SMU | Dedman School of Law

SMU Law Review

Volume 2 | Issue 1 Article 5

January 1948

The Texas Mass Picketing and Closed Shop Statutes of 1947

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THE TEXAS MASS PICKETING AND CLOSED SHOP STATUTES OF 1947

I.

THE picket line has long been a favorite weapon of labor groups in economic contests with employers for a larger share of the products of industry and for amelioration of conditions of employment. The popularity of picketing among labor union strategists stems from its effectivness in enlisting public support in enforcing a boycott against a particular employer or business. Picketing can be carried on without unreasonable expense and without the active participation of a large number of personnel. The greatest advantage of picketing lies in its flexibility. Since the pickets need not be employees of the business being picketed, picketing is the device most commonly used to introduce union organization in industries where little or no unionization has previously taken place. The public recognition today afforded to picketing as lawful and commonplace union activity gives little indication of the judicial hostility toward picketing that existed in the United States less than two decades ago.

The coercive aspects of picketing and its use as a device for the intentional infliction of financial injury to business interests have caused the courts, historically committed to the protection of property rights, to regard this labor activity as anathema. Early decisions reflect this attitude in holding picketing to be illegal *per se* either on the theory that picketing is inherently intimidatory or that from its very nature picketing tends to provoke violence and breaches of the peace.[1] As recently as 1940 a substantial number of jurisdictions maintained this view of picketing without consideration of its purpose and without regard to

[1] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 112 (1940).

whether or not it was carried on in conjunction with a strike.[2] However, the trend of judicial decision in the late thirties was that picketing was merely a prima facie tort and was privileged if conducted in a lawful manner and for a lawful purpose.[3] This doctrine provided a fertile field for the development of rules of conduct in labor disputes in which consideration could be given to matters of public policy and social well-being and a balancing of interests achieved. The advantages of dealing with problems arising out of picketing according to the principles of tort law have been recognized.[4] However, the application of tort doctrines to picketing has been complicated and inhibited by decisions of the United States Supreme Court identifying peaceful picketing with the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution.

The first identification of picketing with free speech by the United States Supreme Court occurred in a dictum by Justice Brandeis in 1937 in the case of *Senn v. Tile Layers Protective Union.*[5] The fruits of the identification were not garnered by labor until 1940 when the Supreme Court decided the cases of *Thornhill v. Alabama*[6] and *Carlson v. California.*[7] In both cases penal statutes categorically prohibiting picketing were held unconstitutional as violative of the right of free speech. The Court particularly objected to the broad language of the statutes.[8]

While foredooming attempts by the states to prohibit all picketing, the Court in the *Thornhill* case recognized the power of the states to regulate picketing and indicated a criterion for the exercise of that power.

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[2] *Id.* § 117, n. 41.
[3] *Id.* § 111, n. 43; RESTATEMENT, TORTS § 775 (1938).
[4] Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 204 (1942).
[5] 301 U. S. 468, 478 (1937).
[6] 310 U. S. 88 (1940).
[7] 310 U. S. 106 (1940).
[8] *See* Thornhill v. Alabama, 310 U. S. 88, 96-98 (1940); Carlson v. California, 310 U. S. 106, 112 (1940). For a later indication that broad prohibitions of picketing are especially objectionable *see* Cafeteria Employees Union v. Angelos, 320 U. S. 293, 295 (1943).

"The power and duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property or invasion of the right of privacy can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger as to justify a *statute narrowly drawn to cover the precise situation giving rise to the danger.*" (Italics supplied.)[9]

Picketing having been established as a constitutional right, the result of the case of *American Federation of Labor v. Swing*[10] was not surprising. Swing had secured an injunction prohibiting all picketing of his shop by virtue of the common law policy of Illinois which forbade picketing in any case where there was not a proximate relation of employer and employee between the pickets and the picketed employer. The United States Supreme Court, especially condemning the broad language of the injunction, held that it was beyond the constitutional power of a state court to enjoin peaceful picketing merely because of the lack of an immediate employer-employee dispute. Justice Frankfurter, writing the opinion of the Court, stated:

"Such a ban is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry is axiomatic. But not even these essential powers are unfettered by the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether these limits be defined by statutes or by the judicial organ of the state."[11]

It would appear from this statement that the Court regarded picketing as completely identified with free speech and immune from state regulation. And yet on the same day that the *Swing* decision was handed down the Supreme Court decided the case of *Milk Wagon Drivers Union v. Meadowmoor Dairies*,[12] which

