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FREEDOM OF SPEECH AND LABOR CONTROVERSIES

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The modern labor injunction has had a long and stormy history in the United States.[1] The usual result of such an injunction has been effectively to put an end to the labor controversy by giving victory to the employer. This result is well expressed by the Supreme Court of New York: "Injunction had (has) been employed to discourage unionization, to frustrate union activities, to wear out the workers and to bludgeon them into submission."[2] Victory to the employer is inevitable when the union is enjoined from using what is usually its most effective weapon, picketing. However, picketing is not the only thing that is restrained by the injunction commonly issued in labor disputes. More often than not the injunction that issues prohibits all activities of the union in its contest with the employer. This includes not only the carrying of banners and other methods of giving information to the public that are generally connected with picketing, but also purely informational activities such as advertisements, articles in newspapers, radio broadcasts, and the distribution of handbills and circulars.

Since picketing itself has been declared to be one aspect of freedom of speech and expression protected by the First and Fourteenth Amendments to the Federal Constitution,[3] the labor injunction raises a very pressing constitutional question, which is as yet far from settled. This recognition of picketing as one aspect of free speech is a relatively recent development. In fact it was not generally recognized until the decision of *Thornhill v. Alabama*[4] and *Carlson v. California*[5] by the United States Supreme Court in 1940. Some state courts have not recognized that picket-

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1. See FRANKFURTER AND GREENE, *The Labor Injunction* (1930). The discussion in the present article starts roughly from the time of the Massachusetts case of Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888).

2. Coward Shoe, Inc. v. Retail Shoe Salesmen's Union Local 1115F, 177 Misc. 708, 711, 31 N. Y. S. (2d) 781, 784 (Sup. Ct., N. Y. County, Special Term, 1941).

3. Senn v. Tile Layers Union, 301 U. S. 468 (1937); Thornhill v. Alabama, 310 U. S. 88 (1940); Carlson v. California, 310 U. S. 106 (1940); American Federation of Labor v. Swing, 312 U. S. 321 (1941).

4. 310 U. S. 88 (1940).

5. 310 U. S. 106 (1940). This proposition was declared to be true in Senn v. Tile Layers Union, 301 U. S. 468 (1937), but this case could not be considered as having firmly established the idea.

ing is protected by the Fourteenth Amendment to the Federal Constitution, and give no protection under the state constitution. Perhaps the most extreme example of this is the New Jersey case of *Mitnick v. Furniture Workers Union, Local No. 66.*[6] In this case the union defended the suit for injunction on the basis of the guarantees of freedom of speech and press found in the state and federal constitutions. As to the Federal Constitution, the New Jersey Court of Chancery said only that "the Fourteenth Amendment to the Federal Constitution is not involved." As to the protection given by the state constitution, the court said: "There are two classes of constitutional rights: (1) Absolute rights; and (2) Qualified rights, which latter are more in the nature of privileges." These absolute rights were said to include "acquiring, possessing, and protecting property" while the "so called right of free speech" was classed as a qualified right, in the nature of a privilege. On the basis of these premises the conclusion of the court, granting the injunction, was inevitable. The court expressed its conclusion as follows: "The complainant and his customers are in the lawful exercise of their inherent or absolute rights; the defendants cannot be permitted to exercise their qualified rights, or privileges, in such manner as will be destructive of the absolute rights of complainant and his customers."[7]

Thus the right of property of the complainant in his business is said to be absolute. The activities of the union interfere with this right. Since the right of free speech is only a privilege, it can not be used to interfere in any way with this exalted right of property in the business. It follows logically enough, then, that the activities of the union, any activities whatsoever that interfere with the business, may be, in fact must be, enjoined. This may be the well settled interpretation of the New Jersey Constitution but it should be noted that not a single case, local or foreign, was cited to support these unusual statements. This is very definitely not the interpretation given to analogous provisions of other state constitutions or the Federal Constitution. In fact the Supreme Court of the United States has repeatedly stated that freedom of speech and of the press, along with the other freedoms protected by the First and Fourteenth Amendments, are

6. 124 N. J. Eq. 147, 200 Atl. 553 (Ch. 1938). In this case the complainant refused to sign a closed shop agreement with the defendant union and the union distributed circulars asking the public not to buy furniture manufactured by complainant and sold at various retail stores. It should be noted that this case was decided two years before the Thornhill and Carlson cases.

7. 124 N. J. Eq. 147, 152, 200 Atl. 553, 555-556 (Ch. 1938).

fundamental and that only the preservation of the nation itself is a justification for the abridgment of these freedoms.[8] As it was expressed by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California,* "But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, *if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.*"[9] In view of this, the summary way in which the New Jersey court dismisses the claim of defendant to protection under the Federal Constitution is pathetic. Most state courts do not get this far from the beaten path.

Even before it was recognized that picketing was protected as a form of free speech, many of the state courts admitted that labor unions had more than a theoretical right to organize. These courts said that while picketing and other activities of the unions on strike did in fact injure the business of the employer, it was *damnum absque injuria.* The economic struggle between employer and employees, like competition between businesses, was said by these courts to create in the striking laborers such self interest as to be legal justification for the injuries inflicted on the employer. The laborers can strike in order to obtain higher wages and better working conditions. These are legitimate ends toward which labor is free to strive with all lawful methods. If the employer is injured by such activity, he can not complain of his injury, because any injury to the employer is incidental to the ultimate lawful purpose of the strike and thus there is no ground for injunction. Since all courts seem to recognize the right of labor to organize and strike, at least in theory, this result would seem to be inevitable. This idea is well expressed as follows, "The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies (picketing), not inconsistent with the rights of others, that are necessary to make the strike effective."[10]

Not all courts agreed with this, however. Especially during the period

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8. Stromberg v. California, 283 U. S. 359 (1931); DeJonge v. Oregon, 299 U. S. 353 (1937); Lovell v. City of Griffin, 303 U. S. 444 (1938); Schneider v. State, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940). See also an excellent statement of this in the dissenting opinion of Mr. Justice Black in Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U. S. 287, 310 (1941).

9. 274 U. S. 357, 373 (1927). Italics added.

10. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 165 Ind. 421, 431, 75 N. E. 877, 880 (1905).

before 1920, many courts,[11] while admitting the right of labor to organize and strike, in theory, held that there could be no such thing as peaceful picketing. According to the arguments of such courts, any picketing, in and of itself, no matter how peaceful and devoid of actual threats of physical violence, amounted to intimidation. Since picketing was intimidation, it was not peaceful. This intimidation interfered with the free access of other workers and customers to the place of business of the employer and thus amounted to a nuisance and could be enjoined on well recognized equitable principles. Some of the opinions that followed this argument were very emotional and in fact seemingly would enjoin any acts of labor that would make the strike effective.[12] Probably the best (worst?) expression of this view is found in *Atchison, T. & S. F. Ry. v. Gee*[13] where the 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." The District Court of Appeals of California had this to say on the subject: "Such conduct (picketing) . . . we think not only constituted an illegal interference with plaintiffs' (employers') rights, but became, and was, as to them a private nuisance." It is obvious to all ". . . God fearing, liberty loving, home defending, and humanity helping . . ." people that such picketing is unlawful.[14] These courts gave any contention for protection of freedom of speech short shift, if they mentioned it at all. Of course, some recognition has for a long time been given to the proposition that freedom of speech and press should be protected as much when exercised by labor

11. A. R. Barnes and Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 N. E. 940 (1908); Otis Steel Co. v. Local Union No. 218, 110 Fed. 698 (C. C. N. D. Ohio 1901); Atchison, T. & S. F. Ry. v. Gee, 139 Fed. 582 (C. C. S. D. Iowa 1905); George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n. of United States and Canada, 72 N. J. Eq. 653, 66 Atl. 953 (1907); Pierce v. Stablemen's Union Local No. 8760, 156 Cal. 70, 103 P. 324 (1909); St. Germain v. Bakery and Confectionery Workers' Union No. 9 of Seattle, 97 Wash. 282, 166 P. 665 (1917); *Ex parte* Stout, 82 Tex. Cr. Rep. 183, 198 S. W. 967 (1917); Rosenberg v. Retail Clerk's Ass'n., Local 428, 39 Cal. App. 67, 177 P. 864 (1918); Local Union No. 313, Hotel and Restaurant Employees v. Stathakis, 135 Ark. 86, 205 S. W. 450 (1918); Moore v. Cooks', Waiters' and Waitresses' Union No. 402, 39 Cal. App. 538, 179 P. 417 (1919).

