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# Constitutional Law -- Validity of Statutes Restricting Picketing and Related Activities

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gard of the safety of others'. Because of the ambiguous use of these words they are not used in the Restatement of this Subject."[37]

Adoption of this rule would permit application of the comparative negligence statute and allow a *factual* consideration of who caused the injury.

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CONSTITUTIONAL LAW—VALIDITY OF STATUTES RESTRICTING PICKETING AND RELATED ACTIVITIES. Recent sessions of state and municipal legislative bodies witnessed considerable agitation for new statutes or amendments to existing labor codes more or less designed to offset the advantages gained by organized labor through legislative and judicial decisions of recent years.[1] Such legislation has to a large extent been directed at picketing and related activities. In Wisconsin such activity has produced the Catlin Anti-Picketing Act[2] and the

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[37] *Ibid.*

[1] Examples are the Norris-LaGuardia Anti-Injunction Act, 47 Stat. 70; The National Labor Relations Act, 49 Stat. 449; the Wisconsin Labor Relations Act, Ch. 111, Wisconsin Stat. (1937). Cases are: Senn v. Tile Layers Union, 301 U.S. 468, 57 Sup. Ct. 857 (1937); Lauf v. Shinner Co., 303 U.S. 323, 58 Sup. Ct. 578 (1938); New Negro Alliance v. Grocery Co., 303 U.S. 552, 58 Sup. Ct. 703 (1938); Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Co., 215 Wis. 623, 256 N.W. 56 (1934); American Furniture Co. v. I. B. of T. C. & H. of A., 222 Wis. 338, 268 N.W. 250 (1936); and the *Senn* decision in the Wisconsin court, 222 Wis. 383, 268 N.W. 270 (1936).

[2] Wis. Laws 1939, c. 25. The bill was introduced by Assemblyman Catlin at the instance of R. O. Wipperman of Milwaukee, a lobbyist, on February 2, 1939. The next day an identical companion bill, 65S, was introduced in the Senate by Senator White. The first draft of the Catlin bill, never actually introduced, forbade picketing by anyone not an employee for six months and provided a penalty of $10.00 to $100.00 or a ten to sixty day jail sentence. The bill as introduced by Assemblyman Catlin abolishing "stranger" picketing defined a labor dispute as a controversy between an employer and "two or more of his . . . employees, or their representatives," and provided that "no labor dispute shall be deemed to exist unless the controversy results in a strike or lockout."

On February 17, Mr. Wipperman had an amendment prepared for 65S which, however, was introduced in the Assembly by Assemblyman Ludvigsen as a substitute for the Catlin bill in its original form. It was this proposal that became the present law. (The legislative history of the Catlin Act is drawn from files in the office of the Secretary of State and the Legislative Reference Library.)

The Ludvigsen amendment went much farther than did the original bill. It forbade not only "stranger" picketing, but all minority picketing. A "labor dispute" was defined as a "controversy between an employer and a majority of his employees in a collective bargaining unit." There is no definition of a "collective bargaining unit" in the act, but compare §111.02 (6) of the Employment Peace Act (Ch. 57, Laws of 1939,) which defines the unit as all the employees of one employer within the state, except where a majority of the employees in a "single craft, division, department or plant" shall have voted

Employment Peace Act.[3] Similar acts have been passed elsewhere[4] while some states have in effect limited picketing by legislation regulating the conduct of labor disputes generally.[5] Other legislatures considered restrictive legislation at the last session but failed to take decisive action.[6]

This activity raises the problem of the constitutional power of the legislature to restrict peaceful picketing. It is the purpose of this comment to consider whether restrictions on the presentation of messages by picketing[7] violates the right of free speech.[8]

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by secret ballot to be a separate bargaining unit. By §111.06 (2) (e), picketing "or any other overt concomitant of a strike" is made an unfair labor practice, unless majority in a collective bargaining unit shall have voted by secret ballot to strike.

[3] The Wisconsin legislature repealed the Wisconsin Labor Relations Act and passed the Employment Peace Act, Wis. Laws 1939, c. 57. This act provided for the establishment of a new labor board and established "unfair labor practices" for both employer and employee. Relevant sections for a discussion of picketing rights are 111.02 (8) (12), 111.04, 111.06 (2) (a-b-e-f-g-i), 111.07 (4), 111.11, 111.15. The latter section contains a provision that nothing in the act should "be so construed as to invade unlawfully the right of freedom of speech." Since the legislature could not do the unconstitutional in any case, it is difficult to see the value of such a clause. It may aid the court when interpreting the act in concluding that the legislature had no intention of exerting its control over free speech to the maximum limit. This provision of the act was contained in amendment 2A offered by Mr. Peterson, the Assemblyman who introduced the bill itself.