[9] 310 U. S. 88, 105 (1940).
[10] 312 U. S. 312 (1941).
[11] *Id.* at 325.
[12] 312 U. S. 287 (1941).

upheld an injunction against all picketing and recognized the power of the state to prevent coercion in conjunction with picketing. The *Meadowmoor Dairies* case qualified the doctrine of the *Swing* case by upholding an injunction against peaceful picketing conducted in a setting of violence so that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."[13]

While the *Meadowmoor Dairies* case is significant as a recognition that peaceful picketing is not in all circumstances beyond the regulatory power of the states, it gave little indication that the Supreme Court considered peaceful picketing as anything more or less than free speech. The first hint of a retreat from the complete identification of picketing with free speech is found in the case of *Bakery and Pastry Drivers Local 802 v. Wohl*,[14] in which Justice Jackson writing the majority opinion, declared:

> "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."[15]

Also indicative of a new attitude toward peaceful picketing is the statement of Justice Douglas in the concurring opinion:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."[16]

Any doubts that the Supreme Court's attitude toward picketing since the *Swing* case were confirmed by the five-to-four decision in the case of *Carpenter and Joiners Union v. Ritter's Cafe*.[17] Here defendant building trades union picketed plaintiff's cafe because he had contracted with a non-union contractor for the construc-

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[13] *Id.* at 294.
[14] 315 U. S. 769 (1942).
[15] *Id.* at 775.
[16] *Id.* at 776.
[17] 315 U. S. 722 (1942)

tion of a building a mile and a half away from the cafe. The record showed no connection between the cafe and the building, and an injunction was granted by a Texas court. The United States Supreme Court affirmed on the theory that a state might properly confine picketing to the area of the industry within which the labor dispute arose. Justice Frankfurter, speaking for the Court, stated:

> "As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional means of communication."[18]

Justice Reed, in a dissenting opinion based on the view that the right of free speech was abridged, also recognized that the states were not without power to regulate peaceful picketing:

> "We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards. open ingress and egress, suitable hours, or other proper limitations not destructive of the right to tell of labor difficulties may be required."[19]

In summation it can be said that the United States Supreme Court has to some extent withdrawn from the position of completely identifying peaceful picketing with free speech. While broad prohibitions of picketing are almost certain to be held unconstitutional, the Court has repeatedly recognized the power of the states to regulate picketing and has indicated that a state need not tolerate peaceful picketing in all circumstances even by a single individual. It is evident from the holding in the *Ritter's Cafe* case that the states are not required to assume the onerous task of proving a "clear and present danger" to life, property, or the right of privacy in order to regulate peaceful picketing. Therefore, a statute narrowly drawn to meet a specific evil may be

[18] *Id.* at 727.
[19] *Id.* at 738.

constitutional. Accepting this thesis as a criterion for state regulation of picketing, it is appropriate to consider the Texas Mass Picketing Statute[20] of 1947 in order to make some observations with respect to its application and constitutionality.

II.

The preamble of the Texas Mass Picketing Statute declares that picketing is more than mere dissemination of ideas in that it is also a means of coercion, often attended by conduct inimical to the public welfare, and at times is used against business concerns having no connection with the labor dispute out of which the picketing arose. While acknowledgment is made that the freedoms of speech and assemblage need protection, it is asserted that there is equal necessity for regulation of picketing in order to preserve the general safety and welfare. These statements reveal a legislative awareness of recent United States Supreme Court decisions and indicate an attempt to achieve a balacing of social interests justifying restrictions designed to remedy specific evils. The abuses prohibited by this statute are: picketing *en masse*, intimidatory and defamatory language in conjunction with picketing to induce breach of collective bargaining contracts, and the advertisement of continued picketing after it has been enjoined.

Section 1 of the statute deals with mass picketing. The terms "picket" and "picketing" are defined in very comprehensive terms. Picketing includes the posting of persons in behalf of an organization for the purpose of persuading others not to enter or patronize the picketed premises or for other enumerated purposes. Mass picketing is prohibited and is defined as picketing in which there are more than two pickets within fifty feet of any other picket or within fifty feet of any entrance to the premises being picketed.[21] Also prohibited is the obstruction of free ingress and

[20] TEX. REV. CIV. STAT. ANN. (Vernon's Supp. 1947), Art. 5154d.

