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STRIKES, PICKETING AND THE CONSTITUTION

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The law's first response to organized labor activities was to attempt to define by judicial decision the ends for which employees might resort to economic weapons against an employer,[1] the weapons which they might use in pursuit of lawful objectives,[2] and the occasions on which resort to economic weapons would be curtailed, as in the case of a nationwide railroad strike, because of the danger of a public catastrophe.[3] The effort was unsuccessful. The judge-made law was neither a reflection of the enduring sentiment of the community nor a response to its needs. The subsequent reaction, which took its initial legislative form in the Clayton Act[4] and reached fruition in the enactment of the Norris-LaGuardia Act[5] and parallel state legislation,[6] led to the virtual elimination of law from the resolution of industrial conflicts and left their adjustment to the processes of negotiation backed by economic weapons. For a time, indeed, there was reason to believe that this view of labor policy had partly achieved constitutional status.[7]

Our primary reliance is still upon collective bargaining, but during the middle forties there was a widespread, if not deep-seated, return to the view that the law has a useful role to play in the conflicts of interest between employers and employees. Many of the extreme provisions found in both state and federal labor legislation enacted in these years were the result of an uncritical public reaction to newspaper accounts of the excesses of "the public-be-damned" type of union leaders, a reaction which industrialists who had never accepted collective bargaining as a permanent institution were quick to turn to their advantage. But these circumstances, I suspect, would have had little influence in the absence of two more fundamental factors. One factor was an increasing awareness of the interdependence of our economy which was widely believed to make economic warfare in basic industries intolerable. The second underlying factor was the conviction that unions sometimes pursued objectives quite inconsistent with accepted notions of fairness and sound policy, and sometimes used weapons that ought to

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1. *E.g.*, Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900).
2. *E.g.*, Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).
3. *In re* Debs, 158 U.S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092 (1895).
4. 38 STAT. 738 (1914), 29 U.S.C.A. § 52 (1947).
5. 47 STAT. 70 (1932) 29, U.S.C.A. §§ 101 *et seq.* (1947).
6. *E.g.*, N.J. STAT. ANN. §§ 2:29-77 *et seq.* (1939); N.Y. CIV. PRAC. ACT § 876-a; WIS. STAT. §§ 103.51 *et seq.* (1949).
7. See, *e.g.*, Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940); Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan. 1945), *appeal dismissed by stipulation*, 326 U.S. 690 (1945).

be banned. Strikes against labor board certifications, or by a closed union for the closed shop, illustrate objectives that most of our society, including union men, condemn. There would be greater debate, but one would also find a large measure of agreement, on the undesirability of such methods of pursuing lawful objectives as mass picketing and extreme forms of secondary boycott. Out of the melange grew a variety of statutory restrictions upon a union's right to invoke its economic power.[8]

It was inevitable under our constitutional system that labor, having been defeated in the legislatures, should carry the fight to retain its immunity in the courts. It would be no more than an example of the Court's functioning as a balance wheel if it were to invalidate the most extreme and ill-considered restrictions upon labor's right of self-help. Thus the most important constitutional litigation in the field of labor relations during the past decade has concerned the power of the state or federal government to restrict the use of the strike, the picket line, the blacklist, the boycott and other economic weapons. It seems probable that this will also be a predominant issue of the nineteen fifties unless it is pushed aside by the activities of a new National War Labor Board.

Although the various forms of concerted employee activity have too much in common to permit complete separation even for the purposes of discussion, considerably greater clarity of analysis can be achieved by focussing attention upon one form at a time and upon the simplest, first.

I. The Strike

The strike is the simplest and most fundamental of labor's economic weapons. Its rudiments are the concerted cessation of work by agreement among employees for the purpose of inflicting upon their employer losses sufficient to induce him to grant the terms that they demand. Quite plainly employees have an interest in using the strike as a means of securing objectives which they deem important. The question is whether this interest is accorded recognition as a constitutional privilege, either qualified or absolute. *A priori* it might be a privilege guaranteed by either the Fifth, Thirteenth or Fourteenth Amendment.

A. *The Thirteenth Amendment*

In view of the Court's recent approval of Mr. Justice Brandeis' famous dictum that there is no absolute right to strike,[9] it may seem supererogatory

8. For short descriptions of the legislation, see Dodd, *Some State Legislatures Go to War—On Labor Unions,* 29 Iowa L. Rev. 148 (1944); Annual Reports of the Committee on State Legislation, Labor Law Section of the American Bar Ass'n, 72 A.B.A. Rep. 393 (1947), 73 *id.* 113 (1948), 74 *id.* 151 (1949).

9. Dorchy v. Kansas, 272 U.S. 306, 311, 47 Sup. Ct. 86, 71 L. Ed. 248 (1926), quoted with approval in International Union, U.A.W. v. Wisconsin Employment Relations Board, 336 U.S. 245, 259, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949).

to analyze again the reasoning which has led the courts to repudiate the contention that involuntary servitude is imposed by the restriction of freedom to strike. But the analysis is prerequisite to resolution of the infinitely more difficult problem of determining where the line lies between permissible restrictions upon strikes and forbidden interference with the individual's right to be free from compulsory servitude.

One group of cases holds the Thirteenth Amendment inapplicable to strikers because a striker suspends his services without permanently severing the employment relation, hoping thereby to induce his employer to accede to his demands.[10] The factual distinction is undeniable but its significance for constitutional purposes, apart from the element of combination, seems doubtful. While the immediate purpose of the Thirteenth Amendment may have been to abolish a system of slavery under which a man might be owned as a chattel, there was also the broader intention "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."[11] The amendment seeks to maintain "a system of completely free and voluntary labor"[12] because it is only under such a system that workers may improve their wages and conditions of employment.

> "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[13]

Under this philosophy can it matter whether the worker quits permanently or merely leaves the establishment until conditions are changed? In the former case he may be said to be exercising the right to sell his services to the highest bidder, leaving others to take his former job, while in the latter case he is seeking to injure the employer by cutting off the supply of labor. But this reasoning scarcely justifies a constitutional distinction, for in either case the improvement of employment conditions ultimately depends upon a withholding of labor from marginal employers until they offer more. Cutting off the supply of labor by a strike is likely to be more effective—and also to have greater impact upon the public—not because the

10. NLRB v. Local 74, United Brotherhood of Carpenters & Joiners, 181 F.2d 126, 132 (6th Cir. 1950), *cert. granted*, 340 U.S. 902 (1950); NLRB v. National Maritime Union, 175 F.2d 686, 692 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950); France Packing Co. v. Dailey, 166 F.2d 751 (3d Cir. 1948); People v. United Mine Workers, 70 Colo. 269, 201 Pac. 54 (1921); Dayton Co. v. Carpet, Linoleum and Resilient Floor Decorators' Union, 229 Minn. 87, 39 N.W.2d 183 (1949), *appeal dismissed*, 339 U.S. 906 (1950).

11. Bailey v. Alabama, 219 U.S. 219, 241, 31 Sup. Ct. 145, 55 L. Ed. 191 (1911).

12. Pollock v. Williams, 322 U.S. 4, 17, 64 Sup. Ct. 792, 88 L. Ed. 1095 (1944).

13. *Id.* at 18.

quitting is temporary but because it almost always involves an attempt to induce other workers to follow the same line of action. Since we are accustomed automatically to link concerted action with temporary suspension of work, it is easy practice to focus on either characteristic. When they are separated for the purposes of logical analysis, however, the temporary or permanent character of the quitting seems irrelevant.[14]

In modern industrial society the right of the individual to change employers, or alone to suspend his services, is often scant protection against substandard wages or oppressive conditions of employment. Thirty years ago Mr. Justice Taft stated the reason for strikes:

> "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court."[15]

Pressing Mr. Chief Justice Taft's statement a little further, it may be urged with considerable force that in terms of the purposes of the Thirteenth Amendment the strike is the modern counterpart of the right to change employers, hence the application of the amendment ought to be extended to cover the strike. Opposed to this consideration is the fact that the very conditions which make group action the worker's only effective method of self-help also distinguish strikes from individual quittings. The coherent action of an organized group carries power that could never be exercised by individuals but, in our highly integrated economy, it also has vastly greater and wider repercussions.

The latter considerations have usually been thought predominant. Numerous cases have held that the prohibition of a strike does not violate the Thirteenth Amendment because the amendment is concerned only with the freedom of an individual.[16] The distinction has been conscientiously observed in federal and state laws dating back at least to the Railway Act of

14. For a contrary view, see Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes,* 27 TEXAS L. REV. 587, 625-26 (1949).

15. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209, 42 Sup. Ct. 72, 66 L. Ed. 189 (1921).

16. Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, 2 F.2d 993 (N.D. Ill. 1924), *aff'd,* 6 F.2d 444 (7th Cir. 1925); Local 170, Transport Workers Union v. Gadola, 322 Mich. 332, 34 N.W.2d 71 (1948); State v. Traffic Telephone Workers' Federation, 2 N.J. 335, 66 A.2d 616 (1949); Wisconsin Employment Relations Board v. Amalgamated Ass'n of Street etc. Employees, 257 Wis. 43, 42 N.W.2d 471 (1950), *cert. granted,* 340 U.S. 874 (1950); *see* Texas & N.O.R.R. v. Brotherhood of Railway & S.S. Clerks, 281 U.S. 548, 565-67, 50 Sup. Ct. 427, 74 L. Ed. 1034 (1930).

1927.[17] On the whole, the conventional analysis seems sound. Where the force and consequences of group action are so different from anything which individuals could set in motion acting alone—either today or when the Thirteenth Amendment was adopted—it would be unwise to force both kinds of conduct into a single constitutional pigeon hole. The constitutional problem of reconciling the public interest in uninterrupted production with the interest of the worker in self-improvement through group action can be handled better under the due process clauses of Fifth and Fourteenth Amendments.

Nevertheless, the traditional distinction between combination and individual action is not without its difficulties; and it is in this borderline area that doubtful cases may arise. In 1947 the United Mine Workers advanced the transparent claim that the work stoppage in the bituminous coal mines did not result from a strike sponsored by the union but from the decision of individual miners to suspend work because of unsatisfactory conditions of employment.[18] The claim was advanced again in 1950 under circumstances which gave it considerable plausibility, although there are those who say that the district court's refusal to hold UMW responsible resulted from judicial blindness to facts of common knowledge.[19] Whatever the truth may be, it requires no stretch of the imagination to envisage a situation in which employees steeped in trade unionism, with strong group loyalties, stop work *en masse* without a signal from their leaders, further organized activity, or even entering into a new agreement to act together. Would the imposition of sanctions against individual workers under these circumstances violate the Thirteenth Amendment?

If such a spontaneous strike were merely the parallel action of many individuals, it would be easy to say that since the laborer has an absolute right to suspend work, or to quit his employment, he can scarcely be supposed to lose the right merely because other laborers wish to take similar action. Actually, two other elements are present. First, each worker knows that all are taking, and will continue to take, parallel action in quitting or returning to work, not by coincidence but in order to exert the power of a combination. While they may suffer from lack of the organization and common direction that gives strength to strikes sponsored by a union, they nevertheless have the power that goes with concert of action. Second, this kind of concerted activity raises serious problems—probably it is possible—only when the work-

17. Railway Labor Act, § 9(8), 44 STAT. 577, 586 (1926), 45 U.S.C.A. § 159(8) (1943), explained SEN. REP. No. 222, 69th Cong., 1st Sess. 4 (1926); War Labor Disputes Act, 57 STAT. 163 (1943), 50 U.S.C.A. App. §§ 1501 *et seq.* (1944); FLA. STAT. ANN. § 453.15 (Supp. 1950); PA. STAT. ANN. § 213.16 (Purdon, Supp. 1947); WIS. STAT. § 111.64 (1949).

18. United States v. United Mine Workers, 77 F. Supp. 563 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 871 (1949).

19. United States v. United Mine Workers, 89 F. Supp. 179 (D.D.C. 1950), appeal pending.

ers have been members of a well-organized, tightly knit union. The bonds created by common loyalties and a long history of successful group activities substitute for explicit agreement and unified command.

Some of the major problems of constitutional law, in the field of labor laws if not elsewhere, arise from the necessity of shaping guarantees born of an individualistic society to the conditions resulting from the solidarity of organized groups. It will not do simply to push all constitutional safeguards aside on the ground that they pertain to individuals and not to groups. Yet it seems probable that the Thirteenth Amendment should be held inapplicable to group activity of any kind. In the past the rights which it guarantees have been regarded as absolute. Exceptional obligations have been permitted, where they had had historial acceptance, such as the duty to bear arms,[20] to work on the highways,[21] and to fulfill a contract as a seaman.[22] The pressure of a wartime emergency may extend the government's power to compel citizens to bear arms to requiring them to render other services for which there is a national necessity even though such a doctrine would involve forced labor for a private employer reaping private profit.[23] But to take the next step and uphold interdiction of a strike on the ground that service may be compelled whenever the public need is great enough, rather than on the ground that the Thirteenth Amendment does not apply to group activities, would go beyond the recognition of exceptional kinds of service and lay the foundation for a doctrine that the right to be free from involuntary servitude is not absolute but may be qualified by the legislature if the public interest requires. To refuse to extend the Thirteenth Amendment to group activities would not deny organized workers all constitutional protection against oppressive legislation. The Fifth and Fourteenth Amendments remain applicable. Hence to remit groups to the latter guarantees seems wiser than to analyze group activities in terms that may strain the chief constitutional bulwark of individual freedom.

B. *The Fifth and Fourteenth Amendments*

On principle the interest of employees in freedom to strike is cognizable under the Fifth and Fourteenth Amendments. Recourse to a strike involves the association of individuals into a group and the combined withholding of personal services. Withholding personal service is surely an exercise of "liberty" in the constitutional sense; and although the point is not clear on the decisions, the concept seems broad enough to include freedom of association. The fact that the strike is a weapon—a form of self-help—used to advance the workers' interest in wages, hours and other terms and conditions

20. Selective Draft Law Cases, 245 U.S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349 (1918).
21. Butler v. Perry, 240 U.S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672 (1916).
22. Robertson v. Baldwin, 165 U.S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715 (1897).
23. *Cf.* Black and Douglas, JJ., concurring in United States v. United Mine Workers, 330 U.S. 258, 328, 329, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947).

of employment does not militate against the claim to some degree of constitutional protection. A constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital must recognize the worker's interest in the conditions under which he labors and the price he receives for his work. And, as Mr. Chief Justice Taft observed in an opinion quoted above,[24] modern industrial organization makes the worker's opportunity to improve his wages and conditions of employment dependent upon association and collective bargaining, backed by freedom to strike.

It may clarify these generalizations to illustrate them in caricature. In the State of Ames cotton is king. There would seem little room to question the power of the Ames legislature to require employers and employees to submit to a state board of arbitration for final and binding decision, without strike or lockout, any labor dispute threatening to interrupt the ginning, compressing or storing of cotton during the harvesting season. This is not an unreasonable method of securing the uninterrupted operation of businesses which, in Ames, might well be deemed essential to the public welfare.[25] But the Ames legislature, instead of providing for compulsory arbitration, has enacted a statute, the sole consequence of which is to make it a crime for the employees of any employer engaged in ginning, compressing or storing cotton to strike as a result of a labor dispute. No Ames statute fixes minimum wages or provides a method of arbitration. Economic conditions would affect the impact of the legislation, and might save it from invalidity if the labor market were sufficiently tight for the laws of supply and demand to protect the individual laborer. But in most Ames communities employment opportunities are more limited, and one consequence of the legislation is likely to be to compel workers to accept whatever wages their employers may offer.

It is submitted that the supposed statute is unconstitutional. The fault is not that the statute curtails the right to strike. Continuous operation of an essential industry is an end which the legislature surely may seek to achieve. The vice is that the legislature chose an arbitrary method of attaining a permissible goal. Despite the availability of alternative remedies, the statute sacrifices the employees' interest in fair wages completely by depriving them of their only effective weapon in competing with employers over the division of the joint product of capital and labor. Many employee interests may be subordinated to the general welfare, but it is submitted that the interest in fair wages is too great to be overridden merely on the ground of legislative preference for this method of securing continued operation of the industry. The guaranty of due process demands "that the law shall not be unreasonable,

24. See p. 577 *supra.*
25. See pp. 581-83 *infra.*

arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[26]

If it is correct to conclude that a restriction upon strikes is invalid under the Fifth or Fourteenth Amendment unless the requirements of substantive due process are satisfied,[27] the constitutionality of each restriction must be determined by pursuing two lines of inquiry. Are the interests which the state has sacrificed overbalanced by the interests which it has sought to secure? Was the sacrifice necessary to advance the preponderant interests? Striking the balance requires value judgments for which there is no final measure however often we may speak of "a rational basis," "a clear and present danger," or "a balance [not] inconsistent with rooted traditions of a free people."[28] But detailed analysis can help to canalize the judgment by substituting understanding of the probable consequences of the legislation for the emotional impact of slogans like "the public interest" and "the right to strike."

(1) Strikes Threatening an Imminent Public Disaster

During the last five years a number of states have enacted statutes outlawing strikes which threaten to interrupt the operation of public utilities and substituting an impartial determination of any dispute over wages, hours and working conditions for resolution by strike or lockout. Although the Supreme Court has recently held that these statutes cannot be applied to industries covered by the National Labor Relations Act because of federal pre-emption,[28a] statutes had been uniformally sustained by state tribunals against attack as a denial of due process of law.[29]

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26. Nebbia v. New York, 291 U.S. 502, 525, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934). The familiar closing paragraph of Mr. Justice Brandeis' dissenting opinion in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488, 41 Sup. Ct. 172, 65 L. Ed. 349 (1921), does not support the conclusion that a legislature is always free to sacrifice the interests of one party to a labor dispute, without examination of its merits, whenever conditions are such that they "cannot continue their struggle without danger to the community." His conclusion was that the legislature "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

27. The above conclusion is sometimes opposed on the ground that since the state has power to forbid all combinations to fix prices, it must have power to forbid all combinations to fix wages. There are three answers to the argument: (1) A distinction should be recognized between combinations relating to the distribution of property and associations of individuals in the performance of personal services. (2) The antitrust laws deal primarily with the further combination of prior aggregations of capital. (3) If and when employees attain an economic position comparable to businesses subjected to the antitrust laws, it will be time enough to consider where a strike for higher wages should not be equated to price-fixing schemes for constitutional purposes.

