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PEACEFUL PICKETING—CONSTITUTIONALLY PROTECTED?

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In some recent decisions the Supreme Court has greatly increased the power of judges to issue injunctions which ban peaceful picketing. For a long time the only limitation on the power of the courts to enjoin peaceful picketing had been their own self-restraint.[1] Legislative attempts to check this power in the early part of the century foundered either on the notion, at one time sponsored by the Supreme Court,[2] that any attempt to regulate labor relations was class legislation, or on the idea, voiced by some other courts, that it infringed on their own inherent power.[3] The day of such decisions has passed, presumably forever. Modern anti-injunction statutes have survived all challenge of constitutionality.[4] Yet peaceful picketing continues to be enjoined —and not only in the states which have no such modern statutes.

In attempting to place the law of picketing beyond the control of even state legislatures, labor lawyers sought to invoke the protection of the due process clause of the Fourteenth Amendment. They claimed

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1. See American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921) where Chief Justice Taft held that, at least in a direct labor controversy, peaceful picketing could not be enjoined even when carried on by persons who had never been employees. For extensive discussions of the subject see FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930); WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932). See also Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts*, 30 ILL. L. REV. 854 (1936); Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. OF CHI. L. REV. 577 (1939).

2. Truax v. Corrigan, 257 U. S. 312 (1921).

3. See Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853 (1916); May's Furs & Ready-to-Wear v. Bauer, 255 App. Div. 643, 8 N. Y. S. 2d 819 (2d Dep't 1939) the views there expressed, however, were rejected on appeal, 282 N. Y. 331, 26 N. E. 2d 279 (1940). See also FRANKFURTER AND GREENE, *op. cit. supra* note 1, at 151-154; WITTE, *op. cit. supra* note 1, at 271-2.

4. See Senn v. Tile Layers Protective Union, 301 U. S. 468 (1937).

that peaceful picketing was merely an aspect of free speech. The difficulty with completely accepting that concept is due to the fact that, while picketing may constitute expression of opinion and therefore is an aspect of free speech, it is also an act having a definite impact on the business of the employer. Picket lines have a double effect on a community: certain persons will not cross any picket line as a matter of principle; others will be dissuaded from crossing a particular line because of the character of the dispute advertised.

Before 1940 the view that picketing was constitutionally protected as free speech had received only scattered judicial approval.[5] Among such early formulations was a dictum by Mr. Justice Brandeis in *Senn v. Tile Layers Union.*[6] In upholding a state statute which restricted the use of injunctions in labor disputes, he said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [7]

The first actual decision came in 1940, in *Thornhill v. Alabama.*[8] There, over the sole dissent of Mr. Justice McReynolds, the Supreme Court held void a state statute which completely prohibited peaceful picketing. Mr. Justice Murphy pointed out:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." [9]

In that case, however, the Court made clear that the states retain the right to regulate abuses of picketing. The important question left open was whether such abuses related only to the *manner* in which the picketing was carried out or extended to its *objectives.*

In 1941, two cases raised the first of these problems: the *manner* in which picketing was conducted. In dealing with them the Court made clear that the constitutional protection included state judicial action as well as legislation.

In one of these cases, *American Federation of Labor v. Swing,*[10] the majority of the Supreme Court struck down a state court injunction

5. Individual Retail Food Store Owners Ass'n v. Penn Treaty Ass'n, 33 D. & C. 100 (Pa. C. P. 1938); Schuster v. International Ass'n, 293 Ill. App. 177, 193 (1937). See also 48 YALE L. J. 308, 312 (1938).
6. 301 U. S. 468 (1937).
7. *Id.* at 478.
8. 310 U. S. 88 (1940).
9. *Id.* at 102.
10. 312 U. S. 321 (1941).

which was motivated by the circumstance that no members of the union had been employed at the place picketed. There was no claim that the picketing was accompanied by violence. Chief Justice Hughes and Justice Roberts dissented on technical grounds. Mr. Justice Frankfurter pointed out that the state had too narrowly circumscribed the labor relation:

> ". . . We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication 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 and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of 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 those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace." [11]

In the other case, *Milk Wagon Drivers Union v. Meadowmore Dairies, Inc.*,[12] the majority of the Court upheld an injunction against all picketing because the state court had concluded that previous violence in connection with the particular strike justified a ban on even peaceful picketing in the future. Justice Frankfurter concluded that nothing in the Constitution forbade a state from reaching a conclusion such as this and that it was important to leave freedom of action in the field to the states. He suggested that if the injunction should ever be put to improper use, recourse could again be had to the Supreme Court.