[21] Although this limitation in number seems rather severe many courts have indicated that this restriction is not unreasonable. *See e.g.*, Bakery and Pastry Drivers Local 802 v. Wohl, 315 U. S. 769, 775 (1942) (by implication); Local Union No. 3871 United Steel

egress to the picketed premises by the pickets personally, by their automobiles, or by any other barrier.

Much can be said in favor of a limitation of the number of persons engaged in picketing activities. Courts have long regarded the mere presence of a large number of pickets as intimidation *per se*.[22] Another reason advanced for restrictions upon mass picketing is that the probability of violence increases in proportion to the number of pickets employed.[23] Acts of violence by irresponsible individuals are more likely when large numbers of pickets are congregated at the scene of a labor dispute because control by union officials and local law enforcement agencies is rendered more difficult. A great danger inherent in mass picketing is the possibility that mob violence and rioting may result. These factors considered, it can hardly be said that a statutory prohibition of mass picketing which allows a sufficient number of pickets to advertise the existence of a labor dispute is an unreasonable exercise of the police power of the state.

The contention most commonly advanced in opposition to prohibitions of mass picketing is that such restriction deprives the pickets of the freedoms of speech and assembly. Courts have almost uniformly held that a limitation of the number of pickets does not abridge these fredoms.[24] Although the United States Supreme Court has not yet passed upon the constitutionality of a state statute forbidding mass picketing, there are many dicta in leading Supreme Court cases indicating that such a statute would

Workers v. Fortner, 42 S. E. (2d) 734 (Ga. S. Ct. 1947); Vim Electric Co. v. Retail Employee's Union, 128 N. J. Eq. 450, 16 A. (2d) 798 (Ch. Ct. 1940).

[22] 1 TELLER, *op. cit. supra* note 1, §§ 124-125.

[23] *See* Allen and Huck v. Amalgamated Meat Cutters and Butcher Workmen, 1 C. C. H. LAB. CAS. No. 18,029 (Calif. Super. Ct. 1937); Isolantite v. United Electrical, Radio and Machine Workers, 22 A. (2d) 796 (N. J. Ch. Ct. 1941).

[24] *E.g.*, United Electrical, Radio and Machine Workers v. Baldwin, 67 F. Supp. 235 (D. C. Conn. 1946); United States Electrical Motors v. United Electrical, Radio and Machine Workers, 166 P. (2d) 921 (Calif. Super. Ct. 1946); Local Union No. 3871 United Steel Workers v. Fortner, 42 S. E. (2d) 734 (Ga. S. Ct. 1947); Westinghouse Electric Corp. v. United Electrical, Radio and Machine Workers, 139 N. J. Eq. 91, 49 A. (2d) 896 (Ct. Err. and App. 1946).

be held constitutional.[25] It seems clear that picketing *en masse* is not regarded as peaceful and within the constitutional guaranty of free speech. Nor is there any constitutional right involved in the prohibition of interference with free ingress and egress by pickets, and there is no possibility that such a penal law will be found objectionable.

The second and third sections of the statute forbid intimidating, slanderous, or libelous language in conjunction with picketing. The constitutionality of these sections may be maintained on grounds similar to those supporting prohibition of mass picketing. But a court may not apply too broadly the concepts of libel and slander.[26]

Section 4 prohibits all picketing to secure the breach of a valid collective bargaining contract between an employer and the bargaining contract between an employer and the bargaining "unit" selected by his employees or certified as such under the provisions of the National Labor Relations Act.[27] This section is designed to protect employers from injuries caused by picketing in an inter-union dispute over exclusive bargaining privileges. Certainly the situation of an employer who has in good faith entered into a collective bargaining contract with one union only to be picketed by a rival union demands sympathy. The employer is on the horns of a dilemma. If he refuses to breach his collective bargaining agreement, he must bear the financial loss that picketing always entails. Or, if he surrenders to the demands of the picketing union, he will undoubtedly incur reprisals by the ousted union. The legislature has sought to alleviate the plight of the employer in this situation by forbidding conduct otherwise lawful when carried on for the purpose of inducing a breach of a collective bargaining contract. The constitutional question raised is whether

[25] *See e.g.*, Thornhill v. Alabama, 310 U. S. 88, 105 1940; Carpenter and Joiners Union v. Ritters Cafe, 315 U. S. 722, 738 (1942).

[26] *See* Cafeteria Employees Union v. Angelos, 320 U. S. 293, 295 (1943).

[27] 49 STAT. 449-457 (1935), 29 U. S. C. §§ 151-166 (1940).

the legislature in prohibiting peaceful picketing has abridged the constitutional right of freedom of speech.