12. Otis Steel Co. v. Local Union No. 2118, 110 Fed. 698 (C. C. N. D. Ohio 1901); Atchison, T. & S. F. Ry. v. Gee, 139 F. 582 (C. C. S. D. Iowa 1905); Moore v. Cooks', Waiters' and Waitresses' Union No. 402, 39 Cal. App. 538, 179 P. 417 (1919).

13. 139 Fed. 582, 584 (C. C. S. D. Iowa 1905).

14. Moore v. Cooks', Waiters' and Waitresses' Union No. 402, 39 Cal. App. 538, 540, 179 P. 417 (1919).

in the course of a strike, as in any other case.[15] It should be noted, however, that these cases were instances of distribution of circulars, or ordinances that try to prohibit all picketing. However, at this time and later most courts look hard at the injury to the business of the employer and allow an injunction. A flagrant example of this approach is the case of *Hotel and Railroad News Co. v. Clark.*[16] In this case there was no picketing and no violence. The employees only published a circular with their claims as to the facts of the dispute. The Massachusetts court granted an injunction because the statements in the circular were held to be inaccurate and had the effect of holding the plaintiff up to public contempt and ridicule. The court found that the circular was intended to harm the business of the plaintiff and therefore granted a very broad injunction against any publication by the defendant union ". . . for the purpose of coercing the plaintiff to reinstate its discharged employees and to employ only union labor." This is, of course, a flagrant abridgment of freedom of the press, but the case follows the lead of earlier Massachusetts cases,[17] in placing chief emphasis upon the injury to the employer's business and sliding over the rights of the employees.

There are also two general types of state statutes or city ordinances which have, until recently, been upheld in their application against striking laborers in spite of the claim of protection of freedom of press and speech by both state and federal constitutions. The first type of ordinance is one that forbids the carrying of signs, or loitering, or, in a few cases, expressly forbids picketing, on the streets. The reasoning of the courts in upholding such ordinances is that the streets are subject to police regulation so that traffic will not be obstructed. The ordinances have been held to be valid as such police regulations.[18] The other prevalent type of ordinance often applied to strike activities is one that prohibits or licenses the distribution of handbills. These ordinances have also been upheld as valid police regu-

15. Marx and Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391 (1902); City of St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30 (1908).

16. 243 Mass. 317, 137 N. E. 534 (1922); *Contra,* Dr. Lietzman, Dentist Inc. v. Radio Broadcasting Station W. C. F. L., 282 Ill. App. 203 (1935).

17. Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888); Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896).

18. Commonwealth v. McCafferty, 145 Mass. 384, 14 N. E. 451 (1888); Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657 (1914); *Ex parte* Stout, 82 Tex. Cr. Rep. 183, 198 S. W. 697 (1917); Watters v. City of Indianapolis, 191 Ind. 671, 134 N. E. 482 (1922); Thomas v. City of Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924); O'Rourke v. City of Birmingham, 27 Ala. App. 133, 168 So. 206 (1936).

lations on the ground of preventing the littering of the streets and thus protecting public health.[19] The claim of protection by constitutional guarantee of freedom of press was denied, the courts saying that such freedom is subject to such reasonable police regulation. Also the argument of *Commonwealth v. Davis*[20] that the city owns the streets and parks and can thus prevent their use in the exercise of the rights of free speech and press, just as any private property owner, has sometimes been accepted. These cases were all in effect overruled by the United States Supreme Court in *Schneider v. State.*[21] This case held that freedom of speech and press as guaranteed by the Federal Constitution was violated by such an ordinance and the fact that the ordinance prevented the littering of streets was not a justification for the abridgment of the constitutionally protected liberty. This case did not arise out of a labor dispute but it effectively decided the invalidity of such ordinances, no matter to whom applied.

Some state courts have themselves come to the conclusion that anti-picketing or loitering statutes violate the constitutional right of free speech.[22] These statutes are in such cases held to violate both the state and federal constitutions. The right of the laborer to strike is recognized, picketing is held to be a method of presenting his side of the controversy to the public and thus it is protected as one aspect of the constitutional right of free speech. The fact that in the process the property of the employer in his business may be injured is not a valid reason for allowing abridgment of these constitutional rights. It is *damnum absque injuria.* Statutes that purport to regulate picketing but confine it within too narrow limits also have been struck down because they violate this constitutional right of free speech.[23]

Since the United States Supreme Court has definitely held that picketing, when used to give publicity to the facts of a labor dispute, is one form

19. *In re* Anderson, 69 Neb. 686, 96 N. W. 149 (1903); City of Milwaukee v. Kassen, 203 Wis. 383, 234 N. W. 352 (1931); Sieroty v. City of Huntington Park, 111 Cal. App. 377, 295 P. 564 (1931); Dziatkiewic v. Township of Maplewood, 115 N. J. L. 37, 178 Atl. 205 (1935); City of Milwaukee v. Snyder, 230 Wis. 131, 283 N. W. 301 (1939), *rev'd,* 308 U. S. 147 (1939).

20. 162 Mass. 510, 39 N. E. 113 (1895), *aff'd,* 167 U. S. 43 (1897).

21. 308 U. S. 147 (1939); See also Lovell v. City of Griffin, 303 U. S. 444 (1938) and Cantwell v. Connecticut, 310 U. S. 296 (1940).

22. City of St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30 (1908); People v. Harris, 104 Colo. 386, 91 P. (2d) 989 (1939); City of Reno v. Second Judicial District Court, 59 Nev. 416, 95 P. (2d) 994 (1939).

23. People v. Garcia, 37 Cal. App. (2d) 753, 98 P. (2d) 265 (1939); People v. Gidaly, 35 Cal. App. (2d) 758, 93 P. (2d) 660 (1939).

of free speech and thus is protected by the First and Fourteenth Amendments to the Federal Constitution,[24] many of the state courts have changed from their former decisions. Relying on these United States Supreme Court cases, they hold that injunctions prohibiting, or statutes prohibiting or too greatly restricting, picketing are unconstitutional.[25]

The argument of the United States Supreme Court in deciding that picketing, as such, is one form of the exercise of free speech, and thus protected by the First and Fourteenth Amendments to the Federal Constitution, is persuasive.

The case of *Thornhill v. Alabama*[26] may well be called the foundation of this view. This case came up on a prosecution under an Alabama statute that prohibited loitering about the premises or picketing for the purpose of hindering, interfering with or injuring a lawful business.[27] The defendant was convicted under this statute because he picketed a plant where he and other workers were on strike. There was no violence or threat of physical force or intimidation. Defendant was at a picket post and quietly asked others not to return to work. The statute prohibited all practical means open to the workers of presenting their side of the controversy to the public. The United States Supreme Court held that the public, as well as the immediate parties to the dispute, had an important interest in such controversies. Thus the giving of information concerning the dispute to the public was protected by the Fourteenth Amendment to the Federal Con-

24. Senn v. Tile Layers Protective Union, 301 U. S. 468 (1937); Thornhill v. Alabama, 310 U. S. 88 (1940); Carlson v. California, 310 U. S. 106 (1940); American Federation of Labor v. Swing, 312 U. S. 321 (1941); Milk Wagon Drivers Union v. Meadowmoor Dairies Inc., 312 U. S. 287 (1941).

25. Ellingsen v. Milk Wagon Drivers' Union of Chicago, Local 753, 377 Ill. 76, 35 N. E. (2d) 349 (1941); People v. Muller, 286 N. Y. 281, 36 N. E. (2d) 206 (1941); Byck Bros. v. Owen Martin, 4 CCH Labor Cases No. 60,430 (Jefferson C. C. of Ky., Ch. 2d Div. 1941); Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 38 N. E. (2d) 972 (Ill. 1942); Mason and Dixon Lines v. Odom, 18 S. E. (2d) 841 (Ga. 1942).

26. 310 U. S. 88 (1940).

27. Section 3448, Code of Alabama, 1923: "Any person or persons, who, without just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any person, firm, corporation, or association of people, engaged in lawful business, for the purpose or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business from a competitive business."

stitution against abridgment by state action. This publicizing of their side of the controversy was accomplished for the strikers by picketing, and thus picketing was held to be protected by the Federal Constitution as one aspect of the exercise of the right of free speech. The Court asserted: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution. . . .Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[28]

The state can, of course, regulate such labor disputes in the public interest but it can not in so doing abridge these constitutional rights of the workers. The statute in question here is so broad that it prohibits ". . . every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."[29] The fact that the legislature chose this method of exercising its undoubted police power to regulate such disputes does not make it any less objectionable to the Constitution. "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."[30] This is an expression of what has come to be known as the clear and present danger test, first set out by Mr. Justice Holmes in *Schenck v. United States*.[31] In the instant case there is no such danger and thus the statute is invalid on its face.