Mr. Justice Black (with whose view Justice Douglas concurred) challenged both the basis on which the majority rested and the correctness of its views. He maintained that the state court had not relied for its decision on the element of violence, but on the finding that the picketing was illegal because it hurt the employer's business. He concluded that such a holding resulted in an unconstitutional restriction of peaceful picketing. Justice Reed dissented separately, pointing out

11. *Id.* at 325, 326.
12. 312 U. S. 287 (1941).

that the remedy lay "in the maintenance of order, not in denial of speech".[13]

In the next year the Court dealt with the second alternative, above: the effect on peaceful picketing of an *objective* found improper by the state court. In so doing it foreshadowed the position more specifically taken in the very recent cases, that state policy controls. The majority of the Court, in *Carpenters & Joiners Union v. Ritter's Cafe*,[14] upheld a ban on picketing even though no violence had occurred at any time, because the Texas court had determined that the union had violated its anti-trust laws. There the union picketed a restaurant because it had a dispute with a contractor employed by the owner of that restaurant to erect a building at a place in the town which was not in any way connected with the restaurant. Mr. Justice Frankfurter emphasized the fact that the person picketed was not involved in the labor dispute. He maintained that Texas had a right to declare it contrary to its public policy for a union to "conscript neutrals to help in a dispute with its employer".

Mr. Justice Black, with the concurrence of Justices Douglas and Murphy, dissented on the ground that the union should have the right to influence the contractor through the restaurant owner who employed him. Justice Reed again dissented separately, arguing that in balancing social differences it was more important to preserve free speech than to relieve the enterprise of the burden of the picket line.

On the other hand, in the *Wohl* case[15] the Court unanimously held void an injunction against picketing by milk drivers of customers of the concern with which the drivers had a controversy. This decision rested in part on the circumstance that there was no other way readily to publicize the dispute and in part because the Court felt the repercussion on the strangers to the dispute to be but slight. Justices Black, Douglas and Murphy filed a separate opinion commenting on this pair of cases and expressed the fear they could be interpreted so as to permit picketing only when it was ineffective.

A later case of this period[16] held that a state could not enjoin peaceful picketing merely because signs carried by the pickets contained epithets such as "Unfair" or "Fascist" or because the owner had claimed that all his employees had become his partners. The Court pointed out also that it was immaterial that the anti-injunction act of the particular state, as construed by its highest court, did not specifically

13. *Id.* at 319.
14. 315 U. S. 722 (1942).
15. Bakery & Pastry Drivers v. Wohl, 315 U. S. 769 (1942).
16. Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943).

safeguard picketing in this situation. The right to picket peacefully insofar as it was protected as an expression of opinion rested on the Constitution and not on the state statute.

So the problem rested for many years. Then, in 1949 came *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company,*[17] where the Supreme Court unanimously upheld the right of states to outlaw closed shop contracts. While this case did not involve picketing it is here important because it made clear to the labor movement that the Supreme Court would allow the states great freedom to legislate on the subject of labor relations. As Mr. Justice Black said:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia v. New York, supra* at 523-524, and *West Coast Hotel Co. v. Parrish, supra* at 392-395, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.
>
> "Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers." [18]

The logic of this decision was, in the same year, applied to peaceful picketing in *Giboney v. Empire Storage & Ice Company.*[19] In Missouri, where labor unions are subject to the anti-trust laws, the state court had enjoined picketing because it was part of an attempt to monopolize the particular industry by forcing the employer not to sell to non-union concerns. Mr. Justice Black, for a unanimous Court, held this injunction to be within state power, on the ground that the

17. 335 U. S. 525 (1949).
18. *Id.* at 536, 537.
19. 336 U. S. 490 (1949).

activity of which the picketing was part was criminal under a valid state statute. He said:

> "We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges v. California,* 314 U. S. 252, 263. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider v. State,* 308 U. S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co. v. Board,* 319 U. S. 533, 539; *Thomas v. Collins,* 323 U. S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins, supra,* at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to non-union peddlers." [20]

And on May 8, 1950, the Supreme Court unanimously (without the participation of Mr. Justice Douglas) applied the principle of these last two cases to one situation where the state statute had not made the prohibited conduct criminal, and to another where the state policy was laid down by judicial utterance, not legislative enactment. The irony of both these cases is that state policy favorable to labor unions became the basis for issuing injunctions against peaceful picketing.