[4] Oregon adopted an anti-picketing law by referendum in the 1938 November election which is similar to the Catlin Act but adds restrictions against sympathetic strikes and jurisdictional disputes. For text see 4 L.R.R. 331, November 14, 1938.

Several cities have put restrictions on picketing, including Antioch, San Diego, and Los Angeles, California, and Flint, Michigan. The Los Angeles ordinance has secret ballot provisions in addition to the restrictions of the Oregon statute. For text of Los Angeles law see 4 L.R.R. 79 (September 26, 1938).

The Minnesota statute, Minn. Laws 1939, c. 440, text at 4 L.R.R. 303 (May 1, 1939), is less restrictive than those cited above. Section 11 requires only that a majority of those picketing an employer be on strike. Sections 1(g) and 11(e), relating to stranger picketing and jurisdictional disputes, are less severe than are the statutes cited above. (For the corrected form of section 11(e) see 4 L.R.R. 341.)

[5] The Michigan Labor Relations Act requires notice to the Labor Board before striking (§§9 and 9a), restricts strikes in the public utility field (§13) and restricts "coercion" in strikes (§17). See House Enrolled Act No. 184, approved June 8, 1939; text at 4 L.R.R. 602 (June 19, 1939).

The Pennsylvania Act is even less directly aimed at picketing except for the implications of the "coercion" clause of §6 (2) (a) and (e). Pamphlet Laws 1168; text at 4 L.R.R. 604 (June 19, 1939).

[6] Idaho House Bill 306, restricting picketing, was killed by a pocket veto. 4 L.R.R. 342 (May 8, 1939).

[7] The term "picketing" is used in this comment in the generally accepted sense of the completely orderly and peaceful activity of patrolling before a store, factory, etc., for the purpose of advertising to the public the existence of a difference of opinion with the employer over a matter relating to labor

Freedom of speech and press, protected against encroachment from the federal government by the First Amendment,[9] are protected

conditions; it includes appeals for aid to patrons of the employer and to his employees by placards, banners, handbills, or oral communications.

[8] There have been some indications of belief in state courts that anti-picketing laws were unconstitutional because violative of the right of free speech. In People v. Harris, 91 P. (2d) 989 (Colorado 1939), the court held the 1905 Colorado anti-picketing statute unconstitutional because it was a "denial of free speech". In Fornilli v. Auto Mechanics Union, 93 P. (2d) 422, 426 (Wash. 1939), a dissenting justice would protect picketing from injunction because of a constitutional right to assemble and to publicize grievances. Other intermediate and lower court decisions taking this ground are *Ex parte* Lyons, 89 P. (2d) 190 (Cal. 1938); People of Cal. v. Watson, No. 2824, July 6, 1939, California Superior Court, Contra Costa County (holding unconstitutional the anti-picketing ordinance of Antioch, California) reported in 4 L.R.R. 789 (July 24, 1939); Commonwealth v. Harris, Court of Common Pleas, Allegheny County, Pennsylvania, March 15, 1935, reported in C.C.H. Labor Law Service p. 16264, par. 16112; Scott Burr Stores Corp. v. Specter, Ohio Ct. of Common Pleas, L.R.R. May 29, 1939, p. 30. Most of these cases rest on mere assertion of the principle of free speech rather than on thorough analysis of the theoretical considerations.

A decision handed down since the writing of this article which gives a careful analysis of the problem is: Reno v. Second Judicial District Court, 95 P. (2d) 994 (Nev. 1939).

This is not to imply that this is the only ground of attack on the constitutionality of anti-picketing legislation. It is to be expected that the problem will be considered from many angles by the United States Supreme Court at this term of court in determining the validity of an old Alabama anti-picketing act, in Thornhill v. State, 189 So. 913 (Ala. 1939), *cert. granted*, December 11, 1939, as reported in 7 Law Week 696, December 12, 1939. Some grounds other than free speech for contesting the validity of anti-picketing legislation are:

A. A state anti-picketing act might be found to be invalid because it conflicts with some portion of the federal labor acts. See W.L.R.B. v. Fred Rueping Leather Company, 228 Wis. 473, 279 N.W. 673 (1938). The enlarged sphere of federal authority over commerce in recent years makes this important. N.L.R.B. v. Fainblatt, 306 U.S. 601, 59 Sup. Ct. 668 (1939); and see Consolidated Edison Company v. N.L.R.B., 305 U.S. 197, 222, 59 Sup. Ct. 206, 213 (1938). But compare Leader v. Apex Hosiery Co., decided November 29, 1939, by C.C.A. (3d), and at this writing reported in full only in 5 L.R.R. 375 (Dec. 4, 1939) for the proposition that the federal government must clearly have intended to occupy the whole field of regulation.