In the case of *Senn v. Tile Layers Protective Union*,[32] Mr. Justice

28. 310 U. S. 88, 101-103 (1940).
29. *Id.* at 104.
30. *Id.* at 104-105.
31. 249 U. S. 47 (1919).
32. 301 U. S. 468 (1937).

Brandeis said by way of dictum that the right of labor to publicize its side of a controversy, by means of picketing as well as other means, is protected by the Federal Constitution. However, the *Thornhill* case is the first one to squarely hold that such protection is given by the Federal Constitution.

The United States Supreme Court decided *Carlson v. California*[33] the same day as the *Thornhill* case. Here an ordinance of Shasta County, California, prohibited picketing on a public highway for various stated purposes.[34] This ordinance was approximately as broad as the statute involved in the *Thornhill* case, and was held invalid mainly on the authority of that case. The ordinance prevented all interested persons from carrying signs in the vicinity of a labor dispute so as to give information about the dispute. Thus it very directly abridged freedom of speech as protected by the Fourteenth Amendment and therefore could not stand. The conclusion of the Court was as follows: "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control."[35] Here the Court again uses the clear and present danger test in deciding whether the state infringement on liberty protected by the Fourteenth Amendment is permissible or not.

The next important case affirming the protection given to labor's rights to picket by the Fourteenth Amendment was *American Federation of Labor*

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33. 310 U. S. 106 (1940).

34. The ordinance as set out in the case, *Id.* at 109, is as follows: "It shall be unlawful for any person, in or upon any public street, highway, sidewalk, alley or other public place in the County of Shasta, State of California, to loiter in front of, or in the vicinity of, or to picket in front of, or in the vicinity of, or to carry, show or display any banner, transparency, badge or sign in front of, or in the vicinity of, any works, or factory, or any place of business or employment, for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from purchasing or using any goods, wares, merchandise, or other articles, manufactured, made or kept for sale therein, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from doing or performing any service or labor in any works, factory, place of business or employment, or for the purpose of intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce any person who is performing, seeking or obtaining service or labor in any such works, factory, place of business or employment."

35. *Id.* at 113.

v. Swing.[36] This case did not involve a statute. It was an appeal from an injunction issued by the courts of Illinois. This injunction was very broad, "ranging from peaceful persuasion to acts of violence." There was no labor dispute here between the plaintiff, Swing, and his immediate employees. The picketing was carried out by a union that was trying to organize plaintiff's beauty parlor. This lack of dispute between employer and his employees was made the basis for the broad injunction in the state courts. The United States Supreme Court held that "Such a ban on free communication is inconsistent with the guarantee of freedom of speech. . . . 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 right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."[37] This case is thus seen to be a very strong expression of the constitutionally protected right of labor to picket in order to present its side of a labor dispute to the public.[38] Here there was no general statute that would prevent the proper exercise of free speech in all such disputes. It was rather an injunction issued by the state courts of Illinois on the specific facts of the case. However, the injunction was very broad and impinged on the rights of these laborers just as the enforcement of a statute. Consequently it is unconstitutional just as a statute would be. The fact that it is an injunction does not, and should not, make any difference as long as it is found to deny the constitutional right of free speech. In this case the United States Supreme Court refused to make any distinction. Other cases are not so clear on this point, as will be pointed out later.

Thus by these cases, *Thornhill, Carlson* and *Swing,* the United States Supreme Court has definitely laid down the principle that picketing is one form of the exercise of the right of free speech and press and as such is protected by the First and Fourteenth Amendments to the Federal Constitution. Some of the later cases cast doubt as to just how far the United

36. 312 U. S. 321 (1941).
37. *Id.* at 325-326.
38. Mr. Justice Roberts wrote a dissenting opinion in this case in which Mr. Chief Justice Hughes joined. This dissent was based on questions of procedure and not on the substantive rights of the defendants considered by the majority opinion. In both the Thornhill and Carlson cases Mr. Justice McReynolds dissented without opinion.

States Supreme Court is willing to uphold this protection. The case of *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*,[39] decided the same day as the *Swing* case, was the first to cast such doubt. This case is very hard to reconcile with the *Swing* case. The majority opinion purports to justify the allowance of the injunction on what they call a context or background of violence. The Supreme Court reversed the Federal Circuit Court of Appeals and denied an injunction in another case growing out of the same controversy.[40] This case was based on the Norris-LaGuardia anti-injunction act,[41] which denies federal courts jurisdiction to grant labor injunctions except in special circumstances which were not shown to exist in this case. The idea of the *Meadowmoor* case is an extension of the well recognized idea that violence, intimidation and coercion in connection with picketing can always be enjoined. The constitutional protection of free speech does not extend to such acts of physical violence and the consequent coercion and intimidation. The Court held that the past acts of violence were neither episodic nor isolated; that the background of violence would carry over into future peaceful picketing. Thus such peaceful picketing would amount to intimidation and therefore was not protected by the constitutional guaranty of freedom of speech and could be enjoined. Whether there was such violence as to justify this deprivation of constitutional freedom is not at all clear. Mr. Justice Black, in his vigorous and well reasoned dissent, analyzes the evidence of violence found in the record, and finds that most of it occurred in 1934, eight months before any picketing occurred and four years before the state courts granted any injunction. This violence occurred under circumstances that made it doubtful whether the defendant union was responsible.[42] From his analysis of the record Mr. Justice Black concluded "that the forfeiture of the right to free speech effected by the injunction is not warranted."[43] Mr. Justice Frankfurter in the majority opinion points out that an injunction and not a broad statute is involved (the same was true in the *Swing* case), and indicates that this is a reason for different treatment. He seems to argue that an

39. 312 U. S. 287 (1941).
40. Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940).
41. 29 U. S. C. § 113(a).
42. Milk Wagon Drivers Union of Chicago, Local 753 v. Meadomoor Dairies, Inc., 312 U. S. 287, 314 (1941). Mr. Justice Douglas concurred in this dissenting opinion.
43. *Id.* at 316.

injunction is fitted to the particular facts of the individual case and therefore the United States Supreme Court should be slower to hold it bad than would be the case if a statute were involved. No reason is given for this in the opinion and it would seem that there is none. The injunction allowed here is very broad and it abridges the freedom of the members of the defendant union as much as, if not more than, would a prosecution under a broad statute such as was involved in the *Thornhill* and *Carlson* cases.[44] Here the injunction is a threat of punishment to all members of the union and perhaps to non-members who may seek to help them. This punishment will be by the summary process of contempt, not by indictment or information and a jury trial, as would be the case if a statute were involved. The members of the union must act in furtherance of the strike (or else give up the struggle) under the threat of such summary punishment if they should chance to violate the very broad and inexact wording of the injunction, which prohibits them "From interfering, hindering or otherwise discouraging or diverting, or attempting to interfere with, hinder, discourage or divert persons desirous of or contemplating purchasing milk and cream or other products aforesaid, including the use of said signs, banners or placards, and walking up and down in front of said stores as aforesaid, and further preventing the deliveries to said stores of other articles which said stores sell through retail; (or) From threatening in any manner to do the foregoing acts; . . . ."[45] Thus it would seem that there is as much of an "overhanging and undefined threat to free utterance" in this injunction as there was in the *Thornhill* and *Carlson* statutes, but in the majority opinion Mr. Justice Frankfurter said there was not[46] and that the injunction should be sustained. The majority opinion emphasizes the context of violence and indicates that when utterances are used as part of a plan or scheme of force and intimidation, they lose their character of an appeal to reason and thus lose their constitutional protection. This comes close to the idea of "verbal act" which was set forth in the case of *Gompers v. Bucks Stove and Range Co.*[47] as follows: "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words

44. The language of the injunction is remarkably like that of the statutes held bad in the Thornhill and Carlson cases. Mr. Justice Black makes a revealing comparison, *Id.* at 309, Footnote 10.
45. As quoted in the dissenting opinion of Mr. Justice Black, *id.* at 308.
46. *Id.* at 292.
47. 221 U. S. 418 (1911).

themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."[48] In the *Meadowmoor* case Mr. Justice Frankfurter says that peaceful picketing in the future will amount to intimidation because of the fear which had been generated by past violence and which will carry over and cling to such peaceful picketing in the future. Thus this future peaceful picketing is in the same class as the verbal acts in the *Bucks Stove* case and can likewise be enjoined regardless of the constitutional protection ordinarily given it as one aspect of free speech.

