro districts, depended greatly for their success on customers of the Negro race. The California Supreme Court upheld the issuance of an injunction restraining picketing by drawing an astonishing analogy to a prior California decision which had forbidden the conjunction of a closed union with a closed shop.[28] The picketing Negroes were informed by the California court that discrimination in favor of the Negro race was an unlawful purpose in spite of the fact that the discrimination by the store owners against the Negro race, while to be deplored, was nevertheless not forbidden by state law. It should be noted that *Hughes* was not a repetition of the *Hanke* case. In *Hanke,* the Washington court sought to protect the freedom of a self-employed person to join or not join a union. If that person chose freely to join, no harm was done for he had then exercised the very choice which the state had sought to protect. However, the purpose of the California court in *Hughes* was to discourage racial discrimination. Where an employer practices with legal impunity a steady, deliberate scheme of discrimination against the employment of Negroes, by what standard of justice could a court term unlawful the objective of reducing the scope of such discrimination to a proportion equal to the racial patronage of the store? Here was one of the strongest cases possible for the United States Supreme Court to rule that the state had "struck a balance so inconsistent with rooted traditions of a free people" that peaceful picketing under such circum-

[26] Id. at 478-79.

[27] 339 U.S. 460, 70 S.Ct. 718 (1950).

[28] James v. Marinship Corp., 25 Cal. (2d) 721, 155 P. (2d) 329 (1944). For an excellent refutation of the "analogy," see the dissenting opinion of Justice Carter in Hughes v. Superior Court, 32 Cal. (2d) 850, 198 P. (2d) 885 (1948).

stances could not be enjoined. If this test possessed any real vitality or substance, *Hughes* presented an excellent opportunity for its expression. Instead, the Court simply stated, "If . . . a state chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will."[29]

The conclusion seems inevitable that *Thornhill* has been relegated to the single ground of denying to the states the power to ban *all* peaceful picketing. Through use of the unlawful purpose formula, the substance of the *Wohl* and *Swing* cases has been overruled. The state courts are now advised as to the existence of certain clear channels through which they may reach their destination of regulation of peaceful picketing. These channels have been created to neutralize the *Thornhill* attempt to thrust peaceful picketing, by nature possessed of both speech and nonspeech characteristics, into the "free speech" concept. It is now apparent that picketing was conceptually incapable of this characterization. Hence, peaceful picketing, as interpreted by the Court, has undergone a process of bewildering vacillation between the clearly defined concepts of free speech and economic conflict. Some writers have sought to dissect peaceful picketing into "signal" and "publicity" categories,[30] but the *Hughes* case has apparently repudiated this distinction, for there the pickets lacked any trade union allies who would, upon signal, align themselves against the employer. The states are now free for all practical purposes to regulate peaceful picketing without fear of conflict with *Thornhill.*

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[29] Hughes v. Superior Court, 339 U.S. 460 at 468, 70 S.Ct. 718 (1950).

[30] 98 UNIV. PA. L. REV. 545 (1950); Cox, Report of Labor Relations Law Section, Committee on State Legislation, American Bar Association 11 (1949). Professor Charles O. Gregory disapproves of this distinction. See 49 MICH. L. REV. 191 (1950).