B. The majority rule provision in the statutes may be so arbitrary and unrelated to the objects of the legislation as to make the laws void under the due process clause. It may be queried what object within the scope of the police power is served if representatives of 49% of the employees are restrained from picketing but those of 51% are not. A lower court decision holding such a provision wholly unreasonable in the Los Angeles statute is People v Gidaly, No's. CR A 1602 and 1607, July 18, 1939, California Superior Court, Appellate Department, Los Angeles County, 4 L.R.R. 826 (July 31, 1939) and 5 L.R.R. 216 (October 30, 1939). For an opposite view by a lower court see A.F.L. v. Bain, Three Judge Circuit Court, Multnomah County, Oregon, July 8, 1939; 4 L.R.R. 824, 826 (July 31, 1939).

For applications by the United States Supreme Court of the majority rule doctrine in labor disputes see Virginian Ry. v. System Federation, 300 U.S. 515, 559, 57 Sup. Ct. 592, 605 (1937); and N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 Sup. Ct. 615, 628 (1937).

C. The Catlin act makes it unlawful to picket or "to interfere" with an employer's business or with any person desiring to transact business with him

against state action by the Fourteenth Amendment.[10] The basic problem to be discussed here is whether the activity of picketing comes within the meaning of free speech or free press. If it does, the remaining problems are first, whether the state can restrict the right of free speech in this case because of its proprietary control of the streets; and second, whether picketing restrictions are properly within the scope of the police power even though free speech is restrained.[11]

I. Is Picketing Within the Meaning of Free Speech or Press?

The terms speech and press mean more than mere oral communication or newspaper message. A picketer's banner, placard, or leaflet may come within the scope of *Lovell v. Griffin*:

> The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[12]

And the act of picketing is as clearly within the meaning of speech as is the display of a red flag, given constitutional protection in *Stromberg v. California*.[13] Hence, if picketing fails to come with-

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in the absence of a labor dispute. Is the word "interfere" so vague as to make the statute void for lack of due process? For a thorough discussion of the principle that a staute may be void for indefiniteness and that the rule applies to civil as well as criminal statutes, see Cline v. Frink Dairy Co., 247 U.S. 445, 458, 47 Sup. Ct. 681, 685 (1927); for a more recent case see Lanzetta v. State, 59 Sup. Ct. 618 (1939).

For a suggestion that the word "interference" is not too vague when applied to restrict employer activity, see Texas & N. O. Ry. Co. v. Railway Clerks, 281 U.S. 548, 568, 50 Sup. Ct. 427, 433 (1930). Query, when applied to employees: Vague injunctions with similar terms proved so harsh and impracticable in application, §9 of the Norris-La Guardia Act and its companion Wis. Stat. §103.58 were enacted. For recognition by the Supreme Court of this purpose, see Virginian Railway Company v. System Federation, 300 U.S. 515, 563, 57 Sup. Ct. 592, 606 (1937).

[9] "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

[10] Palko v. Connecticut, 302 U.S. 319, 58 Sup. Ct. 149 (1937); dissenting opinion, Gilbert v. Minnesota, 254 U.S. 325, 336, 343, 41 Sup. Ct. 125, 128, 131 (1920); Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625 (1925); Whitney v. California, 274 U.S. 357, 47 Sup. Ct. 641 (1927); Stromberg v. California, 283 U.S. 359, 51 Sup. Ct. 532 (1931); Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625 (1931); Grosjean v. American Press Company, 297 U.S. 233, 56 Sup. Ct. 444 (1936); Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732 (1937); Lovell v. Griffin, 303 U.S. 444, 58 Sup. Ct. 666 (1938); Hague v. CIO, 307 U.S. 496, 59 Sup. Ct. 954 (1939); The Handbill Cases, 7 U.S. Law Week 582 (1939); and see for a discussion of the development to the *Gitlow* case, Charles Warren, *The New "Liberty" Under the Fourteenth Amendment* (1936) 39 Harv. L. Rev. 431.

[11] This approach to the problem is modeled after that of the Supreme Court in Hague v. CIO, 307 U.S. 496, 59 Sup. Ct. 954 (1939).

[12] 303 U.S. 444, 452, 58 Sup. Ct. 666, 669 (1938).

[13] 283 U.S. 359, 51 Sup. Ct. 532 (1931).

in the meaning of the First Amendment, it must be for some reason other than that it is not identical with oratory.