The first case presents no real problem. In *Building Service Employees International Union v. Gazzam* [21] the union picketed an employer because he refused to compel his employees to join that union. Had he attempted to influence his employees in their choice of a union he would have violated the Labor Relations Act of the state of Washington. The picketing in this case was directed at the employer, not at the non-union employees. There can be no quarrel with the Supreme Court's decision that the enjoining of such picketing did not violate the constitutional guarantee of free speech and that it was immaterial that the state statute did not, as in the *Giboney* case, make the prohibited action punishable as a criminal offense. Clearly the state legislature must have the right to determine what sanctions to employ

20. *Id.* at 501, 502.
21. 339 U. S. 532 (1950).

to deal with acts held to be contrary to public policy. But it does not follow that in a State having a statute which restricts the use of injunctions in labor disputes an injunction may issue without complying with the procedural requirements of such statute merely because the objective of the picketing is illegal.[22]

The second case decided on May 8, 1950 presents a much more troublesome problem. Here no state statute prohibited the action taken. California courts had, however, declared that discrimination by labor unions on racial grounds was improper under certain circumstances.[23] On the basis of this holding the California court upheld an injunction against picketing designed to force an employer to hire Negroes on a quota basis. In *Hughes v. Superior Court* [24] the Supreme Court unanimously agreed. Mr. Justice Frankfurter said:

> "The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulations may take the form of legislation, *e.g.,* restraint of trade statutes, or be left to the *ad hoc* judicial process, *e.g.,* common law mode of dealing with restraints of trade. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice.
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> "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will. A State is not required to exercise its intervention on the basis of abstract reasoning. The Constitution commands neither logical symmetry nor exhaustion of a principle." [25]

In holding that it was immaterial that the state had expressed its policy through its courts rather than its legislature, Mr. Justice Frankfurter relied on cases in none of which, however, the question now presented had arisen. These were either cases which decided that a state court's declaration of the meaning of its own law is binding on

22. The Supreme Court made it clear that a federal court cannot issue an injunction merely because the objective of the picketing is illegal: Lauf v. Shinner, 303 U. S. 323 (1938). *Cf.* Grace Co. v. Williams, 96 F. 2d 478 (8th Cir. 1938); Donnelly Garment Co. v. I. L. G. W. U., 99 F. 2d 309 (8th Cir. 1938). Some state courts have adopted a contrary view: see cases cited in footnotes 51-55, 6 U. OF CHI. L. REV. 577, 587.

23. James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 (1944); Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 586, 165 P. 2d 903 (1946).

24. 339 U. S. 460 (1950).

25. *Id.* at 468.

the Supreme Court [26] or cases which held that state practice can make something lawful in the absence of an express legislative declaration to that effect.[27] Not one of these cases dealt with a state court's declaration that certain conduct violated state policy where no statute existed for the court's interpretation.

It is surprising that the Court's decision in the *Hughes* case was unanimous,[28] for the logic underlying it insured that the Court would differ on the character of the actions which state judges might, without constitutional hindrance, declare improper. While it may be logical to assert that a state can decide how its public policy should be declared, a blind adherence to that logic in the area of freedom of expression leads to impossible results. Moreover, it is clear that a distinction does exist between legislative and judicial law making processes. When a legislature has passed a bill it gives advance warning to the community in reasonably definite terms that certain action is prohibited and prescribes the applicable sanctions. When judges declare that something is contrary to public policy, they do so after the event and usually in broad general terms, and they devise their own sanctions. No one can ever know what may next be so declared by judges and thus affect his past conduct. Such judicial statements do not come to the Supreme Court "encased in the armor wrought by prior legislative determination." [29]

Moreover, legislatures act in conformity with the democratic principle: there is opportunity, often in advance, through public hearings and pressure groups, always by the later use of the franchise, for public participation in the process. Judges are ordinarily subject to no such public influence. And in no field is this truer than in that of labor relations. Indeed, the motivation behind the modern anti-injunction laws was just this feeling that judges read their economic prejudices into the principles of public policy. It is still true that "in dealing with these lively issues, sterility and unconscious partisanship readily assume the subtle guise of 'legal principles'." [30] Good reasons exist, therefore, for treating judge-made law differently from state law.