28. International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 479, 70 Sup. Ct. 773, 94 L. Ed. 995 (1950).

28a. Amalgamated Ass'n of Street, etc., Employees v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 Sup. Ct. 359 (1951).

29. Wisconsin Employment Relations Board v. Amalgamated Ass'n of Street etc. Employees, 257 Wis. 43, 42 N.W.2d 471 (1950), *rev'd on other grounds,* 340 U.S. 383, 71 Sup. Ct. 359 (1951); see Local 170, Transport Workers Union v. Gadola, 322 Mich. 332, 34 N.W.2d 71 (1948); State v. Traffic Telephone Workers' Federation, 2 N.J. 335, 66 A.2d 616 (1949). The last two cases invalidated the Michigan and New Jersey statutes

However unwise compulsory arbitration may be, the decisions are sound enough on the "due process" issue. In the main, the statutes assure both sides a fair hearing in which their respective interests will be evaluated and the balance struck.[30] Nor is the denial of freedom to strike, standing alone, enough to invalidate the legislation. Workers resort to concerted action because it increases their power to influence the terms and conditions at which they are employed. The strike is a means to an end. There is no reason, therefore, to value it more highly than the interest which it is used to advance. Those who would challenge the constitutionality of compulsory arbitration laws must do so on the ground that they have a constitutional right to bargain collectively.

There is persuasive evidence that collective bargaining in the form of negotiation over wages and other basic conditions of employment cannot survive in an industry subject to compulsory arbitration. Government regulaiton tends to supersede private responsibility and so, in turn, breeds still greater reliance on the state.[31] But a collective bargaining agreement is a private contract, and it is too late in the day to contend that liberty to fix wages by private contract cannot be restricted. In 1923, *Charles Wolff Packing Co. v. Court of Industrial Relations*[32] held a compulsory arbitration law unconstitutional upon this ground when applied to a packing-house, but the Court recognized that a different rule would prevail with respect to businesses affected with a public interest.[33] Later cases upholding wage and hour laws effectively repudiated the constitutional philosophy underlying the *Wolff* decision,[34] and the decision itself was overruled in the closed-shop cases.[35] The Court "has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal con-

for defects which could be cured. The New Jersey statute was amended and has now been sustained. New Jersey Bell Tel. Co. v. Communications Workers of America, 5 N.J. 354, 75 A.2d 721 (1950).

30. In the *New Jersey Bell Telephone* case, *supra* note 29, it was held, partly on federal grounds, that the arbitrators were powerless to award a union security clause. There is also a common report, to which I have no reference, that under the Wisconsin arbitration law issues normally dealt with in collective bargaining cannot be the subject of an award against a company because they curtail management prerogatives. It is possible that such restrictions on the determination of the merits of a controversy would permit attacking the statute as arbitrary in its method of securing uninterrupted public utility services. See pp. 580-81, 590-91.

31. Kennedy, *The Handling of Emergency Disputes*, in PROC. 2d ANN. MEETING INDUST. REL. RES. ASS'N 14 (1949).

32. 262 U.S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103 (1923).

33. Wilson v. New, 243 U.S. 332, 347, 352, 37 Sup. Ct. 298, 61 L. Ed. 755 (1917).

34. Olsen v. Nebraska, 313 U.S. 236, 61 Sup. Ct. 862, 85 L. Ed. 1305 (1941); United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937); Nebbia v New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1937).

35. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 Sup. Ct. 251, 93 L. Ed. 212 (1949).

stitutional prohibition, or of some valid federal law."[36] Although this attitude had become familiar in cases involving business regulations, the closed shop cases were the first in which the new constitutional philosophy was applied to legislation directed against labor unions. If a state can regulate wages and prices because of their effect upon the economy or standard of living, *a fortiori* it has power to avoid a public catastrophe by resolving wage disputes threatening to cut a community off from light, power or fuel.

Yet compulsory arbitration cannot be wholly assimilated to previous regulations of wages and prices. Wage and price regulations control the terms of agreements made voluntarily; they leave the parties legally free not to enter into the relationship. The purpose of compulsory arbitration laws, on the contrary, is to compel the parties to maintain an existing relation between the company and the employees as a group. Furthermore, minimum wage laws and price regulations have to do primarily with the use and expenditure of property whereas the elimination of collective bargaining over wages, under some circumstances, would have the practical, economic effect of forcing men to labor upon the terms of the arbitration award. The pressure would be slight where individuals had real opportunities to exercise their legal right to seek other employment but as employment opportunities diminished, the pressure would increase.

At present compulsory arbitration is confined to highly important businesses, chiefly public ultilities. The individual worker's right to seek other employment furnishes a substantial escape from compulsion to labor upon terms which he is powerless to control. In such industries the justification for the legislation is at its peak. However, if the scope of compulsory arbitration laws were extended under public pressure for an easy escape from the inconvenience and annoyance of strikes, the interference with freedom would increase, and the justification might diminish, to such an extent as to put the issue of constitutionality in serious doubt.

Sections 206 to 210 of the Taft-Hartley Act,[37] which authorize injunctions delaying strikes for 75 days, raise a somewhat different question. Since the injunction deprives the workers of bargaining power during most of the waiting period, the law sacrifices their interest in the immediate improvement of wages and other conditions of employment. Against this injury must be balanced (1) the public interest in uninterrupted production in vital industries; (2) the belief of Congress that the delay would afford time to work out a peaceful solution of the controversy; and (3) the worker's right to seek a retroactive settlement. There is no reason to question the uniform decisions upholding these provisions of the Act.[38]

36. *Id.* at 536.
37. 61 STAT. 136, 155-56 (1947), 29 U.S.C.A. §§ 176-80 (Supp. 1950).
38. *E.g.*, United States v. United Mine Workers, 89 F. Supp. 179 (D.D.C. 1950);

(2) Strikes for "Unlawful Objectives"

Under the traditional common law analysis peaceful concerted activities were tortious and enjoinable if the employees' objective was judged insufficient to justify the intentional infliction of harm.[39] Insufficient objectives came to be called "unlawful" in the special jargon of labor law. The usage is unfortunate. The term describes at least three kinds of purposes: (1) To induce another (usually the employer) to commit a crime, tort or other breach of legal duty. (2) To induce another to engage in conduct which is against declared public policy but which is not prohibited by law. (3) To induce another to engage in conduct which is lawful and not contrary to public policy but which the court deems of such slight benefit to the employees as not to justify a strike.[40]

(1) There can be little doubt concerning the power of state and federal governments to forbid strikes for the first kind of objective. A number of states have enacted laws outlawing closed shop, union shop and maintenance of membership agreements in order to protect the freedom of the individual. The statutes are constitutional.[41] No jurisprudence could tolerate such obvious self-contradiction as to uphold these statutes but deny the states power to deal with conduct which had no purpose except compelling violation of the statute or punishing compliance. In pure theory this principle may even be applicable to the conduct of individuals, and perhaps the state should be allowed to deal with those who leave their jobs for such a purpose. In practice, however, this application of the principle would involve too dangerous an inquiry into individual motivation. A worker may prefer not working to laboring under the conditions which the state prescribes. He may move to another shop because he genuinely prefers the exclusive company of union members. For the states to intervene in these instances would curtail liberty of the person to a degree requiring far greater justification than that required for an interference with liberty of contract. And since no sure way can be devised in which to judge the individual's motive, it is better to leave individual quittings uncontrolled. Perhaps it was some such thought that led Mr. Justice Murphy and Mr. Justice Rutledge to insist that the *Lincoln Federal Labor Union* decision should not be construed either to permit a

United States v. International Longshoremen's and Warehousemen's Union, 78 F. Supp. 710 (N.D. Cal. 1948); United States v. United Mine Workers, 77 F. Supp. 563 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 871 (1950).

39. RESTATEMENT, TORTS § 775 (1939).

40. For example, it has long been law in Massachusetts that closed shop contracts are lawful and, when voluntarily executed, will be enforced. Nevertheless, until the enactment of a statute in 1950, strikes for union security contracts were enjoined. *Compare* Hamer v. Nashawena Mills, Inc., 315 Mass. 160, 52 N.E.2d 22 (1943), and earlier cases cited therein, *with* Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N.E.2d 1 (1943), and earlier authorities.

41. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 Sup. Ct. 251, 93 L. Ed. 212 (1949).

state to make illegal the concerted refusal of union members to work with nonunion men or to imply that such a strike might be enjoined without violation of the Fourteenth Amendment.[42]

The caveat has less merit in the case of organized strikes and boycotts. Group action has no value to workers motivated by a preference for idleness or other employment. Workers resort to concert of action because it increases their power to induce the employer to act in the way they desire. There is no reason, therefore, to value the strike more highly than the interest which it is used to advance. Where the state has constitutionally sacrificed that interest to competing desiderata, as many states did in outlawing the closed or union ship, it also has power to interdict strikes in pursuit of the forbidden objective. The decision in *Giboney v. Empire Storage & Ice Co.*[43] establishes this rule.

(2) It is equally plain that there is no constitutional right to strike for the purpose of inducing another to engage in conduct which violates declared public policy but which has not been prohibited by law. The issue was settled in *Building Service Employees Union v. Gazzam.*[44] The anti-injunction law of the State of Washington contains a conventional recital, copied from the Norris-LaGuardia Act, which declares that the individual employee "shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives [for the purpose of negotiating terms and conditions of employment] or in self-organization or in other concerted activities. . . ."[45] There is no statute implementing the declaration, but the Supreme Court of Washington relied upon it in issuing a decree restraining a union from picketing a hotel in support of the union's demand for recognition as the bargaining representative of the hotel employees under a union security contract, a demand which was pressed despite the employees' desire not to be represented by the union. The Supreme Court of the United States affirmed. Under the so-called public policy of Washington, Mr. Justice Minton said,

> "it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the

42. "But the right to prohibit contracts for union security is one thing. The right to force union members to work with nonunion workers is entirely another. Because of this difference, I expressly reserve judgment upon the later question until it is squarely and inescapably presented. Although this reservation is not made expressly by the Court, I do not understand its opinion to forceclose this question." American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 559, 69 Sup. Ct. 258, 93 L. Ed. 222 (1949).

43. 336 U.S. 490, 69 Sup. Ct. 684, 93 L. Ed. 834 (1949).

44. 339 U.S. 532, 70 Sup. Ct. 784, 94 L. Ed. 1045 (1950). This case, like the *Hughes* and *Hanke* decisions, which are next to be discussed, involved picketing. All three decisions, however, appear equally applicable to strikes.

45. WASH. REV. STAT. §§ 7612-1 *et seq.* (Remington, Supp. 1949). An identical provision is found in the Norris-LaGuardia Act and similar state laws. Apparently, the Supreme Court of Washington is the only one to interpret the provision as referring to anything more than employer support of company dominated unions.

> designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim."[46]

Hughes v. Superior Court[47] makes it plain that the same rule applies to policies developed by the courts.

(3) A far more difficult issue was raised in *International Brotherhood of Teamsters v. Hanke.*[48] The Washington courts had enjoined a union of automobile salesmen from picketing a used car dealer, Hanke, who had no employees, for the purpose of compelling him to enter into an agreement, signed by similar dealers, under which he would be obliged to close his establishment after 6 P.M. weekdays and on Saturdays, Sundays and holidays. For Hanke to accede to the union's demand would not have violated State policy. On this ground Mr. Justice Reed and Mr. Justice Minton distinguished the *Giboney* and *Gazzam* cases. Mr. Justice Black also voted to reverse, apparently on similar reasoning. But a majority upheld the injunction.[49]

> "Nor does the Fourteenth Amendment require prohibition by Washington also of voluntary acquiescence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing. In abstaining from interference with such voluntary agreements a State may rely upon self-interest. In any event, it is not for this Court to question a State's judgment in regulating only where an evil seems to it most conspicuous."[50]

The reasoning reiterates an earlier declaration from *Hughes v. Superior Court:* a state may "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."[51]

No one doubts the abstract validity of the quoted rule. The weakness in the *Hanke* opinion lies in its failure to recognize that the Court is no longer dealing with a situation in which there is a public policy opposed to the union's goal, by whatever means it may be achieved. For the Hankes to have complied with the union's demands would have been lawful. Probably the contract, once executed, would have been enforced by the Washington courts. The

46. Building Service Employees Union v. Gazzam, 339 U.S. 532, 538, 70 Sup. Ct. 784, 94 L. Ed. 1045 (1950).
47. 339 U.S. 460, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950).
48. 339 U.S. 470, 70 Sup. Ct. 773, 94 L. Ed. 995 (1950).
49. Mr. Justice Douglas did not participate. Mr. Justice Clark concurred only in the result. It is not clear whether his unwillingness to join in the opinion of Mr. Justice Frankfurter is to be attributed to disagreement on issue discussed in the text. Probably not, for he joined in the prevailing opinion in the *Hughes* case. It is possible, however, that he read the *Hughes* opinion as covering a case where the conduct requested of the employer was contrary to state policy even though no remedy was provided and was unwilling to extend the reasoning to a case in which only the method of inducement, and not its objective, was discountenanced by the state.
50. 339 U.S. at 479.
51. *Id.* at 468.

decree must have been based, therefore, as in the case of the Massachusetts injunctions against strikes for union security, on a state policy against the use of concerted activities as a means of attaining an otherwise legitimate aim.

The category must be further divided. There can be no doubt of a state's power to protect the community against the social and economic consequences attendant upon the destruction of small, independent enterprises by the force of organized economic power;[52] and despite the competitive effect upon labor standards, it is not unreasonable to conclude that the preservation of such enterprises requires freedom from rules imposed by an outside union concerning the conduct of their businesses.[53] Similarly, a state should be free to protect unorganized employees against economic compulsion to accept a union as their bargaining representative after they have had a free opportunity to express their desires and have voted against the union.[54] The parties are reversed but the underlying principle is the same as that which sustains minimum wage laws and labor relations acts protecting employees against the employer's superior economic power.[55]

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52. Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343 (1944).

53. In addition to the *Hanke* case, see National Labor Relations Act § 8(b)(4)(A), 61 STAT. 140 (1947), 29 U.S.C.A. § 158 (Supp. 1950); Saveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947); Dinoffria v. International Brotherhood of Teamsters, 331 Ill. App. 129, 72 N.E.2d 635 (1947). *But cf.* Coons v. Journeymen Barbers, etc. Local No. 31, 222 Minn. 100, 23 N.W.2d 345 (1946); Singer v. Kirsch Beverage, Inc., 271 App. Div. 801, 65 N.Y.S.2d. 400 (2d Dep't 1946).

54. In Building Service Employees Union v. Gazzam, 339 U.S. 532, 539, 70 Sup. Ct. 784, 94 L. Ed. 1045 (1950), the Court expressly noted that the Washington law had not be construed "to prohibit picketing of workers by other workers." If such a distinction were drawn, the pickets could easily change their demand to insistence that the employees join the union and the employer, as soon as a majority joins, sign a collective bargaining agreement. California and Oregon have drawn this distinction [Peters v. Central Labor Council, 179 Ore. 1, 169 P.2d 870 (1946); Park & Tilford Import Corp. v. International Brotherhood of Teamsters, 27 Cal.2d 599, 165 P.2d 891 (1946)]; but it is difficult to believe that such nice discrimination on the part of a picket on the choice of words has constitutional importance. The economic pressure of an outside union can be as great an interference with freedom of choice as employer misconduct. See *e.g.*, Hall Freight Lines, Inc., 65 N.L.R.B. 397 (1946). Strikes and picketing for the purpose of compelling an employer to recognize a minority union after the union chosen by the majority has been certified are unfair labor practices under the NLRA, § 8(b)(4)(C), and are unenjoinable in many states. R.H. White Co. v. Murphy, 310 Mass. 510, 38 N.E.2d 685 (1942); Florsheim Shoe Store Co. v. Shoe Salesmen's Union, 288 N.Y. 188, 42 N.E.2d 480 (1942); Markham & Callow, Inc. v. International Woodworkers, 170 Ore. 517, 135 P.2d 727 (1943); Swenson v. Seattle Central Labor Council, 27 Wash.2d 193, 177 P.2d. 873 (1947); Bloedel Donovan Lumber Mills v. International Woodworkers, 4 Wash.2d 62, 102 P.2d 270 (1940); RESTATEMENT, TORTS § 794 (1939). *Contra:* Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union 269 App. Div. 757, 54 N.Y.S.2d 788 (2d Dep't 1945); Sachs Quality Furniture, Inc. v. Hensley, 269 App. Div. 264, 55 N.Y.S.2d 450 (1st Dep't 1945) (holding that the picketing could not be enjoined without infringing a right guaranteed by the First and Fourteenth Amendments). There is a slight trend towards granting the same protection to an employer and his employees after they have voted against all union representation in a labor board election. MASS. ANN. LAWS c.150A, § 4(2)(c) (1949); Mass. Acts & Resolves 1950, c.452; Loevin Apparel Shops v. Harlem Union, 24 LAB. REL. REP. (Ref. Man.) 2567 (N.Y. Sup. Ct. 1949); Madison & 40th, Inc. v. Townsend, 24 LAB. REL. REP. (Ref. Man.) 2601 (N.Y. Sup. Ct. 1949). *Contra:* Winston Radio Corp. v. Levine, 25 LAB. REL. REP. (Ref. Man.) 2478 (N.Y. Sup. Ct. 1950). Under the view expressed above all these limitations are constitutional.

55. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 Sup. Ct. 615, 81 L. Ed.

But the case is different where the disputants have relatively equal power and the state forbids a strike, thereby sacrificing the employees' interests, only for the purpose of protecting the employer against the loss, and the community against the waste and inconvenience, attendant upon resort to economic weapons. Neither the principle established by *Giboney, Gazzam* and *Hughes* nor the ruling in *Hanke* is pertinent to this problem. Here the basic question would seem to be whether, in the absence of a real threat to the community, the due process clause guarantees employees freedom to engage in collective bargaining, backed by strikes or boycotts, to advance self-interests which they deem important and against which the state has not set its face. Once this issue is reached, logical analysis will not supply the solution. The answer depends upon the value of freedom to pursue one's wants by the only effective means available. There is no practical meaning in the distinction which Mr. Justice Jackson has suggested between the right to bargain collectively and the right to strike.[56] Employees have no barganing power as a group unless they can withhold their labor as a group. Holmes, Brandeis and a number of state court judges valued such liberty enough to dissent from the prevailing tendency towards protecting the employer's business unless the court approved the employees' objective. Eventually, their view gained wide acceptance and in the case of picketing it seemed for a time to have achieved constitutional status.[57] The stream now flows in the other direction. Probably the Court will hold that a state may constitutionally choose to advance the public interest in the avoidance of waste and business losses except where unusually important interests of the union would be adversely affected. Yet

893 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937).

56. In International Union, U.A.W., v. Wisconsin Employment Relations Board, 336 U.S. 245, 259, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949) the Justice said—"The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act. *Labor Board v. Jones & Laughlin,* 301 U.S. 1, 33." The citation is to a passage in which Mr. Chief Justice Hughes asserted "the legality of collective action on the part of employees in order to safeguard their proper interests" and power of Congress "to make appropriate collective action an instrument of peace rather than of strife." Although the word "strike" is not used in the passage, the meaning of "collective action" is plain enough in the context. Moreover, the passage cites and summarizes the well-known statement of Mr. Chief Justice Taft concerning the need for collective bargaining as a means of overcoming the helplessness of the individual employee in dealing with his employer. See p. 577 *supra.* Mr. Chief Justice Taft did not ignore the dependence of collective bargaining upon the existence of freedom to strike. "Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them." *Ibid.*

57. Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940). Mr. Justice Black is the strongest exponent of this position on the present Court. See International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 481, 70 Sup. Ct. 773, 94 L. Ed. 995 (1950); Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 729, 62 Sup. Ct. 807, 86 L. Ed. 1143 (1942).

it seems to me that even in the case of strikes this should not be held sufficient to meet the requirements of substantive due process unless there is serious and widespread injury to the community. Thus I would hold unconstitutional a state rule of decision which enjoined strikes for the union shop despite the fact that union ship contracts were valid and enforceable. Injury to competitors and occasional public inconvenience are the inevitable costs of the "free struggle for life."[58] Where the struggle is not uneven, more should be required before that freedom is ended.

But even those who hold this view must concede that their case is harder if the union is using its economic power to bring about consequences it has set its face. Strikes against new machines often seem to fall within which the state tolerates when they stem from other causes but against which this category. The difficulty is that one can have little assurance of the true grounds upon which the strike was forbidden. Management may suppress patents or delay installing new equipment in order to avoid making existing plant facilities obsolete before their cost has been recovered. Collective bargaining practices, administrative agencies and Congress have recognized the importance of mitigating the hardships caused by mergers, abandonments and technological change.[59] These circumstances suggest that judicial opposition to strikes against technological change is based not so much upon concern for the costs of delaying the changes as upon a policy of protecting management in its decision. Furthermore, if the state has set its face against the supposedly undesirable consequences only when they result from the pressure of concerted activities, does not this show that their avoidance is, by the state's own standards, not a matter of serious public concern? Is it important enough, then, to justify denying employees the opportunity to use organized self-help in order to advance their interests?[60]

There is no blinking the weaknesses in this approach to the problems of strikes and substantive due process. Perhaps the lines suggested are too fine for the practicalities of constitutional adjudication. They may invite the Court to adjudicate questions of policy instead of confining itself to issues of constitutional power. But the alternatives are even less satisfactory. To decide each case upon weighing and balancing the interests without systematic

58. Holmes, J., dissenting, in Vegelahn v. Guntner, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896).

59. United States v. Lowden, 308 U.S. 225, 60 Sup. Ct. 248, 84 L. Ed. 208 (1939); 57 STAT. 5 (1943), 47 U.S.C.A. § 222 (Supp. 1950); REIGEL, MANAGEMENT, LABOR AND TECHNOLOGICAL CHANGE, c.9 (1942).

60. In United States v. Petrillo, 68 F. Supp. 845 (N.D. Ill. 1946), Judge LaBuy held unconstitutional a statute which he construed to make it unlawful to engage in a peaceful strike or peaceful picketing for the purpose of compelling a radio station to employ unnecessary employees. The Supreme Court reversed, holding that this issue was not raised. 332 U.S. 1, 67 Sup. Ct. 1538, 91 L. Ed. 1877 (1947). In a separate opinion Mr. Justice Frankfurter expressed the opinion that the statute, so construed, was constitutional. *Id.* at 13.

analysis invites decisions based upon "inarticulate instincts" rather than "definite ideas, for which a rational defense is ready."[61] The only other course is to open the door to virtually uncontrolled regulation on the ground that labor unions, by and large, are powerful organizations whose activities raise social and economic questions belonging in the exclusive province of the legislature. Probably this is the prevailing trend of constitutional opinion today. But there will be those who, notwithstanding their awareness of the danger of following the conservative wing of the old Court in reading personal views of policy into the Fifth and Fourteenth Amendments, nevertheless believe that freedom to bargain collectively, with a right to strike, deserves a greater degree of constitutional protection.

One further problem remains for discussion. Two courses are open to the legislature which determines that the social and economic costs of strikes for particular objectives outweigh its advantages. The legislature may simply forbid such strikes, thereby sacrificing the interest of the employees to the will of the employer; or the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."[62] I have already sought to illustrate the constitutional significance of the choice in caricature.[63] The California statute outlawing jurisdictional strikes furnishes an actual example. The statute authorizes the issuance of an injunction against a peaceful strike or picketing "arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees."[64] In *Voeltz v. Bakery & Confectionery Workers Union*,[65] an AFL union struck in support of its demands in contract negotiations. At that time there was no other union claiming to represent the plaintiff's employees, but shortly thereafter an independent union made up exclusively of plaintiff's employees demanded recognition and threatened to commence a strike and picketing. The NLRB refused to take jurisdiction on the ground that the controversy had insufficient effect on interstate commerce. A California court enjoined the picketing.

Despite doubts as to its wisdom, one could scarcely hope to argue that such a restriction upon the right to strike is unconstitutional when the legisla-

61. Holmes, J., dissenting, in Vegelahn v. Guntner, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896).

62. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488, 41 Sup. Ct. 172, 65 L. Ed. 349 (1921) (dissenting opinion).

63. See pp. 580-81 *supra*.

64. CAL. LABOR CODE §§ 1115-18 (Supp. 1949). The constitutionality of the statute has been sustained against the allegation that it is too sweeping an interference with the right to engage in peaceful picketing. Meyers v. Cleaners & Dyers Union, 25 LAB. REL. REP. (Ref. Man.) 2426 (Cal. Super. Ct. 1950); Voeltz v. Bakery & Confectionery Workers Union, 25 LAB. REL. REP. (Ref. Man.) 2461 (Cal. Super. Ct. 1950). *Contra:* International Ass'n of Machinists v. San Diego Trades Council, 22 LAB. REL. REP. (Ref. Man.) 2012 (Cal. Super. Ct. 1948).

