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Address Delivered at a Seminar for Trade Union Leaders Entitled "The Courts and the Constitution"

ADDRESS DELIVERED BY JUSTICE JESSE W. CARTER OF THE SUPREME COURT OF CALIFORNIA AT A SEMINAR FOR TRADE UNION LEADERS PRESENTED BY THE INSTITUTE OF INDUSTRIAL RELATIONS OF THE UNIVERSITY OF CALIFORNIA AT THE SONOMA MISSION INN ON SEPTEMBER 7TH, 1957, ENTITLED, "THE COURTS AND THE CONSTITUTION"

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I have been asked to speak to you tonight on the subject -- "The Courts and the Constitution." This title is broad enough to cover not only the whole field of civil liberties, but every field of constitutional law. However, since this seminar is being presented by the Institute of Industrial Relations of the University of California, I shall confine my remarks to the field of labor law, or the application by the courts of the civil liberties guaranteed by the Bill of Rights to the activities of labor organizations. At the outset I am constrained to state that any student of our statutory law and court decisions on this subject must be impressed with the hodgepodge of conflicting rules and ideas which now exist. Historically speaking, the labor movement

is as old as civilization itself. The revolt of the Israelites against the Pharaohs of Egypt was motivated by the oppressive burden of labor exacted by the Pharaohs from the subjugated Israelites. While Moses has been justly acclaimed as the greatest law giver, he is also entitled to the appellation of being the first great labor leader. His methods were somewhat drastic, and if employed today to accomplish a labor objective, would probably be condemned by both Congressional legislative committees. They were, however, effective, as we are told that he succeeded in leading his followers from a land of bondage to a point well on the road to a land flowing with milk and honey.

Down through the ages the struggle between master and servant has continued, and gradually the plight of those who toil for a living has been improved to a point where both our legislatures and our courts are being importuned by employer groups to impose restrictions on the activities of labor organizations so that they will be less effective in their efforts to exact the worker's share of the wealth his labor produces.

It is my purpose tonight to discuss the present trends in legislation and court decisions in the field of employer-employee relations. These trends may be epitomized in two questions which I will propound and endeavor to answer. These questions may be stated as follows: Are the civil liberties of labor organizations guaranteed by the Bill of Rights being destroyed piecemeal by actions of state courts and state legislatures? Is not this process being furthered by the tendency of the United States Supreme Court to uphold such state actions by over-emphasizing the doctrine of states' rights in certain areas of labor activity?

While the problem may be stated quite simply to be whether or not the constitutionally protected civil liberties of labor organizations are being destroyed piecemeal by state courts, state legislatures, and the Supreme Court of the United States, the reason for the destruction and the solution of the problem is not an easy one.

In 1940, the Supreme Court of the United States decided the case of Thornhill v. Alabama (310 U.S. 88), in

which it was unequivocally held that peaceful picketing by labor unions was a form of expression protected by the First and Fourteenth Amendments to the United States Constitution. It was clearly stated that "in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is protected by the Constitution" and that "The streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Although it is axiomatic that neither the Congress, nor any state, may pass laws in contravention of the mandate of the federal Constitution and its amendments, and hence no law abridging freedom of expression may constitutionally exist, in 1950 the Supreme Court of the United States decided three cases in which peaceful picketing was held to have been

properly enjoined. Prior to these three cases which I will discuss, the Supreme Court had held that peaceful picketing could not be enjoined even though the picketing was done by strangers to the employees and employer (A. F. of L. v. Swing, 312 U.S. 321 [1941]), or even though there was a total absence of the employer-employee relationship (Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 [1942]). In 1949 the tide, which had been obviously pro-labor, began to turn with the Supreme Court's decision in Giboney v. Empire Storage and Ice Company (336 U.S. 490) wherein a Missouri injunction against peaceful picketing was upheld where the objective to be attained by the picketing allegedly violated a state Anti-Combination law. In 1950, the Supreme Court decided Hughes v. Superior Court of California (339 U.S. 460) upholding a California injunction against picketing aimed at forcing an employer to hire Negro help in proportion to the Negro customers of the store. This decision was based on the proposition that California's public policy of no racial discrimination would be interfered