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26. *E.g.,* Skiriotes v. Florida, 313 U. S. 69 (1941); Hebert v. Louisiana, 272 U. S. 312 (1926); Castillo v. McConnico, 168 U. S. 674 (1898).

27. *E.g.,* Nashville C. & St. Louis Ry. v. Browning, 310 U. S. 362 (1940)—the last case cited, Snowden v. Hughes, 321 U. S. 1 (1944), falls in part within this category although it really holds only that an allegation that a state law has been violated creates no federal right which the federal courts will redress.

28. Justices Black, Minton and Reed separately stated their concurrence in the belief that the case was controlled by the decision in the *Giboney* case. Justice Reed in addition stated that he understood the opinion of the California court to hold that discrimination "in favor" of a particular race was unlawful.

29. Bridges v. California, 314 U. S. 252, 261 (1941), quoted with approval in C. I. O. v. Douds, 339 U. S. 382 (1950).

30. Frankfurter and Greene, *op. cit. supra* note 1, at 46.

The circumstances of the *Hughes* case themselves illustrate this problem. If California had a law like that of New York and a few other states, which prohibited racial discrimination by employers, it could well be held that picketing to compel hiring on a racial quota basis seeks to induce an employer to violate that law. For the purpose of such legislation is to forbid an employer to consider racial factors at all. Thus if the employer had acceded to the request to employ Negroes on a quota basis, he would have laid himself open to the administrative process provided by the law in exactly the same way as would the employer in the *Gazzam* case. Absent such a law there are no sanctions against an employer who might be willing to accede to the demands of a union that he employ Negroes on a quota basis.

Perhaps the real answer lies in the question of sanctions. Automatic approval of injunctions against picketing because of the "illegality" of the objective should be confined to those situations in which the person picketed could not comply with the end desired by the picketers without incurring sanctions under state law, whether statutory or judge-made. If, for instance, the California courts had established a principle that racial discrimination by employers (as well as by labor unions) was against public policy and so could be enjoined at the instance of an aggrieved person, the result achieved in the *Hughes* case could be justified. Perhaps a legislative declaration of policy prohibiting discrimination by employers even without legislative specification of sanctions might be sufficient to permit the enjoining of pickets, since it might also form a basis for the enjoining of an employer who discriminated. The vice of the opinion in the *Hughes* case is that it slides over this issue and merely pronounces it immaterial that the state did not prohibit the employer from adopting a quota system of his own free will.

Does that mean that in all other situations picketing is constitutionally protected as a form of spee speech? The Supreme Court has never thought so, as the *Ritter* case shows.[31] But the Court has never been able to formulate a satisfactory principle to indicate the dividing line. Now, as in former times, the question of picketing in connection with secondary boycotts will prove troublesome.[32] The nearest approach to a modern decision by the Supreme Court on this

31. 315 U. S. 722 (1942).

32. People v. Bellows, 281 N. Y. 67, 22 N. E. 2d 238 (1939); Canepa v. "John Doe", 277 N. Y. 52, 12 N. E. 2d 790 (1938); Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. 2d 910 (1937). *Cf.* International Brotherhood v. N. L. R. B., 181 F. 2d 34 (2d Cir. 1950), Clark, J. dissenting at 40. See generally Barnard and Graham, *Labor and the Secondary Boycott,* 15 WASH. L. REV. 137 (1940).

subject was the *Wohl* case.[33] There the Court unanimously struck down a ban on peaceful picketing because it was satisfied that under the circumstances the picketing had a reasonable relation to the existing labor controversy. The Supreme Court did not then take the view that it was enough to justify a state court's ban on such picketing that there was a problem involving labor relations about which reasonable men might differ.