In determining the constitutional status of picketing, the fact that it has historically been placed by the courts on the periphery of illegality may be given some weight. In the first American case unionization itself, fifteen years after the adoption of the First Amendment, was declared a conspiracy.[14] Unionization's legality remained in doubt for three decades.[15] Even recently picketing has frequently been held illegal.[16] In 1905 a federal court said:

> There is, and can be, no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.[17]

This view was approved as recently as 1919 in California.[18] Many courts have held peaceful picketing legal,[19] but have frustrated the activity by a narrow interpretation of the word "peaceful".[20] In 1921 the United States Supreme Court condoned the presence of one picket at each gate of a plant,[21] but as recently as 1932 many courts have in effect made picketing illegal.[22]

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[14] "A combination of workmen to raise their wages may be considered in a two-fold point of view: one to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both." Philadelphia Cordwainers' Case (1806) discussed in Frankfurter and Greene, The Labor Injunction p. 2 (1930).

[15] The landmark decision upholding the legality of organization is Commonwealth v. Hunt, 4 Met. 111 (Massachusetts 1842).

[16] Cases in effect taking this view are, e.g., Local Union No. 313 v. Stathakis, 135 Ark. 86, 205 S.W. 450 (1918); Ellis v. Journeyman Barber's Union, 194 Iowa 1179, 11 N.W. 111 (1922); Paramount Enterprises v. Mitchell, 104 Fla. 407, 140 So. 328 (1932). These cases are discussed in Cooper, *The Fiction of Peaceful Picketing* (1936) 35 Mich. L. R. 73.

[17] Atchison Ry. Co. v. Gee, 139 Fed. 582 (S.D. Iowa 1905).

[18] Moore v. Cook's etc. Union, 39 Cal. App. 538, 179 Pac. 417 (1919).

[19] Federal examples: Iron Molders' Union v. Allis-Chalmers Company, 166 Fed. 45 (C.C.A. 7th, 1908); Bittner v. West Va. & Pittsburgh Coal Company, 214 Fed. 716 (C.C.A. 4th, 1914).

[20] Picketing has been held intimadatory when a "peaceable, law abiding man" was "compelled to pass by men known to him to be unfriendly." Kolley v. Robinson, 187 Fed. 415, 417 (C.C.A. 8th, 1911). And picketing has been held not to be peaceful when the pickets were "hollering different things" including the term "cattle". Sona v. Aluminum Casting Co., 214 Fed. 936 (C.C.A. 6th, 1914). A number of state cases of similar import are collected by Cooper in his article cited in note 16, *supra*.

[21] The Court, however, noted something "sinister", a militancy "inconsistent with peaceful persuasion" in the word "picket". American Foundries v. Tri City Council, 257 U.S. 184, 42 Sup. Ct. 72 (1921).

[22] See Hellerstein, *Picketing Legislation and the Courts* (1932) 10 N.C.L. Rev. 158; for a very careful discussion of factors considered by the courts in their treatment of labor disputes, see Eskin, *The Legality of "Peaceful Coercion" in Labor Disputes* (1937) 85 U. of Pa. L. Rev. 456.

Many recent decisions upholding the right to picket are based, not on constitutional immunity, but on statutory enactments. The Wisconsin court for example has found full protection for picketing in statutory authority:

> We cannot say that the legislature may not validly *permit* acts on the part of labor organizations not intrinsically wrongful as involving violence, intimidation, or misrepresentation, the purpose of which is to give notoriety to the attitude of an employer in a labor dispute.[23]

There is no evidence either here or in two recent United States Supreme Court decisions, which are most favorable to picketing, that the concept of constitutional protection to picketing has ever even occurred to the court.[24]

The condition of these authorities is some indication that picketing is not within the meaning of free speech at all. For how can an activity so recently held illegal leap so suddenly to the privileged position of constitutional protection? And if protection to picketing is based solely on statutes, cannot the legislature freely take away what it has given?[25] On the other hand the chain of cases outlined above reveals a constant development of the status of picketing in the eyes of the courts, and it would appear on the basis of the most recent decisions that picketing has completed the journey to a position of constitutional privilege.

One of the most important of those recent decisions is *Senn v. Tile Layers Union* in which Mr. Justice Brandeis for the Court said:

> Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute *for free-*

[23] American Furniture Co. v. I. B. of T. C. & H. of A., 222 Wis. 338, 364, 268 N.W. 250, 262 (1936). Italics supplied.

[24] New Negro Alliance v. Grocery Co., 303 U.S. 552, 58 Sup. Ct. 703 (1938). Lauf v. Shinner Co., 303 U.S. 323, 58 Sup. Ct. 578 (1938). These decisions are based on the Norris-LaGuardia Anti-Injunction Act.