That there is a limit to the constitutional protection afforded to peaceful picketing is illustrated by the restrictions upheld in the *Meadowmoor Dairies* and *Ritter's Cafe cases*. While no other limitations have as yet been expressly recognized by the United States Supreme Court, it is not unreasonable to assume that there are other situations in which a state might be justified in forbidding peaceful picketing. One such situation may be where the picketing is carried on to obtain an unlawful object.[28] This is not to say that a state is free to declare unlawful any object it chooses. The exact limits of the unlawful purpose doctrine are hazy, and it is probable that the gradual process of judicial inclusion and exclusion must run its course. This doctrine has many times been applied by state and lower federal courts in enjoining peaceful picketing[29] and some recognition of the unlawful purpose principle may be inferred from a dictum in the *Wohl* case.[30] It may well be that the Supreme Court will consider the interest of the state in protecting a blameless employer from financial loss sufficient justification for a prohibition of picketing to secure the breach of a collective bargaining contract. Certainly there is as much or more justification for this restriction as that upheld in the *Ritter's Cafe* case. No objection can be made that the statute is

[28] RESTATEMENT, TORTS, §§ 775, 794 (1938); Larson, *May Peaceful Picketing Be Enjoined?* 22 TEX. L. REV. 392, 422 (1944); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 209 (1942).

[29] *E.g.*, Dixie Motor Coach Corp. v. Amalgamated Assn. of Street Electric Ry. and Motor Coach Employees, 74 F. Supp. 952 (W. D. Ark. 1947); James v. Marinship, 155 P. (2d) 329 (Calif. S. Ct. 1944); Bautista and Macias v. Dairy Employees Union, 155 P. (2d) 343 (Calif. S. Ct. 1944); Burlington Transp. Co. v. Hathaway, 12 N. W. (2d) 167 (Iowa S. Ct. 1943); Fashioncraft v. Halpern, 313 Mass. 385, 48 N. E. (2d) 1 (Mass. Sup. Jud. Ct. 1943); Lafayette Dramatic Productions v. Ferentz, 9 N. W. (2d) 57 (Mich. S. Ct. 1943); Hobbs v. Poteet, 207 S. W. (2d) 501 (Mo. S. Ct. 1947); Schwab v. Moving Picture Machine Operators Local No. 159, 165 Ore. 602, 109 P. (2d) 600 (Ore. S. Ct. 1941); International Assn. of Machinists, Lodge 1488 v. Downtown Employees Assn., 204 S. W. (2d) 685 (Tex. Civ. App. 1947) *writ of error refused no reversible error by Tex. S. Ct.*; Retail Clerks Union v. Wisconsin Employment Relations Board, 242 Wis. 21, 6 N. W. (2d) 698 (Wis. S. Ct. 1942).

[30] 315 U. S. 769, 774 (1942).

too broad. An adequate definition of the prohibited activity is contained in the statute, which is narrowly drawn to meet a specific abuse of picketing.

Section 4a prohibits the declaring, advertising, or publicizing of continued picketing, actual or constructive, after such picketing has been enjoined by a court of competent jurisdiction. This section was probably intended by the legislature to prevent the circumvention of the restrictions imposed by the preceding section relating to inter-union disputes. However, it would seem to apply to any situation in which picketing has been enjoined. The section seems to authorize punishment of persons who attempt to induce a disregard of a court restraining order or who attempt to evade a judicial prohibition of picketing by requesting the aid of labor sympathizers in the observance of an imaginary picket line. It is perhaps the last mentioned practice that was intended to be made unlawful by the use of the term "constructive" picketing. This term is not defined in the statute and has not acquired a definite meaning from judicial usage. Such uncertainty in a penal statute is unfortunate.

In summary, the constitutional prospects of the Texas Mass Picketing Statute seem fairly secure. Limitation of the number of pickets is within the police power of the state, and the rights of freedom of speech and assembly are not substantially abridged. The same can be said as to the prohibitions of intimidatory and defamatory picketing and of interference with ingress and egress from a picketed plant. Picketing in an inter-union dispute where the employer has already contracted with a union representing his men would appear to be an evil for which remedial legislation may be constitutionally enacted. A balacing of interests of employers, unions, and the public may reasonably lead to the conclusion that the picketing should be enjoined, since this activity is something more than free speech and causes financial loss.

III.

