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Constitutionality of State Limitations of Peaceful Picketing

James Lee Mitchell

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NOTES AND COMMENTS

CONSTITUTIONALITY OF STATE LIMITATIONS ON PEACEFUL PICKETING

THE decisions in *Thornhill v. Alabama*¹ and *Carlson v. California*² went a long way in removing industrial picketing beyond the control of the police power of a state. To what extent the doctrine announced by those two cases immunized peaceful picketing from injunction has been a "storm center of constitutional law" during the past ten years.

In the *Thornhill* and *Carlson* cases the Supreme Court of the United States declared the publication of the facts of a labor dispute near an employer's place of business, whether by sign, pamphlet, or word of mouth, to be an exercise of the right of free speech protected from abridgment by a state by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Accordingly, a state or municipal enactment forbidding all picketing was unconstitutional. The language of the opinions indicated that the Court was primarily concerned with the broad prohibitory scope of the statutes and were not holding that a state would be powerless under all circumstances to control or restrict industrial picketing. Mr. Justice Murphy speaking for the Court in the *Thornhill* case indicated the reservation in the mind of the Court:

"Abridgment of the liberty of such discussion can be justified only where the 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. . . .

"... No clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace 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. . . . [The statute] in question here does not aim specifically at serious encroachment on these interests and does not evi-

¹ 310 U. S. 88 (1940).

² 310 U. S. 106 (1940).

dence any such care in balancing these interests against the interests of the community and that of the individual in freedom of discussion on matters of public concern. . . ."³

Thus, the Court made it clear that it was not holding that peaceful picketing was speech pure and simple and immune from state control under any and all circumstances. But under what conditions and for what purpose a state could restrict peaceful picketing without running afoul of the Constitution was not answered by the *Thornhill* and *Carlson* cases. Nor has this question been fully clarified by subsequent cases.⁴

In *American Federation of Labor v. Swing*⁵ the Court held that peaceful picketing does not lose its constitutional protection merely because there is no immediate employer-employee dispute. Lack of employer-employee relationship could not be seized upon as an invariably sufficient cause for injunction. Such a rule was too broad because "the interdependence of economic interest of all engaged in the same industry has become a commonplace." It is to be noted that the *Swing* case was one in which the peaceful picketing was carried on for the closed shop.

*Pastry Drivers and Helpers Local 802 v. Wohl*⁶ spread the cloak of constitutional protection over secondary picketing. Defendant union, in an endeavor to induce plaintiffs (peddlers who bought and resold bakery goods) to work but six days a week and to hire an unemployed union member one day a week, picketed wholesale bakeries selling to plaintiffs and grocery stores who purchased plaintiffs' goods. Plaintiffs were independent contractors who made deliveries in their own trucks without help. There was no employer-employee relationship between plaintiffs and the manufacturing bakers or the grocery stores buying plaintiffs' wares. The New York court issued an injunction against all picketing by defend-

³ 310 U. S. at 104, 105.

⁴ The "Thornhill doctrine" has provoked numerous comments by legal scholars. For an excellent discussion of the doctrine from "Thornhill to Angelos" see Larson, *May Peaceful Picketing Be Enjoined?* 22 Tex. L. Rev. 392 (1944).

⁵ 312 U. S. 321 (1941).

⁶ 315 U. S. 769 (1942).

ant union.⁷ The Supreme Court reversed and held that secondary picketing was an exercise of the right of free speech protected by the Fourteenth Amendment to the Federal Constitution. "One need not be in a labor dispute, as defined by state law, to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."⁸ Weight was given to the deep interest which defendant union had in preventing the spread of the peddler system at the expense of union standards. The Court remarked that it could perceive no substantive evils in the situation of such magnitude as to warrant a holding that constitutional guaranties did not operate.

In *Carpenters and Joiners Union v. Ritter's Cafe*⁹ the Court in a 5-4 decision found peaceful picketing to be conducted under circumstances that justified the State of Texas in issuing an injunction. Ritter had employed non-union men in the construction of a building having no connection with his cafe. Defendant union picketed his cafe, carrying signs informing the public that the owner of the cafe had contracted with a non-union employer for the construction of a building. The decision in the case did not detract from the proposition that peaceful picketing is an exercise of the right of free speech. But it did reject the argument that peaceful picketing, because it is speech, must be free from restraint wherever and however it occurs. The decision upheld the power of a state to restrict picketing to the area of the industry within which the labor dispute arose. The language of the opinion speaks of reasonable regulations for the protection of the community, indicating that a reasonable balancing of interests would not offend the Fourteenth Amendment.

The *Ritter's Cafe* case is an instance where peaceful picketing is outside the boundaries of constitutional protection. The boundary indicated is the lines of industry within which the dispute

⁷ 284 N. Y. 788, 31 N. E. 2d 765 (1940), *aff'g* 259 App. Div. 868, 19 N. Y. S. 2d 811 (1940).

⁸ 315 U. S. at 774.