[25] It might be argued that judicial decisions are not under the due process restriction of the Fourteenth Amendment while legislative acts are. But a change in the established construction of a statute may violate due process: Gelpcke v. Dubuque, 1 Wall. 175 (1863). Therefore the many "illegality" decisions would have no bearing on what a legislature might possibly do. For a short suggestion that a decision reaching a certain result may be constitutional while a statute to the same end would not be, see Note (1928) 8 Col. L. Rev. 619, 624, 625.

> *dom of speech is guaranteed by the federal constitution.* . . . If the end sought by the unions is not forbidden by the Federal Constitution, the state may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to seek their desired economic ends.[26]

The justice here says that there is a constitutional right to "make known the facts" of a labor dispute. Did he speak of picketing as the method for this publicity? Since the entire case, as well as the sentences immediately surrounding the italicized portion above, does deal with picketing, the crucial sentence would be a surprising irrelevancy if it did not refer to the same thing. And it is to be noted that picketing is explicitly stated to be no more a mere permissive right—*i.e.*, a right subject to the mandate of the state—than is the "combination" of capitalists or employers.

The decision of the Supreme Court in the *Handbill Cases*[27] lends strong support to the view that picketing is within the meaning of free speech. The *Handbill Cases* were a group of four cases treated as one by the Supreme Court for the purpose of decision. All of them involve the distribution of leaflets in violation of law. Three of the cases involved religious or political problems, but the fourth, *Snyder v. Milwaukee*, a decision appealed from the Wisconsin supreme court,[28] involves as defendant a picket who stood in front of a meat market distributing leaflets concerning a strike against the shop. The Supreme Court held that the ordinances violated the constitutional right of free speech. This would appear to be conclusive evidence that the Supreme Court considers picketing for some purposes at least to be within the meaning of free speech and press. If anti-picketing ordinances are to be sustained, it must be on some other ground than that picketing is not in any sense an exercise of the right of "free speech".[29]

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[26] 301 U.S. 468, 478, 57 Sup. Ct. 857, 862 (1937). Italics supplied.

[27] *Supra* note 10.

[28] Milwaukee v. Snyder, 230 Wis. 131, 283 N.W. 301 (1939).

[29] Of course the state cases holding that anti-picketing ordinances are violative of the right of free speech necessarily conclude that picketing is included within the meaning of free speech. (Cases collected in note 8.)

For a tacit assumption that picketing is within the meaning of free speech, although a particular restraint was not invalid, see Meadowmoor Dairies, Inc. v. Milk Wagon Drivers Union, 371 Ill. 377, 21 N.E. (2d) 308 (1939), *cert. denied*, November 23, 1939, and rehearing denied December 14, 1939. The question is reserved in Fur Workers Union Local No. 72 v. Fur Workers Union, 105 Fed. (2d) 1, 12 (1939), *supra* note 9.

## II. Control of Streets by Legislature

If a state has absolute control of its streets, such as a householder has of his home, then a state could forbid the use of its streets even for purposes protected by free speech. The Supreme Court formerly held this position, as stated in *Davis v. Massachusetts* in 1897.[30] The conviction of Davis for making speeches in Boston Common contrary to a city ordinance was affirmed.

In *Hague v. C. I. O.*, involving the right of the C. I. O. and others to hold public meetings in Jersey City, counsel for Mayor Hague, relying on the *Davis* decision, contended that the city might be as arbitrary as it chose in restricting the use of public streets and parks. Respondent C. I. O. in its brief argued that the *Davis* case was decided more than 25 years before the Supreme Court ruled that freedom of speech was included within the Fourteenth Amendment:[31]

> The analogy pressed in the *Davis* Case, and by the petitioners herein, between the interest of the public authorities in the public places and the interest of a private homeowner in his home, becomes inapposite once it is granted that the Fourteenth Amendment protects against the invasion of the right of free speech. To the private homeowner the strictures of the Fourteenth Amendment do not apply. To the public authorities, they do.[32]

Although the Supreme Court declined to expressly overrule the *Davis* case as unnecessary to the decision in the *Hague* case, it would appear that all possible meaning was "distinguished" out of the *Davis* rule. The Court found that streets and parks were held in trust for the public and that they had always been used for purposes of assembly and discussion.[33] When the *Handbill Cases*[34] discussed above were decided a few months after the *Hague* case, the Court did not find it necessary even to mention the problem here discussed. From these decisions it may be concluded that anti-picketing statutes cannot because of the state's ownership of the streets over-ride the protection given to free speech.

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[30] 167 U.S. 43, 17 Sup. Ct. 731 (1897), affirming Com. v. Davis, (per Holmes, J.) 162 Mass. 510, 39 N.E. 113 (1895).

[31] *Supra* note 10.

[32] Respondent's brief p. 58 in Hague v. C.I.O., 307 U.S. 496, 59 Sup. Ct. 954 (1939).