The principle of the closed shop[31] originated in the craft guilds of medieval England and was a part of the heritage of colonial America.[32] Despite its ancient origin, there was surprisingly little development of legal doctrines regarding problems raised by the closed shop in the United States until the past four decades. Since 1903, when the National Association of Manufacturers formally resolved that the open shop[33] was necessary to maintain "industrial safety, advancement, and supremacy,"[34] the closed shop has been one of the most controversial issues of our time.

Proponents of the closed shop have argued that this type of union security is both necessary and desirable to increase the bargaining power of the individual worker, to protect employees from anti-union activity by employers, and to compel all recipients of the benefits of union activity to share the cost of unionism. On the other hand, opponents of the closed shop denounce the qualification of the employee's right to work, the creation of an anti-social labor monopoly, and the denial to the employer of free access to the employment market resulting from a closed shop. The social, economic, and ethical concepts involved in a consideration of the merits or demerits of the closed shop are very complex. Because of the complexity of the problem it is not remarkable that state courts and legislatures have differed widely in their attitudes toward the closed shop.

In colonial America attempts by workers to obtain a closed shop were indictable as criminal conspiracies. Although the aspect of criminality disappeared by the latter half of the Nineteenth

[31] A closed shop (sometimes called an "all union shop") exists in a business establishment where all workers are required to be union members as a condition precedent to being hired and must retain union membership as a condition of continued employment.

[32] TONER, THE CLOSED SHOP (American Council on Public Affairs, Washington, D. C. 1942).

[33] An open shop exists in a business establishment where both union and non-union workers are employed free from discrimination. Advocates of labor claim, however, that the open shop usually becomes the equivalent of a non-union shop—a shop in which union workers are not employed.

[34] Proceedings of the National Assn. of Manufacturers 62 (1903).

century, activity by labor to secure a closed shop was until comparatively recently considered tortious in most jurisdictions. In the period immediately preceding World War II, however, a majority of the states had, by statute or decision, recognized the legality of the closed shop.[35] The tenor of federal legislation at this time also was favorable to the closed shop. Since the termination of hostilities, the legislative trend has been reversed, and a substantial number of states have passed statutes or constitutional amendments outlawing the closed shop.[36] Among these states is Texas, which outlawed closed shop contracts by statute in 1947.[37]

IV.

The first section of the Texas Closed Shop Statute provides that the inherent right of a person to work and to bargain collectively or individually with his employer shall not be abridged by law or by any organization. This broad statement is followed by a specific declaration of public policy in the second section that no person shall be denied employment on account of membership or non-membership in a labor union.

The means for carrying these declarations of policy into effect is found in Section 3. This section states that any contract requiring that employees or applicants for employment shall or shall not be or remain members of a labor union shall be void and against public policy. This section is not applicable to contracts entered into before the effective date of the statute but applies only

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[35] 1 TELLER, *op. cit. supra* note 1, § 97.

[36] ARIZ. CONST. AMEND. adopted Nov. 5, 1946 and Ariz. Laws, 1947, c. 81; ARK. CONST. AMEND. No. 34 adopted Dec. 7, 1944 and Ark. Laws 1947, c. 101; FLA. CONST. § 12 (1944); Ga. Laws, 1947, Act. No. 140; Iowa Laws 1947, S. B. 109; ME. REV. STAT., c. 25, § 41-A as added by Me. Laws, 1947, c. 395; NEB. CONST. AMEND. adopted Nov. 5, 1946 and Neb. Laws, 1947, L. B. 347; N. H. Laws, c. 212, § 21 (1942), as amended by N. H. Laws, 1947, c. 194; N. M. CONST. AMEND. adopted Feb. 24, 1947; N. C. Laws 1947, H. B. 151; S. D. CONST. AMEND. Art. VI, § 2 adopted Nov. 5, 1946 and S. D. Laws, 1947, S. B. 367; TEX. REV. CIV. STAT. ANN. (Vernon's Supp. 1947) Art. 5207a; Va. Laws, 1947, c. 2.

[37] TEX. REV. CIV. STAT. ANN. (Vernon's Supp. 1947) Art. 5207a.

to extensions or renewals of existing contracts and to any new agreements.

The statute has been interpreted as outlawing any contract that discriminates against employees solely on the basis of membership or non-membership in a union.[38] In view of this interpretation it is desirable to list and define the types of agreements within the purview of the statute:

A closed shop agreement requires that only union members be hired and that union membership be maintained as a condition of continued employment.

A union shop agreement requires that all who are hired become union members within a specified period after their employment and that union membership be maintained as a condition of continued employment.