⁹ 315 U. S. 722 (1942), *aff'g* 149 S. W. 2d 694 (Tex. Civ. App. 1941).

arose. May other boundary lines be drawn? The answer to this question is in the affirmative, as evidenced by three decisions of the United States Supreme Court handed down on May 8, 1950.

In *Hughes v. Superior Court of California*¹⁰ the Court had before it this question: "Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers?" The petitioners, acting in behalf of a group calling itself "Progressive Citizens of America," demanded of Lucky Stores, Inc., that it hire Negroes at its store near a certain housing project in Richmond, California, as white clerks quit or were transferred, until the proportion of Negro clerks to white clerks approximated the proportion of Negro to white customers. Lucky refused to comply with this demand, and petitioners picketed Lucky's store to compel compliance. The superior court granted injunction against the picketing, and when petitioners continued to picket in the face of this injunction, the court found them guilty of contempt. On appeal the intermediate court annulled the judgment, but the judgment was reinstated upon review by a divided state supreme court.¹¹ The petitioners defended their action by attacking the injunction on the ground that it violated the right of freedom of speech guaranteed by the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court granted certiorari to consider this constitutional question.

The state court held that the picketing enjoined was for the attainment of an unlawful objective in that it sought to compel Lucky to discriminate in favor of one race as against all others in the hiring of a portion of its clerks rather than to select on the basis of merit. The declared public policy of the state was against discrimination because of race, color or creed. The court found that proportional hiring would constitute discrimination, and therefore the objective made petitioners' acts an abuse of the right to picket.

¹⁰ 70 S. Ct. 718, 719 (1950).

¹¹ 32 Cal. 2d 850, 198 P. 2d 885 (1948).

The United States Supreme Court, in a unanimous decision, affirmed the judgment of the state court. The peculiar fact situation may make the case of doubtful value as a precedent to be followed in the usual run of labor cases. No employer-employee dispute was involved; the purpose of the picketing was not to advance the cause of labor but to foster the special interests of a racial group. That the court was influenced in its opinion by the consequences that might flow from a contrary holding is evidenced in the following quotation: "To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups of New York, and so on through the whole gamut of racial and religious concentrations in various cities."¹² With respect to the constitutional right to picket the court was careful in its expression:

"We have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment. . . . [Citing the *Thornhill*, *Swing*, *Wohl* and *Angelos*¹³ cases.] However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a state if the manner in which picketing is conducted *or the purpose* which it seeks to effectuate gives ground for its disallowance."¹⁴

The Court was at pains to point out that the picketing was for an unlawful objective (to promote discrimination). There is a hint that had the picketing been to protest existing discrimination, it would have enjoyed constitutional protection.¹⁵ How to determine whether the purpose of picketing is to promote discrimination or

¹² 70 S. Ct. at 721.

¹³ 320 U. S. 293 (1943).

¹⁴ 70 S. Ct. at 721. Italics added.

¹⁵ *Id.* at 722.

to protest existing discrimination is a problem the difficulty of which should not be underestimated.

*Building Service Union v. Gazzam*¹⁶ is similar to the *Hughes* case in that the picketing therein enjoined was for a purpose declared to be against public policy. But here the resemblance ends. The picketing in the *Gazzam* case was carried on by a labor union to promote traditional interests of organized labor; no racial conflict was involved. Defendant union picketed plaintiff's business to compel him to sign a contract that would cause him to coerce his employees into joining defendant union. The Washington court based its decision on the argument that picketing for a purpose that subverted the public policy of the state was outside the scope of constitutional protection and subject to state restraint.¹⁷ The decision was rendered by a divided court and expressly overruled prior decisions which had made virtually all peaceful picketing immune from injunction under the authority of the *Swing* case.

The United States Supreme Court affirmed the judgment of the Washington court, citing the *Angelos*, *Wohl*, *Thornhill*, and *Swing* cases for the proposition that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. The Court went on to say: "But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity," citing *Milk Wagon Drivers Union v. Meadowmoor Dairies*, *Hotel and Restaurant Employees, International Alliance, Local No. 222 v. Wisconsin Employment Relation Board*, and the *Ritter's Cafe* case.¹⁸ In answer to petitioner's argument that the *Swing* case was controlling, the Court said:

¹⁶ 70 S. Ct. 784 (1950).

¹⁷ 29 Wash. 2d 488, 188 P. 2d 97 (1947).

¹⁸ 70 S. Ct. at 787. In both the *Meadowmoor* (312 U. S. 287 (1941)) and the *Hotel and Restaurant Employees' Alliance* (315 U. S. 437 (1942)) cases violence accompanied the picketing and was responsible for the holdings.