[33] Hague v. C.I.O., 307 U.S. 496, 59 Sup. Ct. 954 (1939). Compare the dissent of Mr. Justice Butler for his complete reliance on the *Davis* decision as ruling the instant case.

[34] *Supra* note 10.

III. Are Picketing Restrictions Within the Scope of Police Power?

A. *The Presumption of Constitutionality.* It has become a maxim of the courts that there is a presumption in favor of the constitutionality of police power regulation. For example:

> The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[35]

Such a presumption, if it applies to legislation affecting civil rights, will make it correspondingly difficult to show the unconstitutionality of anti-picketing ordinances. The writer concludes to the contrary, that a "presumption of unconstitutionality" attachs to statutory limits on free speech. Analysis of the free speech cases since the Supreme Court extended the Fourteenth Amendment to cover certain basic guarantees of the Bill of Rights[36] shows that in the early cases the Supreme Court applied the presumption of constitutionality as fully to civil liberty cases as to other cases.[37] In the subsequent civil liberty cases, however, the majority opinions have ignored the presumption of constitutionality as though it never existed. This was particularly evident in the case of *Near v. Minnesota,* despite the contention of Mr. Justice Butler, dissenting for himself and three colleagues, that the act should be upheld because of the presumption.[38]

The state of the cases thus implies that the Supreme Court has no intention of applying the presumption of constitutionality to civil liberty cases, and the implicit becomes explicit in the *Handbill Cases*:

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes

[35] U.S. v. Carolene Products Co., 304 U.S. 144, 152, 58 Sup. Ct. 778, 783 (1937). For a general discussion of the presumption see Note (1936) 36 Col. L. Rev. 283.

[36] Cases listed *supra* note 10.

[37] See Gitlow v. New York, 268 U.S. 652, 668, 45 Sup. Ct. 625, 630 (1925); Whitney v. California, 274 U.S. 357, 371, 47 Sup. Ct. 641, 646 (1927).

[38] Near v. Minn., 283 U.S. 697, 51 Sup. Ct. 625 (1931). Contrast the dissent by Mr. Justice Sutherland in Associated Press v. N.L.R.B., 301 U.S. 103, 57 Sup. Ct. 650 (1937), where he would hold unconstitutional on free speech grounds a law restraining a publisher from discharging editorial workers for union membership.

> the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[39]

In the *Carolene* case, quoted above as an example of the application of the presumption of constitutionality in commercial[40] matters, Mr. Justice Stone in a footnote to his opinion expressed the thought that the presumption might not apply to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation".[41] This raises the question of whether the "presumption of unconstitutionality" is to be applied in all civil liberties cases or only in those in which the statutes in question directly affect political activity. Granting that picketing is not within this category, it is nevertheless believed by this writer that the Supreme Court has no intention of so subdividing civil liberties. This is evidenced by the failure to apply the presumption of constitutionality in the *Hague* and *Lovell* cases[42] where the rights were of a non-political nature, and the presence of the statement quoted above in the *Handbill Cases*, one of which, as has been pointed out, was a labor case.[43]

This being the state of the authorities, it is concluded that anti-picketing legislation will not have the benefit of the presumption of constitutionality and may even face a contrary presumption.

B. *General Police Power Control of Free Speech.* The question remaining for consideration is, are picketing restrictions on the right of free speech constitutional as an exercise of the police power. It is established, for example, that in time of war the state may, when necessary to preserve itself, make some speech restrictions on the

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[39] 7 U.S. Law Week 582, 584 (November 22, 1939); and compare for a similar view St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 73, 77, 83, 56 Sup. Ct. 720, 735, 737, 739 (1936), concurring opinion of Mr. Justice Brandeis.

[40] Note that Mr. Justice Stone in the quoted portion of the *Carolene* opinion speaks only of "legislation affecting ordinary commercial transactions."

[41] 304 U.S. 144, 152, footnote 4, 58 Sup. Ct. 778, 783 (1937).

[42] Cited *supra* note 10.