A maintenance of membership agreement requires all who are union members on an agreed date, and those who thereafter become union members, to maintain membership for the term of the collective agreement as a condition of employment.

A "yellow dog" agreement requires that an employee resign union membership, if a member, and remain unaffiliated with a union as a condition of continued employment.

Whether or not the union preferential hiring agreement is affected by the statute cannot be told with certainty. Such agreement requires an employer to show preference in hiring union members but makes no condition precedent or subsequent regarding union membership.

The closed shop statute provides for no penalty to deter employers and unions from making one of the outlawed agreements. How then is the legislative purpose to be effected? The answer in part, is that the agreement is unenforcable in the courts because it is void and against public policy. The statute may also be applied in conjunction with principles of tort law to give a

[38] MARSHAL O. BELL, BRIEF AND ANALYSIS OF LABOR LAWS PASSED BY THE 50TH LEGISLATURE (1947).

cause of action to an individual worker against the parties to a contract which causes his dismissal or exclusion from employment.[39] The statute may further serve as the basis for injunction against strikes, picketing, or other anti-employer activity for the purpose of obtaining a closed shop contract—an unlawful purpose.

In several states the constitutionality of anti-closed shop legislation has been questioned, but so far all statutes of this type have been upheld.[40] The issue has not yet been decided by the United States Supreme Court, and it is therefore appropriate to consider the constitutional prospects of the Texas statute.

It would seem unlikely that the Texas Closed Shop Statute will be held an improper exercise of the state's police power. Although the issue is highly controversial, there seems to be sufficient basis in fact to support a legislative determination that the public interest would best be served by making closed shop contracts illegal and unenforceable. Ordinarily, a statute is constitutional unless it is arbitrary, discriminatory, or rationally unconnected with the evil sought to be remedied. The police power of the state is broad, and a convincing argument can be made in support of anti-closed shop legislation by drawing an analogy to statutory prohibitions of "yellow dog" contracts, which have been upheld by the United States Supreme Court.[41] If a state may properly prevent an employer from discriminating against union workers by the terms of an employment contract, it would seem that a state may also prohibit discrimination by an employer and a union against non-union workers.

To the extent that the judicial process for the enforcement of closed shop contracts is withheld, the Texas legislature does not

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[39] *See* American Federation of Labor v. Watson, Atty. Gen., 327 U. S. 582, 598 (1946).

[40] *E.g.*, American Federation of Labor v. Watson, Attq. Gen., 60 F. Supp. 1010 (S. D. Fal. 1945) *rev'd on other grounds*, 327 U. S. 582 (1946); American Federation of Labor v. American Sash and Door Co., 189 P. (2d) 912 (S. Ct. Ariz. 1948); Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 13 C. C. H. LAB. CAS. No. 63,919 (Neb. Dist. Ct. 1947); State v. Whitaker, 45 S. E. (2d) 860 (S. Ct. N. C. 1947); Mascari v. International Brotherhood of Teamsters, 209 S. W. (2d) 756 (Tenn. St. Ct. 1948).

[41] Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177 (1941).

seem to have infringed constitutional rights. Only in respect to the use of the statute as a basis for injunction against peaceful picketing is there a serious constitutional question.[42] However there are grounds for belief that the "unlawful object" theory may be sustained by the United States Supreme Court. In other words, an injunction against peaceful picketing may be sustained where individual and public interests have been weighed and the purpose (the closed shop) has been declared unlawful by the legislature.[43]

The doubt that anti-closed shop legislation is consistent with federal law has been dispelled by the recently enacted Labor-Management Relations Act.[44] Section 14b of the Act states:

> "... nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

It is clear from this statement that Congress has left the problem of the closed shop to be dealt with by the states, and it is significant that fourteen states passed legislation outlawing the closed shop in 1947.[45] Perhaps it is well that the states be permitted to experiment with legislation in attempting solutions to the problems arising from disputes over the closed shop.

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[42] While upholding an anti-closed shop statute as a reasonable exercise of the state's police power, the Tennessee Supreme Court refused to allow an injunction against peaceful picketing to obtain a closed shop contract in the case of Mascari v. International Brotherhood of Teamsters, 209 S. W. (2d) 756 (Tenn. S. Ct. 1948).

[43] See notes 28-30 *supra.*

[44] 61 STAT. 136-407 (1947), 29 U. S. C. §§ 141-197 (Supp. 1947).

[45] See note 36 *supra.*