However, the majority opinion seems to realize that it has gone very far in limiting the rights of free speech, for in the last two pages of the opinion Mr. Justice Frankfurter tries to justify the result as not so bad after all.[49] In this he has little success. He points out again that this is an injunction and not a statute, that the defendant union can try to get it modified when conditions have changed and that if the injunction is enforced in the broad aspect which its language would normally imply (but which this opinion denies) then there would be a remedy by another appeal to the United States Supreme Court. It is also said that Illinois has, not only the right and power, but the duty to protect its citizens and their businesses from bombings, window smashings and other acts of violence. This has always been admitted by everyone who considers the question. However, the Court here says that there is no reason why Illinois can not use the injunction of its courts rather than the policemen's club to accomplish this. When an injunction as restrictive of free speech as the present one is used, the Fourteenth Amendment to the Federal Constitution is compelling reason. Of course a narrow injunction against violence would be proper. The fact that Illinois, by its courts, chooses to use a broad injunction that is found to violate the Fourteenth Amendment, should have no more weight than an indication of legislative preference shown by the enactment of statutes and ordinances. This legislative preference has repeatedly been held not to justify abridgment of free speech and press.[50] The

48. *Id.* at 439.
49. Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287, 297 (1941).
50. Herndon v. Lowry, 301 U. S. 242 (1937); Schneider v. State, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940).

choice of the courts should be no greater justification for overriding the constitutional guarantees.

However, what seems to be the actual basis for the opinion has not been mentioned yet. This is the philosophy of Mr. Justice Frankfurter that state action should be upheld if at all possible. This will be fully discussed later.

It should also be noted that the majority opinion does not mention or consider in any way the clear and present danger test.

The dissenting opinion of Mr. Justice Black, holding that the injunction violates the Fourteenth Amendment, is based on the importance which he attaches, and rightly so, to the constitutional guaranty of freedom of speech. He says, ". . . I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."[51]

In addition to what has already been said, this dissenting opinion points out that the injunction covers the acts alleged by the complaint and the complaint objects to stories in the newspapers of Chicago. Thus the injunction, by orthodox construction, would prevent any mention of the union's side of the controversy in the public press. The dissent also points out that there was no clear and present danger that demanded such a broad injunction for the protection of the public. Rather this broad language seems designed to prevent the presentation of the union's side of the controversy to the public in any manner, shape or form. This not only violates the rights of the union to give publicity to its side of the controversy but also denies to the public the right to receive information as to both sides of a controversy in which it has a vital interest. The injunction, of course, will protect the business of the plaintiff, but it should be only the protection of the public, not the individual, that justifies abridgment of free speech. If this is not so the anomalous result of some of the earlier cases is resurrected. These cases said that they recognized the right of the union to organize and strike. However, when this happened and the employer asked an injunction, the courts said that the laborers could not

51. Milk Wagon Drivers' Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U S. 287, 301 (1941).

injure the property of the plaintiff. His business was property and since the picketing and other acts of the union hurt the plaintiff's business, these acts would be enjoined, it being the historic jurisdiction of equity to issue injunctions to protect property. Thus these courts gave lip service to the rights of unions, but whenever the unions did anything to make their rghts effective, the courts would grant an injunction. The effect of these injunctions was to deny the rights of the labor unions.[52] The majority opinion seems to depart from the firm foundation of the *Thornhill, Carlson* and *Swing* cases and starts back down the hill to the fallacious reasoning and consequent distorted results just described.

Mr. Justice Reed also wrote a dissenting opinion in this case. He admits that Illinois can protect its citizens against violence, but adds, "This authority of Illinois to protect its storekeepers must be exercised, however, within the framework of the Constitution."[53] The remedy for any fear or coercion that peaceful picketing may carry over from past violence is said to be the maintenance of order, not a denial of the right of free speech. The fact that this is an injunction and not a statute is no basis for distinction. It is not shown that the union was responsible for the violence and the possible fear that peaceful picketing may carry with it thus is not sufficient to justify the suspension of the constitutional right of free speech to the thousands of members of the union. If an injunction is allowed here the rights maintained in the *Thornhill* case collapse at the first attack.

The arguments of Mr. Justice Reed are cogent and to the point, and together with the arguments and factual analysis of Mr. Justice Black seem clearly to show that the majority opinion actually allows infringement of the right of free speech in a matter of great public concern for the insufficient reason of long past violence that might cause a carryover of some fear if peaceful picketing were continued. This possible fear seems small basis on which to rest such an abridgment of free speech.

The *Meadowmoor* case is not alone in allowing a state injunction which abridges freedom of speech. In *Carpenters and Joiners Union of America,*

52. Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888); Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896); Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13 (1898); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229 (1917); Hotel and Railroad News Co. v. Clark, 243 Mass. 317, 137 N. E. 534 (1922). See also cases cited in footnote 11 *supra.*

53. Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287, 319 (1941).

Local No. 213 v. Ritter's Cafe[54] the United States Supreme Court in a five to four decision allowed an injunction at least as questionable as the one allowed in the *Meadowmoor* case. Again Mr. Justice Frankfurter wrote the majority opinion. This case is especially doubtful when compared with the *Swing* case. In this case Ritter let a contract for the construction of a building. The contractor used non-union labor and the carpenters and joiners union, together with a painters union, picketed the cafe owned by Ritter, about a mile and a half from the site of the new building. The cafe was unionized and the employees walked out because of the picketing, which resulted in a decline in the business of about sixty per cent. The Texas state courts granted an injunction because the picketing violated the state anti-trust law.[55] This injunction only prohibited picketing the cafe or carrying banners in front of it. It did not prevent picketing at other places or other means of presenting the facts of the dispute to the public.[56] This majority opinion construes the position of the union as claiming that picketing, protected by the Fourteenth Amendment, is an absolute right and is subject to no regulation whatever, and as to this concludes that the fact that there is a labor dispute does not give any greater rights than those given by the Fourteenth Amendment to other exercises of the right of free speech. The opinion then says that Texas can limit the sphere within which the activities of the labor controversy may be carried out. This is here limited to those directly involved in the dispute (the union and the contractor) and the Fourteenth Amendment does not prevent this. Mr. Justice Black again wrote a dissenting opinion,[57] as did Mr. Justice Reed. The dissent of Mr. Justice Black relies on the *Thornhill* case. He says that this injunction infringes on the freedom of speech which the Court in the *Thornhill* case said was protected by the Fourteenth Amendment to the Federal Constitution. The purpose of the injunction was to prevent the picketing and thus prevent the union from conveying information to the public in front of the cafe.

54. 62 Sup. Ct. 807 (1942).

55. Texas Penal Code, art. 1632 *et seq.* (1936); Carpenters and Joiners Union, Local No. 213 v. Ritter's Cafe, 149 S. W. (2d) 694 (Ct. of Civ. App. Texas, 1941).

56. This is the interpretation given by Mr. Justice Frankfurter, Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 62 Sup. Ct. 807, 808 (1942). Mr. Justice Black, in his dissent, says that this may be correct but that it would seem that the theory of the state court would allow an injunction against any means of persuading the public not to patronize Ritter's Cafe. *Id.* at 812.