[43] *Supra* note 10. For a brief discussion of this subject emphasizing the protection of civil liberties see Frankfurter, Mr. Justice Holmes and the Supreme Court (1938) 50. It is to be noted further that Mr. Justice Stone in the footnote under discussion cites as examples of his observation cases involving religious, national, and racial minorities.

exercise of free speech.[44] However, the words used and the surrounding circumstances must show a "clear and present danger" to the state.[45]

The post-war cases have been followed by a series of decisions in which the Supreme Court has taken a much stricter view of legislative power,[46] holding that only utterances inimical to the state in the clearest fashion may be restricted. The post-war view has been that of a rule of reason,[47] and this of necessity is extremely difficult to define in objective terms. The task the Supreme Court has taken upon itself is:

> . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights. . .[48]

But this always within the limits of the "clear and present danger" theory.[49]

If the theory outlined here expressed the whole of the state's power to restrict free speech, a necessary conclusion would be that anti-picketing legislation, when directed at peaceful picketing, was unconstitutional; for peaceful picketing would not appear to offer any overwhelming danger to the state. But it would appear from the

[44] Schenck v. U.S., 249 U.S. 47, 39 Sup. Ct. 247 (1919); Frohwerk v. U.S. 249 U.S. 204, 39 Sup. Ct. 249 (1919); Debs v. U.S., 249 U.S. 211, 39 Sup. Ct. 252 (1919); Abrams v. U.S., 250 U.S. 616, 40 Sup. Ct. 17 (1919); Schaefer v. U.S., 251 U.S. 466, 40 Sup. Ct. 259 (1920); Pierce v. U.S., 252 U.S. 239, 40 Sup. Ct. 205 (1920); O'Connell v. U.S., 253 U.S. 142, 40 Sup. Ct. 444 (1920); Gilbert v. Minnesota, 254 U.S. 325, 41 Sup. Ct. 125 (1920).

[45] Schenck v. U.S., 249 U.S. 47, 39 Sup. Ct. 247 (1919).

[46] *Supra* note 10.

[47] "The limitation upon individual liberty must have appropriate relation to the safety of the state." Herndon v. Lowry, 301 U.S. 242, 258, 57 Sup. Ct. 732, 739 (1937).

[48] Handbill Cases, 7 U.S. Law Week 582, 584 (November 22, 1939).

[49] *In re* Ford Motor Co., 14 NLRB No. 28, 4 L.R.R. 921 (August 10, 1939) is an example of restriction of speech by the Labor Board. In this case the Ford Company was charged with distributing lists of "Fordisms" to its employees. The "Fordisms" were statements critical of unionism, as "Our men ought to consider whether it is necessary for them to pay some outsider every month for the privilege of working at Ford's." Ford Company claimed that these were merely expressions of opinion, but the Board found that they had a coercive effect causing the employees to fear for their jobs and their promotions. The Board stated that the guarantee of such rights as the N.L.R.A. gives employees would be "wholly ineffective" if such "coercion" were tolerated.

This writer considers that if the tests of permissible free speech restriction are those outlined up to this point in the comment, the N.L.R.B. decision is thoroughly wrong. Time enough for it to act when words become deeds. If this decision is correct, then the anti-picketing statutes must also be constitutional on the grounds that the employee may be restrained from coercing the employer.

decisions that the state has greater powers of regulation where private rights are involved than where the problem is solely one of the relation of state and individual. This may be inferred from a statement by Mr. Justice Holmes in his dissent in *Abrams v. United States*:

> It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion *where private rights are not concerned.*[50]

It is important to note that in the great opinions which are landmarks of civil liberties, the only seeker for protection from "danger" is the state which by its legislative branch would afford itself protection. Thus in *Near v. Minnesota, DeJonge v. Oregon, Herndon v. Lowry, Lovell v. Griffin,* no private rights were involved;[51] even in *Hague v. C. I. O.* and the *Handbill Cases,*[52] although both have labor aspects, private rights were only indirectly concerned. In the latter case Milwaukee was not trying to protect the butcher's property or business, but merely to keep refuse off the streets.

When a union pickets, the employer may suffer a direct pecuniary loss; his "property rights" may be injured. The courts have always required that to be justified such damage must arise in the pursuit of a lawful purpose by the one doing the damage. The legal doctrine involved here has been stated by Mr. Justice Holmes:

> The intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. . . . When the defendant escapes, the court is of the opinion that he has acted with just cause. . . .
>
> But whether and how far a privilege should be allowed is a question of policy. Questions of policy are *legislative questions* and judges are shy of reasoning from such grounds.[53]

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[50] 250 U.S. 616, 628, 40 Sup. Ct. 17, 21 (1919). Italics supplied.

[51] *Supra* note 10.

[52] *Supra* note 10.

[53] Holmes, *Privilege, Malice, and Intent* (1894) 8 Harv. L. Rev. 1. Italics supplied. This article does not specifically deal with labor problems but it seems certain that such problems were in the mind of the author as the editorial note (8 Harv. L. Rev. 52) describes the significance of the article solely from that standpoint. Frankfurter and Greene, The Labor Injunction (1930) 24 speak of this treatment by Holmes and his application of it in certain cases as "The fountainhead of analysis of this problem." Compare for a statement of this principle in a case, Aikens v. Wisconsin, 195 U.S. 194, 25 Sup. Ct. 3 (1904).