Yet it seems this latter principle rather than the former one which guided the Court in the third of the cases decided on May 8, 1950, *International Brotherhood v. Hanke*.[34] This time the Court was not unanimous. Indeed, this may be considered a 5-4 decision for it is probable that Mr. Justice Douglas would have joined the dissenters had he participated. There, picketing was designed to force an individual doing business without any employees to conform to the union's pattern with regard to closing time. Mr. Justice Frankfurter, for the majority, upheld the state's action on the ground that the State of Washington, through its courts, had the right to balance the value to the union of industry-wide compliance with the standards against the value to the community of unfettered self-employers. He stressed the fact that the number of non-conformists was small. In distinguishing some of the earlier cases he advanced the formalistic argument that the state courts had not there expressly declared illegal the objective for which they enjoined the picketing. Mr. Justice Frankfurter, after quoting the state court's justification for its decision, said:

> "We are, needless to say, fully aware of the contentious nature of these views. It is not our business even remotely to hint at agreement or disagreement with what has commended itself to the State of Washington, or even to intimate that all the relevant considerations are exposed in the conclusions reached by the Washington court. They seldom are in this field, so deceptive and opaque are the elements of these problems. That is precisely what is meant by recognizing that they are within the domain of a State's public policy. Because there is lack of agreement as to the relevant factors and divergent interpretations of their meaning, as well as differences in assessing what is the short and what is the long view, the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to the Congress as well as to the forty-eight states." [35]

This argument, of course, only emphasizes the unwisdom of the decision in the *Hughes* case which had equated the judicial and legis-

33. 315 U. S. 769 (1942).
34. 339 U. S. 470 (1950)—Mr. Justice Clark concurred in the result only.
35. *Id.* at 478.

lative aspects of law making. Unfortunately this aspect of the problem was not stressed by the dissenting judges. Justice Black referred only to his opinion in the *Ritter* case.[36] Justice Minton dissented separately and was joined by Justice Reed. He concluded that the decision now reached was inconsistent with many earlier cases and said:

> "It seems equally clear to me that peaceful picketing which is used properly as an instrument of publicity has been held by this Court in *Thornhill v. Alabama,* 310 U.S. 88; *Carlson v. California,* 310 U.S. 106; *American Federation of Labor v. Swing,* 312 U.S. 321; *Bakery & Pastry Drivers & Helpers Local v. Wohl,* 315 U.S. 769; and *Cafeteria Employees Union v. Angelos,* 320 U.S. 293, to be protected by the Fourteenth Amendment. I do not understand that in the last three mentioned cases this Court, as the majority in its opinion says, '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.' If the states may set bounds, it is not for this Court to say where they shall be set, unless the setting violates some provision of the Federal Constitution. I understand the above cases to have found violations of the federal constitutional guarantee of freedom of speech, and the picketing could not be restrained because to do so would violate the right of free speech and publicity." [37]

From these various cases we can perhaps draw the following principles:

1. Indiscriminate bans on peaceful picketing whether by statute or injunction violate the Constitution.

2. Peaceful picketing may be enjoined when it is part of an activity which the state, whether by its legislature or its highest court, has declared contrary to public policy—subject, of course, to the proviso that such a declaration be itself constitutional. It is thus in this area that the discussion is likely to take place in the future since state courts will be sufficiently astute to take the hint contained in Mr. Justice Frankfurter's opinion and hereafter to declare as illegal any objective toward which the picketing which they seek to enjoin is directed.

3. Between these extremes lies an area about which no safe prediction can be made—that is, if the state courts, failing to take the hint, let such an area remain. There the validity of a ban on peaceful picketing will depend on whether the majority of the Supreme

36. 315 U. S. 722, 729 (1942).
37. 339 U. S. 470, 482.

Court considers that the state has confined the picketing to an "unrealistic" area.

We have traveled a long way. For a time it seemed as though peaceful picketing were going to receive real constitutional protection. Now it looks as though state courts, by the simple device of declaring union objectives contrary to public policy, can ban peaceful picketing in almost all situations where there is room for difference of opinion as to these objectives. We seem to be on the road back to government by injunction.