with if the injunction were set aside. It is interesting to note the difference between these two cases: In the Giboney case, a state law was involved; in the California case, a state Supreme Court decision purporting to decide what was the public policy of the state was under consideration. In 1950, the United States Supreme Court decided Teamsters Union v. Hanke (339 U.S. 470), in which a somewhat different state public policy was involved. There the union was picketing to compel the plaintiff, who was a self-employed proprietor of a garage and used car outlet with no employees, to operate a union shop and keep business hours similar to those kept by other union shops. The court, in affirming and upholding the injunction of the Washington court, held that a balance must be kept between "self-employer shops" and "union standards"; that the encouraging of "self-employer" shops had been stressed by "some of our profoundest thinkers from Jefferson to Brandeis." In Building & Service Employees Union v. Gazzam (339 U.S. 532), also decided in 1950, an injunction

granted by a Washington court, was also upheld. The picketing in the Gazzam case was by strangers in an attempt to force the employer to coerce his employees into joining the union. The union activity in the Gazzam case was held violative of the state's anti-injunction statute. It is interesting to note that the Washington statute was enacted for the expressed purpose of prohibiting such union activity. It was stated in statute (Wash. Rev. Stat. § 7612-2 [Supp. 1940]) that: " . Under prevailing economic conditions . . . the individual unorganized worker is . . . helpless to exercise actual liberty of contract and to protect his freedom of labor . he should be free to decline to associate with fellows . . . [and] it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing. . . ." It was also held in the Gazzam case that the type of "coercion" exercised by unions was also prohibited by the Labor Management Relations Act (29 U.S.C.A., § 158 (b) (1) (A)).

From the foregoing, it is obvious that the Supreme Court has receded from its 1940 concept that peaceful picketing was a form of expression guaranteed by the First and Fourteenth Amendments to the federal Constitution. In a case decided on June 17th of this year -- Teamsters against Vogt (77 Sup. Ct. Rep. 1166), a majority of the court reviews its earlier pronouncements and, in effect, if not expressly, overrules the Thornhill and Swing cases with their broad statements that peaceful picketing is a form of expression guaranteed by the Constitution. In the majority opinion (the case was decided by a five-to-three-court) it seems to me that we find the reason for the turning tide. Writers have long hinted that changing economic and political pressures have been responsible but have been loath to come right out and say that was so because the enforcement of constitutional mandates is the duty of every court, judge and lawyer without regard to either economic or political pressures of the day. In other words, every person has an

absolute right to rely on the protections guaranteed him by the Constitution despite his economic or political status or the particular economic or political character of the times. A majority of the court in the Vogt case has this to say in discussing its former opinions: "Inevitably, therefore, doctrine of a particular case 'is not allowed to end with its enunciation, and . . an expression in an opinion yields later to the impact of facts unforeseen.'" (Jaybird Mining Co. v. Weir, 271 U.S. 609, 619.) And "It is not too surprising that the response of the States -- legislative and judicial -- to use of the injunction in labor controversies should have given rise to a series of adjudications in this Court relating to the limitations on state action contained in the provisions of the Due Process Clause of the Fourteenth Amendment. <u>It is also not too surprising that examination of these adjudications should disclose an evolving, not a static, course of decisions</u>." In discussing the Thornhill case, majority said: "Soon, however, the Court came to realize that

the broad pronouncements, but not the specific holding, of Thornhill had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated" and, in speaking of

cases following, it was said that they "made manifest that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all state regulation." The Court then quoted from the Wohl case (315 U.S. 769, 776) that "'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket

may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'" The majority sought to justify its course of action by saying that the later cases placed strong reliance "on the particular facts in each case [and] demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity'