An application of this principle to an actual labor situation[54] is seen in *Dorchy v. Kansas*, where Mr. Justice Brandeis spoke for the Court:

> A strike may be illegal because of its purpose, however orderly the manner in which it may be conducted. To collect a stale claim due to a fellow member . . . is not a permissible purpose. . . . Neither the common law nor the Fourteenth Amendment confers the absolute right to strike.[55]

Extremely significant in this connection is this paragraph from Frankfurter and Greene:

> The damage inflicted by combative measures of a union—the strike, the boycott, the picket—must win immunity by its purpose. But neither this nor any other formula will save courts the painful necessity of deciding whether, in a given conflict, the privilege has been overstepped.[56]

The theory arising from this discussion is that there are different standards of legislative power to repress speech where property rights are directly involved. If this theory is accepted, the state has far less power to restrict political and conscientious activity than it has to prevent the infliction of temporal damage.[57] This view was followed in a recent Illinois decision. In that case the union protested an injunction restraining picketing on free speech grounds; the court distinguished all previous free speech cases on the ground that they "did not involve the construction to be given in cases of conflicting constitutional rights"[58] and granted the injunction. The *Rueping* decision of the Wisconsin supreme court seems, somewhat subcon-

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[54] For a related development to the principle of restraint of temporal damage in labor disputes, consider the growth of injunctive relief against trade disparagement. Derenberg, Trade Mark Protection and Unfair Trading (1936) 137; Nims on Unfair Competition and Trade Marks (3d ed. 1929) for non-constitutional angles. See Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 Harv. L. Rev. 640.

[55] 272 U.S. 306, 311, 47 Sup. Ct. 86, 87 (1926).

[56] The Labor Injunction (1930) 25.

[57] If this distinction is ever fully adopted and applied by the Court, the analogies from restrictive "private" legislation which are used to support restrictive "public" legislation would lose currency. Thus the statement by Mr. Justice Holmes in the *Schenck* decision that a man has no constitutional right to counsel murder would lose all relevancy; for the murder case involves private temporal damage, while the *Schenck* case involves only the individual and the state.

[58] Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union, 371 Ill. 377, 393, 21 N.E. (2d) 308, 316 (1939), *cert. denied*, November 23, 1939, and rehearing on plea for certiorari denied December 14, 1939.

sciously, to have followed much the same theory in this respect although in the Wisconsin case it was the employer, not the employee, who was restricted.[59]

Thus two possible conclusions remain. If, as suggested by Mr. Justice Holmes in the italicized passage above, the policy involved in justifying temporal damage is a legislative problem, the unions can do no more than point to their established property right in organization[60] and demand at least evenhanded treatment. If, on the other hand, the Court should decide that the legislature can set policy as to the infliction of temporal damage subject to the same strict requirements put upon political rights (the "clear and present danger" theory, above) this entire argument will fall. Such a view would necessitate the overruling of the Illinois case referred to.[61]

Other possible police power grounds for upholding anti-picketing legislation are that it may prevent violence[62] or preserve the economic welfare of the state. Three factors must be kept in mind, however, when weighing these considerations: first, that under the hypothesis here presented these contentions will not have the benefit of the presumption of constitutionality; second, they will have to prevail over the argument suggested above that the particular means chosen by the anti-picketing acts are arbitrary and have no reasonable relation to the desired objectives;[63] and third, that *at least* so far as these purposes are other than to protect against the infliction of temporal damage, they must be justified by the overwhelming necessity of the state.[64]

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[59] "The right of free speech has never been considered to make impossible civil remedies or criminal prosecutions for libel, duress, or fraud, although speech was the agency in each case. The distinction between the exercise by an employer of his right of freedom of speech and the actual use of the spoken work as an instrumentality to overpower the will of employees is well understood and constitutes the dividing line between what an employer may do and what he may not do. . . ." W.L.R.B. v. Rueping, 228 Wis. 473, 496, 279 N.W. 673, 683 (1938).

[60] Texas & N.O. Ry. Co. v. Railway Clerks, 281 U.S. 548, 571, 50 Sup. Ct. 427, 434 (1930).

[61] The *Ford* case discussed in note 49 *supra*, would also have to be overruled.

[62] This ground was accepted in *A.F.L. v. Bain* cited *supra* note 8 (B).

[63] *Supra* note 8 (B)

[64] It may be possible that even if the anti-picketing acts should be held unconstitutional for violating the right of free speech, the legislatures might be able to achieve precisely the same ends by passing laws making it unlawful for the employer to do any of the things which might be the objects of minority or stranger picketing. If, for example, it were made unlawful for an employer to bargain collectively with the representatives of less than half of his employees,