57. Justices Murphy and Douglas concurred in the opinion of Mr. Justice Black.

This prevention was to protect the cafe business of the plaintiff from the injury consequent to the picketing. This violates the principles laid down in the *Thornhill* case and presents no sufficient justification for the infringement of the right of free speech. The fact that the union could give publicity to its side of the controversy in other ways and places does not lessen or justify the abridgment of the right of free speech which the union sought to exercise in an appropriate place and manner.[58] In a separate dissent Mr. Justice Reed points out clearly that the reason for the injunction was to prevent injury to the business of the plaintiff. He admits that picketing is subject to some regulation, is not an absolute right, but concludes that the injunction here under consideration is not a proper regulation. He points out that the majority opinion would limit the right to picket, when picketing is not conducted by employees of the business picketed, to members of the same industry. He concludes that this is bad both because the scope of an industry is undefined and because such a limitation is unwarranted "So long as civil government is able to function normally for the protection of its citizens. . . ."[59]

When this case is compared closely with the case of *American Federation of Labor v. Swing*[60] they are impossible of reconciliation. Mr. Justice Frankfurter wrote both opinions and in both the Court was faced with peaceful picketing. In neither was the picketing carried out by employees of the business picketed. In the *Swing* case the Court says that "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."[61] It is this last sentence which Mr. Justice Frankfurter seizes upon to take the *Ritter* case out of the authority of the *Swing* case. The *Ritter* case did not involve members of the same industry. However, in the *Ritter* case there was a very close connection between Ritter and the employment of non-union construction workers, which caused the controversy. Ritter was the owner of the cafe that was picketed and also was the owner of the building

58. Schneider v. State (Town of Irvington), 308 U. S. 147 (1939).
59. Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, Sup. Ct. 807, 815-816 (1942). It should be noted that this is in effect another expression of the clear and present danger test.
60. 312 U. S. 321 (1941).
61. *Id.* at 326.

that was being constructed with non-union labor. The logical place for the union to exert pressure was on Ritter who had ultimate control of the construction. Whether he could change this particular contract is not disclosed. However, as pointed out by the dissenting opinion of Mr. Justice Black,[62] this was the place where pressure would have the most effect on contractors who directly hire the labor. Thus there would seem to be as close a connection here as in the case of other members of the same industry, as was involved in the *Swing* case. However, the United States Supreme Court, speaking through Mr. Justice Frankfurter, apparently sees a distinction, for they allowed Texas to exclude picketing of the owner's other business, the cafe, from the area of permissible activity in a labor dispute. This contrasts greatly with the opinion in the *Swing* case which allowed picketing by workers of the same industry even though they were strangers to the particular business picketed and there was no dispute of any kind between the employer and his immediate employees. The Court in the *Swing* case says, "Communication by such employees (in the same industry) of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance in *Thornhill's* case."[63] However, where the picketers are not of the same industry there is apparently no such constitutional protection given to the facts of a dispute, deemed by the workers to be relevant to their interests. There seems to be no substantial difference and the criticism of this basis for distinction found in Mr. Justice Reed's dissent in the *Ritter* case is sound. In both cases the picketers had sufficient interest and their exercise of free speech should be protected. The clear and present danger test would so protect it.

The protection of individual business, which seems to be the basis of the *Ritter* case, does not satisfy this clear and present danger test. The different result in the two cases could possibly be reached on the basis of the slight difference in facts. However, this difference is not persuasive. The United States Supreme Court in the *Swing* case would not allow Illinois to limit permissible picketing to the immediate employees of the employer picketed, but said that such activites were protected by the Federal Constitution when carried on by anyone in the same industry. In the *Ritter*

62. Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 62 Sup. Ct. 807, 815-816 (1942).
63. 312 U. S. 321, 326 (1941).

case the picketing was carried on by a union not of the same industry as the business picketed and the United States Supreme Court said that Texas could limit the permissible field of such activity so as to outlaw this picketing. In both cases the parties picketing were taking the most effective way of presenting their side of the controversy to the public and in neither case was any evidence produced to indicate a malicious desire to do harm for the sake of doing harm. The harm in both cases was incidental to the legitimate ends of the unions; securing employment for union members and recognition of the union. The difference in facts as regards the same industry is superficial at best. Under the complex economic structure of today the control of parts of many different industries may be and often is in the hands of the same person. If the "same industry" limitation is adhered to strictly, as the *Ritter* case would seem to indicate the Court is doing, it will result in many workers not being able to exert pressure on the people who direct the acts against which they complain. Ritter was the logical person to be picketed. Under this decision he is free to enjoy all the benefits of unionization of his cafe and other unions can not effectively make known to the public his non-union activities in other fields of economic activity in which he may be engaged. This use of the "same industry" as a test to decide when picketing is constitutionally protected and when it is not is highly superficial and also ignores actual facts and everyday happenings.

The *Ritter* and *Meadowmoor* cases seem to have one very important thing in common. That is the idea of Mr. Justice Frankfurter, who wrote both opinions, that all things should be stretched almost to the breaking point in order to hold any act of a state constitutional. This idea seems to be an unjustifiable extension of the philosophy of Mr. Justice Holmes. However, as applied by the latter the idea was restricted to such questions as whether state regulation of business, hours of labor and other ordinary instances of the exercise of state police power, violated the due process clause of the Fourteenth Amendment. He realized that in the field of civil liberties, especially freedom of speech and press, the mandatory terms of the Constitution did not allow such indulgence for state action which might infringe these freedoms. It was Mr. Justice Holmes who originated the clear and present danger test, in the case of *Schenck v. United States*.[64]

In the *Meadowmoor* case Mr. Justice Frankfurter says that the master, to whom the case was referred by the lower state court, found that there

64. 249 U. S. 47 (1919).

had been violence and that peaceful picketing in the future would contain a threat and amount to coercion because of such past violence. The Supreme Court of Illinois affirmed this and "We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee . . ."[65] of free speech and press. He goes on to say that Illinois has power to protect its shopkeepers from violence and that if Illinois chooses to do so by use of an injunction, as here, it is all right and the Fourteenth Amendment does not prevent it. The state does not have to rely on the police to keep order, it has chosen to use the injunction for this purpose and it has the power to so choose. This deference to the choice of the state is even more apparent in the *Ritter* case. The opinion in that case states: ". . . *Texas has declared that its general welfare would not be served* if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder."[66] Again he says, "*Texas has deemed it desirable* to insulate from the dispute an establishment which industrially has no connection with the dispute."[67] The opinion goes on to say that Texas can limit the sphere within which the labor controversy must be kept and the limitation set up by Texas is a reasonable regulation and therefore allowable. This language and reasoning is all very well and proper where the due process clause of the Fourteenth Amendment alone is involved. In such cases the state regulation is bad only if it is so unreasonable as to be purely arbitrary and capricious.[68] However, in cases like the present, more is involved. Not only the Fourteenth, but also the First Amendment[69] must be considered. The protection provided against acts of the Federal Government by the First Amendment, is now given against acts of the states. This result is reached by reading the guarantees found in the First Amendment into the word liberty found

65. 312 U. S. 287, 294 (1941).
66. 62 Sup. Ct. 807, 809 (1942). Italics added.
67. *Id.* at 810. Italics added.
68. Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); New State Ice Co. v. Liebmann, 285 U. S. 262 (1932) (dissent by Brandeis); Nebbia v. New York, 291 U. S. 502 (1934); and cases cited.
69. The relevant part of the First Amendment is: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

in the due process clause of the Fourteenth.[70] The language of the First Amendment is mandatory. Thus any action by the government (either state or federal) that abridges freedom of speech or press, would seem to be inconsistent with this amendment. Of course it is recognized that, from the nature of things, no right is absolute. Government can and must protect itself and it was in such a case that Mr. Justice Holmes evolved the clear and present danger test.[71] Also, police regulations of the state that are necessary for such purposes as the protection of public health, safety and morals may subject the right of free speech to reasonable regulation. However, all such things must be sharply inspected and their necessity must be clear before they can be allowed.[72] The presumption that state acts are valid is proper when the due process clause alone is involved. In such cases the party claiming unconstitutionality is required to show beyond all reasonable doubt that the state action is arbitrary and unreasonable and beyond the powers retained by the state under the Federal Constitution. However, the protection given to free speech and press, by reason of the mandatory language of the First Amendment, is of a higher order, and any abridgment or infringement must be justified or be struck down as unconstitutional. There is no presumption in its favor. The clear and present danger test is the best criterion yet formulated for deciding whether the abridgment is justified or not. Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States*[73] expressed the importance of the constitutional guaranty of free speech as follows: "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. . . ."[74] Later in the same opinion he said: ". . . (people have come to believe) that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at

70. Since Gitlow v. People of New York, 268 U. S. 652 (1925), this has been assumed and the Court has never expressed any doubt. It is now so well settled as not to require citation of authority.

71. Schenck v. United States, 249 U. S. 47 (1919).

72. Fiske v. Kansas, 274 U. S. 380 (1927); Stromberg v. California, 283 U. S. 359 (1931); Near v. Minnesota, 283 U. S. 697 (1931); DeJonge v. Oregon, 299 U. S. 353 (1937); Lovell v. City of Griffin, 303 U. S. 444 (1938); Herndon v. Lowry, 301 U. S. 242 (1937); Schneider v. State (Town of Irvington), 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940); Bridges v. California, 62 Sup. Ct. 190 (1941).