"We think not. In that case this court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing. . . ."¹⁹

It appears that the objectives sought in the *Swing* and *Gazzam* cases were the same, *i.e.*, the closed shop. The two cases present a different approach to the same question—should an employer be protected from the consequences occasioned by picketing of his place of business to compel him to coerce his employees to join the picketing union? The Illinois court, in the *Swing* case, answered this question in the affirmative and granted an injunction, relying on the absence of an employer-employee relationship. The Washington court answered the same question in the affirmative but based its power to grant injunctive relief on an expressed holding that the picketing was for an unlawful purpose in that it was an attempt to subvert the declared public policy of the state against employer coercion of employees in their choice of a bargaining representative. The two cases must be distinguished on the basis that the questions presented to the Supreme Court were different. This point of distinction is apparent in the following expression:

"Peaceful picketing for any lawful purpose is not prohibited by the decree under review. The state has not here, as in *Swing*, relied on the absence of an employer-employee relationship. Thus the state has not, as was the case there, excluded workmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."²⁰

The court further said:

"The injunction was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated, namely, 'an abuse of the exercise of the right to picket.'"²¹

¹⁹ 70 S. Ct. at 788.

²⁰ *Ibid.*

²¹ 70 S. Ct. at 789.

The court relied on *Giboney v. Empire Storage and Ice Co.*,²² saying: "Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than the declared policy of the state."²³

One perceives that picketing, because it is more than speech, is subject to state prohibition if the control is directed against a situation calculated to subvert the public policy of the state. Moreover, "to judge the wisdom of such policy" is not for the Supreme Court; the Court "is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgement by the Fourteenth Amendment."²⁴

In *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers Union, Local 309 v. Hanke et al.*,²⁵ the Court decided two cases favorable to the action of the State of Washington in granting an injunction against picketing for a union shop. The state's action²⁶ was based on a weighing of the interests to be protected, and the state's power to do this is upheld by the decision. Plaintiff Hanke operated a garage and used car lot in Seattle. He operated his business with the aid of his three sons, employing no outside help. It was the practice of Hanke to remain open nights, weekends, and holidays. Defendant union, which included in its membership automobile dealers and salesmen, picketed Hanke's business to compel him to operate his business in accordance with an agreement between the union and the Independent Automobile Dealers Association of Seattle. Specifically, the union demanded that Hanke close on weekends and on eight specified holidays. The facts in the companion case were similar. Picketing was carried on by an outside union to force plaintiffs to operate according to union standards. The precise question to be decided

²² 336 U. S. 490 (1949). In this case the objective of the picketing was violation of a state anti-trust law having criminal sanction.

²³ 70 S. Ct. at 789.

²⁴ *Id.* at 788.

²⁵ 70 S. Ct. 773 (1950).

²⁶ 207 P. 2d 206 (Wash. 1949).

had been answered favorably to the picketing union by the Supreme Court in the *Swing*, *Wohl*, and *Angelos* cases.²⁷ The *Wohl* case, in particular, was a holding that seemed square authority extending constitutional protection to defendant's picketing. The court put these cases to one side saying; "In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances to what constitutes an industrial relationship or a labor dispute."²⁸ If that was the extent of the holdings in those cases, then it is a proper point of distinction. But, as pointed out by the dissent,²⁹ it is difficult to understand that they were so narrowly confined. Whether the cases are in conflict or are distinguishable is a mooted question. The significant point is the holding in the principal case. The Court declared:

"[W]e must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' . . . 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 limits of permissible contest open to industrial combatants.' . . . A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect."³⁰

The court reflected on the serious problems confronting a state in balancing public and private interests and made it clear that the Court would not substitute its judgment for the judgment of the state.

²⁷ The *Swing* and *Wohl* cases are discussed *supra* notes 5 and 6. In the *Angelos* case, cited *supra* note 13, defendant union picketed plaintiffs' cafe to induce plaintiffs to hire union help. The plaintiffs had been operating without help.

²⁸ 70 S. Ct. at 778.

²⁹ Justices Minton, Black, and Reed dissented.

³⁰ 70 S. Ct. at 775, 776.

“Whether to prefer the union or a self-employer in such a situation, or to seek partial recognition of both interests, and, if so, by what means to secure such accommodation, obviously presents to a State serious problems. There are no sure answers, and the best available solution is likely to be experimental and tentative, and always subject to control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of *Senn v. Tile Layers Protective Union*. . . .”³¹

This seems to be a forthright statement. Peaceful picketing has in it an element of communication, but it is not speech pure and simple and does not enjoy the full protection accorded to that sacred right. A state may restrict peaceful picketing so long as in doing so it gives due regard to the element of communication therein contained. All that the Constitution requires is that there be a reasonable balancing of conflicting interests.

In concluding, a word should be said about Chapter 74 of Texas Laws of 1947.³² This statute declares that the union or closed shop contract is void and against public policy. Speculation has been indulged as to the right of a union to strike and picket for the union or closed shop in contravention of this enactment. In view of the three United States Supreme Court cases decided this year, there would seem to be no doubt that Texas has the constitutional power to enjoin picketing for such a purpose.

James Lee Mitchell.

³¹ 70 S. Ct. at 776. The *Senn* case is to be found in 301 U. S. 468 (1937).

³² TEX. REV. CIV. STAT. (Vernon, 1948) art. 5207a.