65. 25 LAB. REL. REP. (Ref. Man.) 2461 (Cal. Super. Ct. 1950).

ture has established adequate procedures for determining the identity of the majority representative and compelling the employer to bargain with the designated union.[66] But California affords the employees no such protection. There is no state labor relations act and no judicial power to enforce the statute declaring the public policy in favor of collective bargaining.[67] Thus, when there are two competing unions, the effect of the jurisdictional strike law is to take from even a majority of the employees, without supplying a substitute, their only effective method of realizing the right to bargain collectively. The unnecessary sacrifice of so fundamental an employee interest, when other methods of safeguarding the public can be devised, would seem to be a plain violation of the Fourteenth Amendment.[68]

II. The Secondary Boycott

Legislation and common law rules forbidding secondary strikes and secondary refusals to patronize have two purposes not involved in regulation of a strike against an employer with whom the union has a direct controversy. One is to protect from direct business losses persons in various degrees of neutrality; the other, to prevent disputes from spreading through the community. While differences of degree may be noted, it is enough for present purposes to suggest that wherever both these considerations have substantial relevance, they will furnish sufficient constitutional foundation for outlawing concerted economic pressures.[69]

III. Picketing

Although the common law treated the strike as a permissible method of pursuing "lawful" labor objectives, picketing was slow to achieve the same recognition. Many judges regarded all picketing as inherently coercive, and therefore unlawful, however peacefully conducted and whatever the objective

66. See pp. 587 *supra*.

67. Nutter v. Pacific Electric Ry., 6 Lab. Rel. Rep. (Ref. Man.) 1067 (Cal. Super. Ct. 1940).

68. *Cf.* Wallace v. United Brotherhood of Carpenters & Joiners, 26 Lab. Rel. Rep. (Ref. Man.) 2645 (Cal. Super. Ct. 1950), upholding the provisions of the jurisdictional strike law as applied to a strike over work assignments, partly on the ground that there was an adequate, if extralegal, forum for the peaceful resolution of such conflicts. Section 8(b)(4)(D) of the NLRA declare some strikes over work assignments to be unfair labor practices. Section 10(k) seems to have been intended to supply an alternative method for resolving such disputes, but the NLRB has refused to disturb whatever work assignment is made by the employer. 14 NLRB Ann. Rep. 99-104 (1949). This ruling might open § 8(b)(4)(D) to attack upon the analysis suggested in the text, but it seems unlikely. The interest of the members of a particular union in a work assignment is much less than the interest in collective bargaining.

69. NLRB v. United Brotherhood of Carpenters & Joiners, 184 F.2d 60 (10th Cir. 1950); NLRB v. Local 74, United Brotherhood of Carpenters & Joiners, 181 F.2d 126 (6th Cir. 1950); NLRB v. Wine, Liquor & Distillery Workers Union, 178 F.2d 584 (2d Cir. 1949); Printing Specialties and Paper Converters Union v. LeBaron, 171 F.2d 331 (9th Cir. 1948), *cert. denied*, 336 U.S. 949 (1949); State v. Casselman, 69 Idaho 237, 205 P.2d 1131, *cert. denied*, 338 U.S. 900 (1949).

might be.[70] In some states the common law doctrine retained its vitality into the nineteen-thirties[71] while other communities, some of them seeking to attract new industries from unionized areas, revived earlier statutes or enacted new laws making picketing unlawful *per se*.[72]

Beginning in 1937 the Supreme Court arrested this development. In *Senn v. Tile Layers Protective Union*,[73] Mr. Justice Brandeis held that a state was not prohibited by the Fourteenth Amendment from authorizing a union to engage in peaceful picketing as a means of carrying on a labor dispute, saying: "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[74]

Although this assimilation of picketing to freedom of speech was plainly dictum, it became the basis of decision four years later in *Thornhill v. Alabama*,[75] when the Court held unconstitutional an Alabama statute forbidding picketing for the purpose of injuring any lawful business. Even more significant than the decision was the fact that the Court's opinion was cast in the language of the First Amendment. Picketing was held to be a practicable and effective means "whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute." In a companion case, the opinion declared—

> "[P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communieation which is secured to every person by the Fourteenth Amendment against abridgment by a State."[76]

Out of the *Thornhill* case and subsequent decisions there arose serious judicial uncertainty and much academic disputation[77] as to whether peaceful picketing is "an exercise of the right of free speech," or "more than free speech," or essentially "a form of coercion unrelated to the free communication

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70. Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896); 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 112 (1940); *cf.* American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189 (1921).

71. 1 TELLER, *loc. cit. supra* note 70.

72. *E.g.*, ALA. CODE § 3448 (1923); Ordinance of Shasta County, Cal., adopted as an emergency law, 1938, cited in Carlson v. California, 310 U.S. 106, 109, 60 Sup. Ct. 746, 84 L. Ed. 1104 (1940), Record on Appeal 68A.

73. 301 U.S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229 (1937).

74. 301 U.S. at 478.

75. 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).

76. Carlson v. California, 310 U.S. 106, 113, 60 Sup. Ct. 746, 84 L. Ed. 1104 (1940).

77. See, *e.g.*, Gregory, *Peaceful Picketing and Freedom of Speech*, 26 A.B.A.J. 709 (1940); 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); Jaffee, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037 (1943); Cox, *The Influence of Mr. Justice Murphy on Labor Law*, 48 MICH. L. REV. 767 (1950); Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950).

of ideas which is guaranteed by the First Amendment." So long as one speaks of "peaceful picketing" *simpliciter* each of these seemingly inconsistent assertions can be, and probably is, literally accurate. The term covers several quite different sorts of conduct, some of which is essentially publicity and propaganda, some of which is essentially economic coercion, and much of which is a blend in which each of those qualities is present in varying degrees. Moreover, although the term "picketing" is used over and over again in Supreme Court opinions as if it described a single type of conduct, in my judgment the course of decision will not be clarified until the Court analyzes the facts more closely.

When negotiation fails, a labor union must resort to economic power to gain its objectives, either by withholding from the employer the services of its members or by withholding, and inducing others to withhold, their patronage. Success depends upon convincing the employer that it will be cheaper to capitulate, or to compromise the union's demands, than to face continuing losses. Since there are relatively few occasions on which picket lines are set for the sole purpose of influencing public opinion, the role of the picket nearly always is to give notice of, and secure adherents to, the union's plan to injure the employer.

But despite this common economic purpose of virtually all picketing, a sharp distinction between various kinds of picketing may be drawn according to (1) the basis of its appeal for support and (2) the character of the audience to which the appeal is addressed. Freedom of speech is an ideal born during the enlightenment out of the faith that men can progress by the use of reason if ideas are freely interchanged to be tested by debate and experience. Nor can we seek to judge between appeals to reason and bare slogans arousing prejudice or emotion. Much of our constitutional law grows out of this philosophy. Discussion may be curtailed if, but only if, a "clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[78] But if the speaker goes beyond discussion and invokes sanctions to support his words, he cannot claim the same constitutional protection. For this reason an employer may speak freely on labor questions but if he does not leave his ideas to seek approval on their merits and instead of this invokes fear of his economic power to induce obedience, the constitutional privilege is exceeded and the state may intervene.[79] "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is

78. Thornhill v. Alabama, 310 U.S. 88, 105, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940). Compare the concurring opinion of Mr. Justice Brandeis in Whitney v. California, 274 U.S. 357, 372, 377, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927).

79. NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 62 Sup. Ct. 344, 86 L. Ed. 348 (1941).

doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."[80]

It is from this standpoint that the term "peaceful picketing" covers too broad a range of conduct to have constitutional significance. The International Brotherhood of Teamsters has made wide use of its ability to shut off the flow of supplies into an establishment, or to stop the movement of its products, merely by posting a single picket at each driveway normally used by incoming or outgoing trucks. Other unions exercise similar power not by appealing to the public but because of the discipline of their members. The critical point, however, is not the success of such tactics but the fact that the union members respect the picket line because of a group discipline based partly on common loyalties, partly on the force of habit, partly on fear of social ostracism but also on severe economic sanctions. The truck driver who crosses a teamsters' picket line is subject not only to union fines but also to expulsion, and in the trucking industry suspension or expulsion from the union may carry with it loss of employment. In the Hollywood jurisdictional strike carpenters who crossed a picket line established by their union were fined the equivalent of one year's earnings. The constitutions and by-laws of other unions provide similar sanctions and while reliable statistics are not available, it seems plain that whenever the union is strong enough to exercise its power, the power will be invoked, if necessary. In such cases picketing is not merely a method of self-expression or of securing publicity, nor are the pickets seeking to secure adherents by persuading others of the truth of what they have to say. The picket's reliance in such a case is on the sanctions inherent in the discipline and organized economic power of his union.

Quite different is the peaceful picketing which is directed primarily to the general public. Familiar illustrations may be found outside motion picture theatres, restaurants, and beauty parlors where none of the employees are on strike. Theoretically such a picket line is entitled to the same respect from union members as any other picket line, but as a practical matter the same economic sanctions play little part. Prospective patrons who are not union members are left free to determine their own course of conduct influenced but not coerced by the knowledge that a labor dispute is in progress. In such cases, therefore, the success or failure of pickets' appeal depends primarily upon the persuasiveness of their message.

This distinction between picketing backed by the threat of economic punishment and picketing which appeals only to reason, loyalty and other emotions is paralleled by a difference in the audience which the pickets seek to reach. The Teamsters' picket line is rarely addressed to individual mem-

80. Mr. Justice Douglas, concurring, in Thomas v. Collins, 323 U.S. 516, 543, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945).

bers of the public. Its primary, and often its exclusive purpose is to notify union members and members of affiliated unions that they must not work in the picketed establishment, or pick up or deliver goods, because their unions are engaged in bringing economic weapons to bear on the employer. Despite its element of publicity and propaganda, therefore, such picketing may be fairly described as the signal by which the union invokes its economic power.[81] The pickets patrolling in front of a retail establishment are also bringing economic pressure against the business—and in this respect the case is the same—but their appeal is addressed to the public and the members of the public decide chiefly as individuals whether to patronize the establishment or to support the pickets' cause. Thus the publicizing is the primary element and the disciplined economic power of the union is an insignificant factor.