73. 250 U. S. 616 (1919). This was an appeal from a conviction under the Espionage Act during World War I. Thus only the First Amendment was involved.

any rate is the theory of our Constitution. . . . While that experiment (free speech) is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command (of the First Amendment)."[75] Thus we see that where the constitutional protection of freedom of speech and press is involved, there is no presumption of constitutionality of state action and the idea of letting the states do what they want to, if at all possible, is not proper. The protection of freedom of speech to the person, or a group of people, is the important thing and the court should guard this jealously; they should not be loath to declare a state law unconstitutional for this reason.

Thus while this philosophy of Mr. Justice Frankfurter may explain the result of the *Meadowmoor* and *Ritter* cases, it does not constitute a sufficient justification for the abridgment of freedom of speech involved. In fact it only gives more cogency to the arguments of the dissenting opinions.[76]

Several times in this article the clear and present danger test, as formulated by Mr. Justice Holmes in the case of *Schenck v. United States*,[77] has been referred to. In the language of that opinion: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[78]

The words clear and present danger make a useful handle and because of this it is easy to think of this as a mechanical test. However, when the idea behind the words is understood it is seen to be the very antithesis of mechanical. As Mr. Justice Holmes says: "It is a question of proximity and degree."[79] Just because the government, federal or state, wants to impose a certain regulation or penalty, the test is not satisfied. The mere

74. *Id.* at 628.
75. *Id.* at 630.
76. Such fuzzy reasoning, with dissenting opinions that would protect freedom of speech, is well illustrated in the more recent case of Jones v. City of Opelika, 62 Sup. Ct. 1231 (1942).
77. 249 U. S. 47 (1919).
78. *Id.* at 52.
79. *Ibid.*

legislative choice of means to combat an existing evil or attain a desired and desirable end, is not enough. There must be some very important reason that amounts to strict necessity before any abridgment of the constitutional guaranty can be allowed. The infringement on freedom of speech and press can be tolerated only when the utterance will result in very great harm to the community and when there is no other way to protect that community. Only then can it be said that this test has been satisfied. The mere possibility of injury or danger is not enough. The danger threatened must be clear, it must at least be of such a nature that man, from his imperfect experience, can say, not that it will probably occur, but that, barring some unforseeable circumstance or change, it will happen. Also the danger must be a present one.[80] It can not be something that it is thought may cause harm in the distant future. Man can not predict the results of such stimuli over more than a relatively short period of time. Thus the danger that is clear must also be one that will occur, or begin, within the time that human experience will allow a reasonably accurate prediction. It must not be so remote that it becomes probable that some change, or unforseen circumstance, will divert the stimulus of the freely exercised speech to a result not foreseen at the time the words were uttered.

When this test is thus considered it is not in the least mechanical. It takes various forms in various cases. There are many ways of expressing it and sometimes it is not expressly set forth at all. However, a study of the cases dealing with civil liberties leads to the conclusion that most of the sound ones have used this clear and present danger test.[81] No case has ever criticized this test or advanced any reason why it should not be used. Some cases have reached the result of protecting freedom of speech, press and

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80. Whitney v. California, 274 U. S. 357 (1927) (concurring opinion of Mr. Justice Brandeis); Herndon v. Lowry, 301 U. S. 242 (1937).

81. This clear and present danger test is discussed in many cases. Often where the majority opinion goes off on some improper tangent there is a dissent based on it. Schenck v. United States, 249 U. S. 47 (1919); Abrams v. United States, 250 U. S. 616 (1919) Dissent, Holmes; Schaefer v. United States, 251 U. S. 466 (1920) Dissent, Brandeis; Pierce v. United States, 252 U. S. 239 (1920) Dissent, Brandeis; Gitlow v. People of New York, 268 U. S. 652 (1925) Dissent, Holmes; Whitney v. California, 274 U. S. 357 (1927) Concurring opinion by Brandeis; People v. Garcia, 37 Cal. App. (2d) 753, 98 P. (2d) 265 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940); Thornhill v. Alabama, 310 U. S. 88 (1940); Carlson v. California, 310 U. S. 106 (1940); Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287 (1941) Dissent, Black; Bridges v. California, 62 Sup. Ct. 190 (1941); Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 62 Sup. Ct. 816 (1942).

religion without expressly using the test[82] but it is well to note that in the cases in which questionable infringements on these freedoms have been allowed, the Court has not purported to find such clear and present danger to exist, but rather has ignored this test altogether.[83] Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*[84] makes the substance of this test plain and comprehensble. He says:

> "This Court has not yet fixed the standard by which to determine when danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as a means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.
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> "Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . .
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> "Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . But even advocacy of violation (of law), however reprehensible morally, is not a justification for denying free speech where

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82. Stromberg v. California, 283 U. S. 359 (1931); Near v. Minnesota, 283 U. S. 697 (1931); DeJonge v. Oregon, 299 U. S. 353 (1937); Lovell v. City of Griffin, 303 U. S. 444 (1938); Hague v. Committee for Industrial Organization, 307 U. S. 496 (1939); Schneider v. State (Town of Irvington), 308 U. S. 147 (1939); American Federation of Labor v. Swing, 312 U. S. 321 (1941).

83. Abrams v. United States, 250 U. S. 616 (1919); Schaefer v. United States, 251 U. S. 466 (1920); Pierce v. United States, 252 U. S 239 (1920); Gitlow v. New York, 268 U. S. 652 (1925), See 6 Mo. L. Rev. 106; Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287 (1941); Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 62 Sup. Ct. 807 (1942); Jones v. City of Opelika, 62 Sup. Ct. 1231 (1942).

84. 274 U. S. 357 (1927).

the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

". . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. . . . Only an emergency can justify repression. . . . It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

"Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial *harm to society*. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of *serious injury to the State.*"[85]

Thus it is seen that the freedom of speech and press is given the utmost in protection; that only grave danger to society, which will more than likely occur and occur shortly, will justify any abridgment or infringement of these personal freedoms. This is as it should be and as it was intended by the framers of the Constitution. There is and can be no question that if these considerations which go to make up the clear and present danger test had been considered in the decision of the *Meadowmoor*[86] and *Ritter*[87] cases, the injunctions would have been denied. There was actually no danger to society in either case. The danger comes rather from the suppression that follows from the injunction. There was of course danger to the businesses picketed. The profits from them would be lessened, perhaps even the vendor system involved in the *Meadowmoor* case would have been destroyed. However, this is not such grave and imminent danger to society as Mr. Justice Brandeis speaks of as the only justification for the abridgment of free speech. The explanation has, of course, been

85. *Id.* at 374-378. Italics added. It should be carefully noted that it is harm to society or the state and not to an individual or group of individuals that justifies this abridgment.

86. 312 U. S. 287 (1941).

87. 62 Sup. Ct. 807 (1942).

previously pointed out; the predilection to sustain state action in all possible instances.

The simple conclusion from this study is that because of the affirmative and emphatic language used in the First Amendment to the Federal Constitution, freedom of speech and of the press are rights as nearly absolute as any rights can be in modern society. These rights can therefore only be abridged in cases of overwhelming necessity; and the proper criterion to be used in determining when such necessity exists is what has been called here the clear and present danger test.[88] When it is not used there is danger of an overemphasis on what should properly be subsidiary issues, resulting in questionable decisions. When this test is understood and used it forces a determination of whether or not there is that overwhelming necessity which alone justifies abridgment, and thus the danger of mistakes and suppression is reduced to a minimum.

There is another and closely related question that has but recently arisen. To what extent does the right of free speech protect utterances of the employer? This question is usually raised by orders of the National Labor Relations Board and not by the ordinary process of injunction.[89] The problem involved is a delicate one and the United States Supreme Court has not yet passed on it. The Federal Constitution protects the right of free speech to everyone; employer, employee and stranger to the conflict. However, statements of the employer may be such that they have the effect of intimidating and coercing the employee and thus deprive him of his right to free choice of collective bargaining representatives given him by the National Labor Relations Act. As it was expressed by the Fifth Circuit Court of Appeals, "The employer has the right to have and to express a preference for one union over another (or against all unions) so long as that expression is the mere expression of opinion in the exercise of free speech and is not the use of economic power to coerce, compel or buy the support of the employees for or against a particular labor organization."[90]

88. It is not contended that this is the only possible criterion, but it is submitted that this is the most nearly adequate one that has as yet been formulated.

89. The cases of Texas and New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 (1930); and Virginian Ry. v. System Federation No. 40, 84 F. (2d) 641 (C. C. A. 4th, 1936), both arose under the Railroad Employment Act. The Supreme Court of the United States did not consider the problem when it reviewed the last mentioned case, 300 U. S. 515 (1937).