and competing interests of state policy." While it is admitted that a state can not either through its courts or legislature lawfully automatically enjoin peaceful picketing, what is, apparently, to be the new rule is laid down: that there must be an investigation into the conduct and purposes of picketing. From this it clearly appears that peaceful picketing in and of itself can no longer be considered as a means of expression. We are warned that the court will scrutinize closely the objective to be attained and the means used to obtain it; that the state may, by legislative enactment, or judicial decision, ban certain types of picketing and certain types of union or labor objectives without the restraining thought that such legislation or judicial decision must conform to the constitutional mandate that an individual's freedom of expression shall not be abridged. Mr. Justice Douglas dissented from the views expressed in the majority opinion in the Vogt case. I was pleased to know, as I am sure you will be, that his dissenting

opinion was concurred in by Mr. Chief Justice Warren and Mr. Justice Black. Mr. Justice Douglas states that the court has "now come full circle" from the Thornhill case; that "retreat" began in the Hanke case and became a "rout" in the Graham case (Local Union No. 10, United Ass'n. of Journeymen, Plumbers and Steamfitters, etc. v. Graham, 345 U.S. 192). He states that the Graham case made the "State court's characterization of the picketers' 'purpose' . . . well-nigh conclusive. Considerations of the proximity of picketing to conduct which the State could control or prevent were abandoned, and no longer was it necessary for the state court's decree to be narrowly drawn to proscribe a specific evil " Mr. Justice Douglas states that when the court signed Vogt case it signed a "formal surrender . [that] State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing." He says, and Mr. Chief Justice Warren and Mr. Justice Black, agree,

that "I would adhere to the result reached in Swing. I would return to the test enunciated in Giboney -- that this form of expression can be regulated or prohibited only to the extent it forms an essential part of a course of conduct which the State can regulate or prohibit." While I, personally, am not so sure that we should return to the test announced in the Giboney case which, it will be recalled, involved picketing which was held to be in violation of Missouri's Anti-Combination law, I wholeheartedly agree that all courts should adhere to the rule enunciated in the Thornhill case -- peaceful picketing is within the protection of the First Fourteenth Amendments. In the first instance, it is difficult for me to see how the picketing in the Giboney case could have been considered to be in violation of the Missouri statute. In other words, it appears to me that the stated objective -- to prevent the sale of ice to non-union peddlers -- was a lawful objective and that the injunction which restrained the picketing was a direct invasion of the

guaranteed freedom of expression as set forth in the Thornhill case. While picketing is conduct as well as expression, it appears to me that the state's interest is in the regulation of the conduct, rather than the expression. By conduct, I mean the pickets' demeanor, the misleading, or truthful character of their signs and placards, their numerical strength, and the like. If this is what Mr. Justice Douglas means by returning to the Giboney test, I agree with him; if he means that the mere fact that the picketing was to "compel Empire to abide by union rather than by state regulation of trade" (as the court held), I can not agree with him since to do so would mean that I approved of interpreting any legislative measure as a ban on peaceful picketing. Since I believe that peaceful picketing is a form of expression guaranteed by the First and Fourteenth Amendments I do not believe that a state has the power to pass legislation which either directly or indirectly contravenes the Constitution and its amendments The same thing is, of course, true with regard to court

decisions whether the court is a state court, a lower federal court, or the Supreme Court of the United States.

Very appropriate to this discussion is a law review article I read some time ago (102 Pennsylvania Law Review 959 [1954]) entitled "Federalism and Labor Relations in the United States" by Paul R. Hays, Professor of Law, Columbia University School of Law. Professor Hays, in discussing the Congressional intent so far as the National Labor Relations Act and the Labor-Management Relations Act were concerned, wrote of the 1953 hearings before the Senate Committee on Labor and Public Welfare on proposed revisions of the Labor-Management Relations Act. He said, quite correctly as it appears, that there is still little comprehension on the part of either Senators or others of the complexities inherent in the application of a flexible federalism to the field of labor relations. I read with a rather terrible amusement of remarks made at the hearings by Senator Goldwater (Hearings before Committee on Labor and Public Welfare on Proposed Revisions