In caricature the lines are always sharper than in life. The multitude of picketing cases falls between these two extremes in the range of activities covered by "peaceful picketing." The same picket line usually appeals both to public opinion and to group discipline backed by economic sanctions. The relative importance of the two appeals varies from case to case, presenting such nice questions of classification that from time to time the differences may be obscured. It is submitted, however, that the distinction is practicable and that the constitutional decisions in picketing cases should depend, in part, on whether the "publicity" or "signal" aspect predominates.

"Signal picketing" is entitled to no greater constitutional protection than the combination it sets in motion. Some slight interference with the communication of ideas may result, but it is inconsequential so long as other avenues of expression remain open. The point was squarely decided in *Giboney v. Empire Storage & Ice Co.*,[82] where the Court affirmed a Missouri decree enjoining a union from picketing an employer in support of its demand that the employer violate the local antitrust law by refusing to sell ice to independent peddlers. The Court unanimously rejected the union's contention that the injunction against picketing was an unconstitutional abridgment of free speech because the picketers were peacefully publicizing the facts of a labor dispute.

> "[A]ll of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct which was in violation of Missouri's valid law. . . . [Therefore] it is

81. *Cf.* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797 (1911): "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."

82. 336 U.S. 490, 69 Sup. Ct. 684, 93 L. Ed 834 (1949).

clear that appellants were doing more than exercising a right of free speech or press. *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-777 [1942]. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade."[83]

That this course of conduct resulted from speech and writing was immaterial because "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[84] Where the elements of speech are entwined with the use of the unions' economic power, the speech loses its immunity from regulation and the union's whole course of conduct becomes subject to the power of the State "to set the limits of permissible contest open to industrial combatants." The underlying principle of the *Giboney* decision is emphasized by the authorities cited.[85]

Is "publicity picketing" entitled to a higher degree of constitutional protection? In *Hughes v. Superior Court*,[86] the Progressive Citizens of America were cited for contempt for violating a decree enjoining them from picketing one of a chain of grocery stores for the purpose of inducing the stores to prefer Negroes in hiring new employees until their number became proportionate to the percentage of Negroes among the customers. Mr. Justice Traynor's dissenting opinion in the Supreme Court of California forcefully stated the distinction between "signal" and "publicity" picketing.[87] Nevertheless, the point was ignored when the decree was affirmed on certiorari. The prevailing opinion, written by Mr. Justice Frankfurter followed the practice of speaking of picketing *simpliciter* as if the term described a single line of conduct.

"Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influence, and it produces consequences,

83. *Id.* at 498-503.
84. *Id.* at 502.
85. The opinion relies heavily on Virginia Electric & Power Co. v. National Labor Relations Board, 319 U.S. 533, 63 Sup. Ct. 1214, 87 L. Ed. 1568 (1943), where the Court had held that although an employer has a constitutional privilege to address his employees on labor issues, the privilege is lost if he also invokes his economic power over the employees. It also quotes two significant passages from Thomas v. Collins, 323 U.S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945). The first was from the opinion of the Court written by Mr. Justice Rutledge: "When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. . . . But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." 323 U.S. at 537.
The second passage was from the concurring opinion of Mr. Justice Douglas: "But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee." *Id.* at 543.
86. 339 U.S. 460, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950).
87. *See* Hughes v. Superior Court, 32 Cal.2d 850, 871, 198 P.2d 885, 897-98 (1948).

different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."[88]

Because of these compulsive features, the Court concluded, picketing may be subjected to stricter regulation than other forms of communication. "The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' "[89] It is not altogether clear that this means that all picketing is subject to the same degree of regulation as an organized strike.

The sharp divergences of opinion in *Hughes v. Superior Court* and its companion cases make it impossible to discern any underlying philosophy held in common by a majority of the justices, save that of greater tolerance for State regulation. Yet if one may analyze the cases simply for their value as precedents, several conclusions are warranted:

(1) The First and Fourteenth Amendments are violated by any law which makes picketing illegal *per se*. The key to the *Thornhill* decision is the holding that the validity of the statute should be determined upon its face. From that premise the conclusion followed that the conviction should be reversed if *any* of the activities condemned by the statute constituted an exercise of freedom of expression. The Alabama courts had already held that the statute forbade picketing of a retail establishment by a single picket who, without speaking, carried a sign truthfully stating that the store employed nonunion labor. Under this interpretation, which was binding on the Supreme Court, the statute proscribed all picketing without regard to any other circumstance. The Court's ruling that a State may not make picketing unlawful *per se* has not been affected by the subsequent cases.

(2) In *American Federation of Labor v. Swing*,[90] the question before the Court was the validity of "a decree which for the purposes of this case asserts as the common law of a state that there ean be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him."[91] The Illinois rule covered all kinds of picketing and apparently only publicity picketing was involved in the litigation. The Court held that "[T]he right of free communication cannot . . . be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."[92] Thus the constitutional right to engage in publicity picketing was extended

88. Hughes v. Superior Court, 339 U.S. 460, 465, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950).
89. International Brotherhood of Teamsters v. Hanke, 339 U.S. 460, 474, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950).
90. 312 U.S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855 (1941).
91. *Id.* at 325.
92. *Id.* at 326.

to those who are not employees. In *Bakery & Pastry Drivers v. Wohl*,[93] the same right was extended to persons who, according to state law, were not engaged in a "labor dispute" even though they were seriously affected by the employment conditions of which they complained. Finally, in *Cafeteria Employees Union, Local 302 v. Angelos*,[94] non-employees were held privileged to picket a restaurant even though there was no labor dispute within the meaning of the state statute, thus combining the rules established by the *Wohl* and *Swing* cases.

Since Mr. Justice Frankfurter distinguished these decisions in the *Hughes* and *Hanke* opinions, it is to be assumed that they would be followed today if identical issues were presented. Their effectiveness, however, is greatly impaired. In *Building Service Employees Union v. Gazzam*,[95] the Court enjoined stranger picketing intended to put pressure upon an employer to interfere in the employees' selection of a bargaining representative. Although the point was reserved, the conclusion that a state may protect unorganized employees in their choice of representatives against organized economic coercion from outside the bargaining unit seems logically inescapable.[96] There is no constitutional reason for requiring either policy to be formulated by statute. Under such circumstances it should not be surprising if some state courts suddenly discover that their antipathy to stranger picketing is based upon one or the other of these considerations.

Similarly, only three lines in a judicial opinion separate *Wohl* and *Angelos* from *Hanke*. In all three cases the injunction was based upon the circumstance that the complainants carried on their businesses without employees. The New York courts said nothing more and the decrees were reversed. The Washington court seems to me to have concluded that a state might prefer the right of an employer to carry on a lawful business over the right of a union to engage in free speech where its interests were only remotely affected. Fortunately for the Hankes, however, the court also used the phrases "individual proprietors" and "little businessmen and property owners" in one sentence in its opinion. In these expressions the majority of the Supreme Court discovered that the Washington injunction stemmed from an important state policy which had not been applied by New York.[97]

93. 315 U.S. 769, 62 Sup. Ct. 816, 86 L. Ed. 1178 (1942).
94. 320 U.S. 293, 64 Sup. Ct. 126, 88 L. Ed. 58 (1943).
95. 339 U.S. 532, 70 Sup. Ct. 784, 94 L. Ed. 1045 (1950)
96. See p. 587 *supra*.
97. Hanke v. International Brotherhood of Teamsters, etc., 33 Wash.2d 646, 659-60, 207 P.2d 206, 213 (1949), 3 VAND. L. REV. 313 (1950). It is not my purpose in making the comments in the last two paragraphs to deny the existence of distinctions between *Swing* and *Wohl*, on the one hand, and *Gazzam* and *Hanke*, on the other. See COX, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 30 (1947). No careful formulation of policy based upon an evaluation of conflicting interests, such as the Court held not unconstitutional in *Gazzam* and *Hanke*, was involved in either the rule against stranger picketing or the New York practice of issuing an injunction automatically upon concluding that no "labor dispute" was in progress. What

(3) Picketing may be prohibited where its objective is "unlawful" in the sense that the employer's capitulation would result in violation of a public policy declared either by the legislature or the courts. This is the clear holding of the *Giboney, Gazzam* and *Hughes* cases, and it appears to command unanimous acceptance from the Court. Nothing to the contrary was decided by earlier precedents.