90. Continental Box Co. v. National Labor Relations Board, 113 F. (2d) 93, 97 (C. C. A. 5th, 1940). The problem in this case was employer domination of a local union.

The position of the employer and his ability to fire or otherwise discriminate against an employee who goes against his wishes may well give to his statements the force of coercion and therefore it is argued that such statements by the employer are not protected by the First Amendment. The cases in the various circuit courts of appeals are in conflict but if the right of free speech is to be given as much sweep and force in this situation as it has in others, it would seem that the implications of many of these cases will have to be disregarded. There are very few cases squarely on the point. Most of them find some reason why a square decision is not needed. The reason most often given is that there were acts of the employer which justify the finding of the National Labor Relations Board that he engaged in unfair labor practices, without consideration of his statements. There can be, of course, no doubt that the employer can, by verbal threats, effectively coerce his employees into doing what he wants them to do or prevent them from doing what they want to do in the matter of union organization and collective bargaining. Actual open threats are unusual today. The form is generally more subtle and this greatly increases the difficulty of deciding what amounts to such coercion as will take the employer's statements out of the protection of the First Amendment. This is the idea behind many of the cases. In *Virginian Railway Co. v. System Federation No. 40,* the court says ". . . and it is a violation of the terms, as well as of the spirit of the act, for the employer to address arguments to the employee couched in such terms, or presented in such manner, as to lead the employee to fear that he may suffer from the action of the employer if he does not follow the wishes of the latter in making his choice of representatives."[91] There are several other cases in which the order of the National Labor Relations Board is general in character and the court does not have to expressly decide the point, but which contain dicta that show the attitude of the court similar to that in the *Virginian Railway* case.[92] The courts seem to question whether the acts of the employer violate the

91. 84 F. (2d) 641, 643 (C. C. A. 4th, 1936). *Aff'd on other grounds,* 300 U. S. 515 (1937).

92. Montgomery Ward and Co. v. National Labor Relations Board, 107 F. (2d) 555 (C. C. A. 7th, 1939); National Labor Relations Board v. Elkland Leather Co., 114 F. (2d) 221 (C. C. A. 3d, 1940); National Labor Relations Board v. Chicago Apparatus Co., 116 F. (2d) 753 (C. C. A. 7th, 1940); National Labor Relations Board v. Reed and Prince Mfg. Co., 118 F. (2d) 874 (C. C. A. 1st, 1941). *Cert. denied,* 313 U. S. 595 (1941); National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106 (C. C. A. 2d, 1941); National Labor Relations Board v. Link-Belt Co., 311 U. S. 584 (1941).

National Labor Relations Act and if it is found that they do then the courts conclude that the Board's order should be upheld. Whether such statements may be protected by the First Amendment is seldom directly considered. The case of *National Labor Relations Board v. Elkland Leather Co.*[93] is typical of these cases. The court finds that the Board was justified in finding the statement involved "was manifestly designed to discourage organizational efforts" indicates that it thinks such action by the employer was reprehensible and violative of the policy of the act, and then avoids the issue by saying that no direct opinion is required.

The prevailing idea that any statement of the employer will have a coercive effect because of his economic position would seem to lead naturally to the conclusion that they amount to what has been called "verbal acts" and thus are not protected as an exercise of free speech.[94] However, the only case that deals with this idea is *National Labor Relations Board v. Reed and Prince Mfg. Co.*[95] This case cites the *Meadowmoor* case which at least comes close to using the "verbal act" doctrine. In the *Reed and Prince* case the court says that "Anti-union propaganda addressed by an employer to his employees may be more than a mere expression of opinion, may 'lose its significance as an appeal to reason', in a context of violence, intimidation or coercion. At this point the employer's constitutional right of free speech ends."[96] The court says that this anti-union propaganda is one phase of the refusal to bargain but concludes that there is sufficient evidence to support the Board's finding without holding that the propaganda, in and of itself, is an unfair labor practice. The fallacy of the argument set out in the above quotation has been pointed out before and the arguments against it are as cogent when the doctrine is applied to the employer as when applied to the employee. One of the few cases that have made a decision directly on the question of the employer free speech is *National Labor Relations Board v. Luxuray, Inc.* The Board issued a cease and desist order against making anti-union statements and the court enforced the order. The employer told his employees that they did not have to join any union, advised them against joining and said that they would get along best by working

93. 114 F. (2d) 221 (C. C. A. 3d, 1940).
94. This "verbal act" doctrine is explained and applied in Gompers v. Bucks Stove and Range Co., 221 U. S. 418 (1911).
95. 118 F. (2d) 874 (C. C. A. 1st, 1941). *Cert. denied,* 313 U. S. 595 (1941).
96. *Id.* at 889.
97. 123 F. (2d) 106 (C. C. A. 2d, 1941).

in harmony with the company. The court, through Judge Augustus N. Hand, said, "But freedom of speech does not extend to interested appeals by an employer to induce his men not to exercise the right of collective bargaining and not to become members of a labor union. . . . In view of his power to discharge the employees they might fairly suppose not only that it was not to their interest to become members of the union but that they might suffer from such an association."[98] The National Labor Relations Act does not require that the employees join any union or other organization. The employer has great interests in the activities of his employees in such matters and his expression of opinion and even advice would seem to be quite proper. There is nothing in this case to show that the statements of the employer had any element of threat and thus the restrictive view of the court seems unjustified.

In *National Labor Relations Board v. Link-Belt Co.*[99] the Supreme Court of the United States, in a case involving employer domination of a local union, uses language which taken alone would seem to indicate a very narrow construction of the employer's right to free speech. However, when it is read in its context of the discussion of employer domination of the union, this language loses its significance in relation to the problem here being considered. Thus there is still no intimation as to what the United States Supreme Court will do when it finally considers this question.

Not all of the cases put such strict limits on the employer's right of free speech, but this again is mostly dicta.[100] The past attitude of the employer has often been considered important. Where the court considers that the employer has been very fair and cooperative with the employees it tends to say that rather emphatic expressions of opinion are permissible. This is true not only of dicta but also in the case of *Midland Steel Products*

98. *Id.* at 108.

99. 311 U. S. 584 (1941). See also International Association of Machinists; Tool and Die Makers Lodge No. 35 v. National Labor Relations Board, 311 U. S. 72 (1940).

100. Texas and New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 (1930); National Labor Relations Board v. Union Pacific Stages, Inc., 99 F. (2d) 153 (C. C. A. 9th, 1938); National Labor Relations Board v. Falk Corp., 102 F. (2d) 383 (C. C. A. 7th, 1939); Jefferson Electric Co. v. National Labor Relations Board, 102 F. (2d) 949 (C. C. A. 7th, 1939); Continental Box Co. v. National Labor Relations Board, 113 F. (2d) 93 (C. C. A. 5th, 1940); Midland Steel Products Co. v. National Labor Relations Board, 113 F. (2d) 800 (C. C. A. 6th, 1940); National Labor Relations Board v. Ford Motor Co., 114 F. (2d) 905 (C. C. A. 6th, 1940); National Labor Relations Board v. Federbush Co., 121 F. (2d) 954 (C. C. A. 2d, 1941); Owens-Illinois Glass Co. v. National Labor Relations Board, 123 F. (2d) 670 (C. C. A. 6th, 1941) (dissent).

Co. v. National Labor Relations Board[101] it was the main basis for reversing the order of the Board. The courts seem mainly to be worried about whether the Act does or was intended to prevent statements of opinion or desire by the employer. Often the court finds that the statements of the employer do not violate the Act and adds dicta to the effect that if the Act were construed to prohibit such statements it would be unconstitutional. Thus the discussion of the constitutional question in most of the cases is haphazard at best.[102]

The case of *National Labor Relations Board v. Federbush Co.*[103] makes the usual statements that pay lip service to the theory of constitutional right of free speech but adds that freedom of speech operates only when it is in fact used for persuasion. When the employer makes known his opinions and wishes it has additional force, other than persuasion, because of his economic position, and is therefore not protected by the Constituton. This is of course another form of the usual problem, but the court goes on and says that it is proper for the National Labor Relations Board to draw the line between what is persuasion and what is force and indicates that the courts will not themselves look into this. This idea is at variance with the accepted scope of judical review in cases involving civil liberties.[104]

The most important case so far decided on this question is *National Labor Relations Board v. Ford Motor Co.*[105] The court in this case seems doubtful that there was any actual coercion from the statements of the employer. Also it indicates doubt that the National Labor Relations Act prevents anti-union propaganda. However, the decision of the court seems to be based on the more fundamental constitutional protection of free speech. The Constitution is held to protect utterances of the employer as well as those of the employee and the order of the board against circulation of such anti-union propaganda is reversed. It is submitted that the result of this case is proper, but the reasoning is far from clear. There are

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101. 113 F. (2d) 800 (C. C. A. 6th, 1940); See also National Labor Relations Board v. Falk Corp., 102 F. (2d) 383 (C. C. A. 7th, 1939).