(4) The *Hanke* case, as pointed out in our discussion of the right to strike, appears to hold that picketing may be enjoined where the use of organized economic power against weaker members of the community will have undesirable social and economic consequences. But since only three justices joined with Mr. Justice Frankfurter in the prevailing opinion, the issue may still be open.[98]

(5) It is still unsettled whether picketing may be forbidden when its objective is "unlawful" only in the Pickwickian sense that, although there is no policy opposed to the union's attaining its objective by other means, the court (or legislature) deems it insufficient to justify injuring the employer's business and causing loss and inconvenience to the public. *Thornhill v. Alabama* once seemed close to the issue—

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. . . . We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in § 3448."[99]

But the case can be distinguished on the ground that the Alabama statute did forbid picketing without regard to the importance or triviality of the objective; and *Hughes* and *Hanke,* although they too are distinguishable, look towards a different rule. The arguments *pro* and *con* resemble those concerning parallel limitations on the right to strike, save that the element of communication should give publicity picketing a higher constitutional value.

The conclusions just stated, like the decisions themselves, offer no lasting solution of the underlying issue. The essence of the problem of the picketing cases is to draw a line between the unquestioned privilege to discuss industrial relations freely and the far more limited right to exert the economic power of an organized group of workers held together by union discipline.

One solution is to accept the line which Mr. Justice Frankfurter has drawn between picketing and other forms of communication. The "purpose of a picket line is to exert influences, and it produces consequences, different

does give cause for great concern is the Court's astuteness in finding for recent injunctions some basis in a supposed state policy which will furnish a constitutional foundation. But each reader will have to decide for himself whether this criticism is justified by comparing the state court and Supreme Court opinions.

98. See note 49 *supra.*

99. 310 U.S. 88, 104-05, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).

from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."[100] One wonders whether the opinion does not mistake for peculiar attributes of picketing characteristics which are common to all appeals for assistance in industrial controversies. The blacklisting of "unfair" employers and the circulation of lists of fair employers whom union men are asked to patronize are also weapons of economic combat which contain an element of communication. Such methods of communication exert the same kind of influences and produce the same kind of consequences as picketing. The circulation of an unfair list may signal the start of a boycott adherence to which is enforced by the threat of union discipline. Where the union does not impose economic sanctions, the member may be moved by the habits inculcated by union ritual, by common loyalties, by fear of social ostracism, and by all those other psychological and emotional forces which bind individuals into a group. Nor is it easy to distinguish between the circulation of a blacklist and the publication of a notice in the press, or the writing of a letter by the president of the union.

It is true, of course, that the picket line is the most effective of all these methods of appealing for sympathy and assistance. The picket reaches his audience at the moment for decision whereas the readers often forget the names in a blacklist or newspaper advertisement. But this distinction—to paraphrase Mr. Justice Douglas[101]—would seem to mean that a state can prohibit speech where it is effective but cannot prohibit it where it is ineffective. It can scarcely be supposed that the Court is heading towards such a doctrine.

Picketing is also more effective because the sanctions behind its appeal, both the threat of economic reprisal and the appeal to group solidarity, are more apparent than in the case of other forms of communication. The union worker who crosses the picket line not only subjects himself to immediate hostility but he also knows that the pickets are there to report his conduct to both the union and his fellow members. Yet this ground of distinction also seems unsatisfactory. There should be no privilege to circulate a blacklist which is the signal that sets in motion a prearranged boycott; certainly, there can be none when the boycott is enforced by union discipline. Conversely, the picket's appeal to the forces that bind union men together is the same in kind as the appeal of the blacklist, of the union press, or of the speech of the union leader. Differences in degree are the stuff of which constitutional law is made, but it behooves us to draw lines that are maintainable.[102]

100. Hughes v. Superior Court, 339 U.S. 460, 465, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950).

101. Bakery & Pastry Drivers Union v. Wohl, 315 U.S. 769, 775, 62 Sup. Ct. 816, 89 L. Ed. 1178 (1942) (concurring opinion).

102. In recent years the most significant decisions concerning the circulation of blacklists have arisen under NLRA § 8(b)(4)(A). Blacklists have been treated in the

If I am right in thinking that the Court cannot long distinguish between the picket line and the unfair list, or between the unfair list and other appeals by the officers of a union to its members, two courses will be open. One is to overrule *Thornhill's* case and all its progeny on the ground that the privilege of free speech should not extend to attempts to coerce an employer into granting concessions. Under this view, which has its persuasive advocates,[103] newspaper and radio appeals to stay on strike until the employer comes to terms, should receive no different treatment from picketing. Its logical conclusion is that the constitution does not limit the states in regulating industrial relations in fields not pre-empted by federal regulation.[104]

In terms of a purely political conception of freedom of speech the argument has considerable merit. There is a clear distinction between discussion looking forward, however, remotely, to political action and requests for immediate economic assistance in driving a private bargain. On this view the *Thornhill* and *Virginia Electric* decisions should be criticized alike. The former case holds expressly, and the latter holds by necessary implication, that the privilege of free speech may be invoked to protect utterances whose purpose is to advance private economic objectives. The argument loses much of its force, however, if the broader ground is taken that the First Amendment embodies a concern for human liberty, as well as political rights, because men know both a need, and often a duty, of expression. From this standpoint it is of small moment that an employer arguing with his employees is thinking of retaining the prerogatives which management loses under collective bargaining, or that a worker bespeaking the aid of his fellows is seeking immediate improvement of his standard of living. It is equally immaterial that the arguments and entreaties may in the one case lead men to refrain from joining the labor organization, thus lessening its economic power, and in the other may induce workers and customers to break off economic relations with the employer, thus injuring a lawful business.

The other alternative is to draw the distinction already suggested between "signal" and "publicity" picketing and then to mark parallel differences applicable to other union communications. The distinction has been questioned on the ground that it asserts that "because signal picketing [which involves a prearranged response] is intelligently effective, it does not qualify as constitutionally protected communication, whereas publicity picketing [which

same manner as picketing and, when part of a secondary boycott, have been held not to be privileged under the First Amendment. See *e.g.*, NLRB v. United Brotherhood of Carpenters & Joiners, 184 F.2d 60 (10th Cir. 1950), *enforcing* 81 N.L.R.B. 802 (1949); Brotherhood of Carpenters & Joiners v. Sperry, 170 F.2d 863 (10th Cir. 1948); Cranefield v. Bricklayers Union, 78 F. Supp. 611 (W.D. Mich. 1948). *Contra:* Sperry v. Denver Bldg. & Const. Trades Council, 77 F. Supp. 321 (D. Colo. 1948).

103. See especially Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950).

104. *Id.* at 208-10.

leaves the response to chance] is entitled to protection because its effect is speculative."[105] Of course, the ground of the distinction is not the consequence of the picketing. The critical inquiry is whether the employees' conduct involves an appeal to an uncoerced audience each individual in which is left free to choose his own course of conduct or invokes the power of an organized combination. The latter activities can scarcely claim immunity under the First Amendment, even though they are entitled to some degree of protection under the Fifth and Fourteenth Amendments and on them depends a strong and free labor movement. But speech alone is surely a form of communication even when it is addressed to those bound by common loyalties and looks to economic assistance.

Speech in the private economic arena may not be entitled to the same protection as discussion of political issues. Picketing, blacklists and similar communications, even when they are not backed by an organized combination, cause damage and serve no useful purpose where their sponsor is seeking to compel a violation of a valid statute or to punish an employer who has complied with the law. Perhaps secondary publicity picketing in extreme forms should be subject to legislative condemnation. But the worker and his union who are seeking an objective which is not itself inconsonant with the policy of the State, should be free to appeal to others for their voluntary, individual assistance.

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105. *Id.*, at 207. Professor Gregory's doubts about the validity of the distinction because it "was lost on Justices Black, Douglas, Murphy and Reed" seem a little curious in view of his distaste for their opinions on the subject of picketing. Nor can his opposition to mention of the element of conspiracy in an analysis of picketing be easily reconciled with his readiness to dismiss the Thirteenth Amendment on the ground that it applies only to individual quittings.

Those attacking the proposed distinction from a viewpoint diametrically opposed to Professor Gregory's have argued that it would lead to the rule condemned by Mr. Justice Douglas in the *Wohl* case: "That a State may prohibit picketing when it is effective but may not prohibit it when it is ineffective." 315 U.S. 769, 776, 62 Sup. Ct. 816, 86 L. Ed. 1178 (1942). There are two answers to this contention. In the first place, the distinction between "publicity picketing" and "signal picketing" does not destroy the efficacy of the *Thornhill* doctrine. The doctrine would continue to prevent a state from treating picketing as inherently unlawful means of concerted activity apart from the economic combination behind it, thereby forcing the legislatures to deal with the substance of the employees' activities. Furthermore, the frequent use of publicity picketing in front of retail establishments is evidence that it is not wholly ineffective. The second answer, however, is that one need not shrink from the conclusion that the suggested distinctions would permit the states to restrict the only picketing which is effective, it must be because the picket's appeal to reason does not suffice, and the union therefore needs to support the appeal with threats of economic sanctions in order to attain its objectives. But this is not a reason to extend the protection of the First Amendment to "signal picketing." No one would seriously assert that the employer who cannot persuade employees to resign from their union has a constitutional privilege to resort to threats of economic reprisals because there is no other way to make his words effective. The parallel argument on the part of labor should receive no more favorable consideration.