102. Jefferson Electric Co. v. National Labor Relations Board, 102 F. (2d) 949 (C. C. A. 7th, 1939); Continental Box Co. v. National Labor Relations Board, 113 F. (2d) 93 (C. C. A. 5th, 1940); Owens-Illinois Glass Co. v. National Labor Relations Board, 123 F. (2d) 670 (C. C. A. 6th, 1941).

103. 121 F. (2d) 954 (C. C. A. 2d, 1941).

104. Schneider v. State (Town of Irvington), 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940).

105. 114 F. (2d) 905 (C. C. A. 6th, 1940). *Cert. denied,* 312 U. S. 689 (1941).

of course limits to the free speech of an employer as well as an employee. The right of the employer is just as fundamental as that of the employee. The *Ford* case sheds very little light on cases which may arise in the future. The practical application of the employer's right of free speech has not yet been put on a firm foundation. None of the cases as yet have considered the broad problem. They all decide that the particular statement is permissible or not under the peculiar facts of the case and do not explain how the conclusion is arrived at. In the field of employee freedom of speech this article advocates the use of the clear and present danger test. No reason is perceived why the protection of that test should not also apply to speech of the employer.

The National Labor Relations Act does not expressly deal with statements of the employer. The courts have not as yet expressly attacked the question of interpretation of the statute on this point. The Act declares it to be an unfair labor practice ". . . for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title (the right of self-organization and collective bargaining)."[106] Thus the courts must conclusively decide that statements of the employer are included in the words "interfere with, restrain or coerce" before the statute is violated. The exact scope of these words has not as yet been found by the courts. If the courts should decide that these words of the statute include all statements of the employer bearing upon union organization and activity, the interpretation would seem to render the statute unconstitutional as violating the First Amendment to the Federal Consitution. Of course, not all statements of the employer are coercive and there is no basis for holding that all such statements violate the statute. However, if the statute is construed to prohibit all utterances of the employer that might, for any reason, have a coercive effect on the employees, there is still grave question of the constitutionality of the statute. As has been pointed out by almost all of the cases,[107] the economic position of the employer may give his seemingly impersonal statements of opinion a coercive

106 49 STAT. 452 (1936); 29 U.S.C.A. § 158 (1940). Section 157 is as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collective through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargainng or other mutual aid or protection." 49 STAT. 452; 29 U. S. C. A. § 157.

107. See especially: National Labor Relations Board v. Reed and Prince Mfg. Co., 118 F. (2d) 874 (C. C. A. 1st, 1941). *Cert. denied,* 313 U. S. 595 (1941); National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106 (C. C. A. 2d, 1941); Continental Box Co. v. National Labor Relations Board, 113 F. (2d)

effect on his employees. However, it must not be forgotten that statements by employees in connection with strikes and picketing may also have, and often are intended to have, a coercive effect on the employer. Yet such statements by employees are constitutionally protected. But, as is pointed out in the *Ford* case,[108] it is the purpose of the National Labor Relations Act to protect the employees from the discrimination which the statements of the employer are supposed to threaten. The existence of this Act and the enforcement machinery set up under it weakens the most persistent argument for limiting the scope of employer free speech in two ways. First, this machinery is used to protect the rights of the employees, and thus the supposed threats can not be carried out by the employer; *i.e.* actual discrimination by the employer is stopped, or remedied after it has occurred. Second, because of the existence of this machinery the employee is not so fearful of the displeasure of the employer. He can and usually does go ahead and exercise his free will in spite of the employer's utterances, which, because of the Act have less, or no, coercive effect. Difficulty in proving discrimination does not necessarily affect this. If, because of difficulties of proof, the machinery set up under the National Labor Relations Act can not entirely protect the employee against all discriminatory acts of the employer, that is no justification for restricting his freedom of speech. This difficulty of proof is present in all fields of the law and is no reason for infringing on constitutional rights.

The purpose of the National Labor Relations Act as declared by Congress[109] is to prevent obstruction to the free flow of commerce. In order to accomplish this the Act sets up procedure to make collective bargaining effective and gives the employees certain rights in relation to it. As long as the employees understand that they are actually at liberty to exercise their own free will in such matters as union affiliation and the selection of collective bargaining representatives, it is evident that utterances of the employer are protected. In fact, under these circumstances there is no violation of the Act and thus no reason to call upon constitutional protection. It is only when statements of the employer can be said to have a coercive effect on the employees and thus may violate the Act, that the First Amend-

93 (C. C. A. 5th, 1940); National Labor Relations Board vfl Federbush Co., 121 F. (2d) 954 (C. C. A. 2d, 1941).

108. 114 F. (2d) 905, 914 (C. C. A. 6th, 1940). *Cert. denied,* 312 U. S. 689 (1941). See also the dissenting opinion in Owens-Illinois Glass Co. v. National Labor Relations Board, 123 F. (2d) 670 (C. C. A. 6th, 1941).

109. 49 STAT. 457; 29 U. S. C. A. § 151.

ment to the Federal Constitution is involved. The evil which Congress can try to prevent is the interference with and obstruction of the free flow of commerce that results from labor disputes. It is clear that not every interference with the policy of Congress expressed in this statute is a justification for an abridgment of free speech. The question thus becomes one of whether the statements of the employer cause such interference as to create such a clear and present danger of an evil which Congress can prevent that the abridgment of free speech is justified. Not all coercive effect places the statements of the employer beyond the protection of the First Amendment. It is only when the statements of the employer have such coercive force that they threaten great harm to society that such a clear and present danger can be said to exist. This danger to society results when the coercion of the employer's statements creates a danger of complete suppression of the rights of collective bargaining and union organization given by the Act. This in turn creates a grave danger of serious obstruction to the free flow of interstate commerce upon which the economic life of the nation rests. When this danger threatens in a clear and present manner the test has been met and the statements are no longer protected by the constitutional right of free speech.

It is not statements that may make a few timid workers slow to exercise their rights, but statements that are calculated to coerce most of the workers affected, to refrain from exercising their rights, that meets the clear and present danger test. Of course, in applying this test all the circumstances and conditions will have to be carefully considered. This consideration is primarily the task of the National Labor Relations Board. However, the courts should continue to look into the facts when the decisions of the Board are challenged, and determine for themselves whether the coercion which the Board has found to exist is of such seriousness as to justify the abridgment of free speech found in the challenged order. In other words, court review should be as broad here as in other civil liberties cases that come to the Supreme Court of the United States.[110]

It is submitted that in the cases that have so far come to the courts, there is no conclusive showing of a clear and present danger. There may be inconvenience and delay resulting from such statements of the employer, but they are not of such seriousness as will justify the abridgment of

110. Schneider v. State (Town of Irvington) 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940).

freedom of speech in the face of the mandatory language of the First Amendment to the Federal Constitution.

The National Labor Relations Act gives the employees rights of collective bargaining but it can not be forgotten that the employer has rights and interests also. These labor controversies do not operate in a vacuum and Congress does not force acceptance of any particular union, or any union at all. Thus the employer should be allowed to speak freely until the result of his speech creates such a clear and present danger that it is proper to limit it. Mere statements of opinion by the employer should always be protected. The possible coercive effect from any such statement is so problematical that it can not be said to create a clear danger. It is submitted that nothing short of an actual threat will meet this clear and present danger test, although any statements that create a danger of defeating all collective bargaining in a plant would be included. Of course the threat may be either express or implied. But the courts should find an implied threat only on clear and convincing evidence, and no presumption from the economic position of the employer should be indulged in. Here, as in other cases involving free speech, it is more important that this fundamental right be protected than that every possible interference with the policy of Congress be checked.

Thus we see that in spite of the great strides made in recent years, the exact scope of the right of free speech is as yet far from clear. However, the clear and present danger test would seem to be the best guide that has as yet been evolved for searching out the boundaries of this great and fundamental right.