of the Labor-Management Relations Act of 1947, 83rd Cong., 1st Sess. [1953]) when he demanded to know the basis for a witness' statement that "the laws of the United States shall be the supreme law of the land." When he was told that the statement was based on the Constitution, he asked "The Congress has to be given that right by the States by agreement; is that right?" (606). Senator Goldwater was so deeply shocked by the statement that he later repeated it to another witness and asked, "Do you feel, as attorney general of Nebraska, that that is a true statement, that in this particular field the federal law is the supreme law of the land?" (879).

There were also remarks by other Senators in the same vein But Professor Hays also noted that when the Senators asked labor leaders to suggest some workable plans the situation was no better since they seemed to be merely "parroting" the opinions of their counsel and that the lawyers' formulas "were derived from the decisions which the Court had been forced to abandon as inadequate when it relinquished to

Congress the administration of federalism in this field." I say that I read the statements with a rather terrible amusement because if our legislators, both state and national, do not know that the federal Constitution and the laws of the federal government are the law of the land in so far as state legislation is concerned, and that state legislation must not contravene the Constitution and the laws passed by the federal government in fields in which it may constitutionally legislate, there is little hope that sensible, sane and constitutional laws will be passed in the field of labor relations.

The present legislation in the field of labor and labor-management is conceded by practically all writers in the field to be unworkable and unwieldy. The legislation is too broad and too vague and uncertain with respect to a delineation of state and federal government areas of control. The recent case of Guss v. Utah Labor Relations Board (77 Sup. Ct. 598 [1957]) is a good example of the hiatus existing

between the national and state laws. In the Guss case, the Supreme Court held that Congress, by vesting the National Labor Relations Board with jurisdiction, had completely displaced the state's power to deal in the area except where the board had ceded jurisdiction to the state pursuant to the proviso to Section 10(a) of the Labor-Management Relations Act (29 U.S.C.A., § 160(a) [1952]). Where the Labor Management Relations Act either permits, or prohibits, some activity, the National Labor Relations Board has exclusive jurisdiction and a state may not enjoin that which is either permitted or prohibited; and a state may not substitute its own regulations when the National Labor Relations Board declines jurisdiction over a dispute on the ground that regulations would not be in furtherance of the purposes of the act. If, as in the Guss case, the National Board refuses to take jurisdiction and yet also refuses to cede jurisdiction to the state, a no-man's land results where the state is powerless to act.

It seems to me that the so-called "right-to-work" laws which are now being passed so freely in various parts of this state may present grave problems of constitutional law in the very near future. If, and when, one of them comes before the Supreme Court of California, it appears to me that the court, of which I am one of seven, is going to be confronted with a dilemma, since it is the law of California that the "closed shop" is legal. In my opinion, if the "right-to-work" laws are held constitutional, these laws will effectively put an end to the closed shop. If the "right-to-work" laws are held constitutional, then, of course, picketing for either a closed shop, or for organizational purposes, will be unlawful under the recent decisions of the Supreme Court of the United States. And if, and when, one of those laws comes before that court, it will be held constitutional under the Gazzam case and picketing for a closed shop may then be enjoined. So far as I know, no proper case involving a "right-to-work" law has yet been

before the Supreme Court of the United States. Such laws have uniformly been held constitutional by Supreme Court decisions in Arizona, Florida, Georgia, Louisiana, Oregon and Texas as of early 1956. (Arizona Flame Restaurant, Inc. v. Baldwin, 34 L.R.R.M. 2707; Self v. Taylor, 235 S.W.2d 45; Plumber & Pipefitters Union v. Robertson, 44 So.2d 889; Woodard v. Collier, 78 S.E.2d 526; Hanson v. Operating Engineers, 79 So.2d 199; Gilbertson v. Culinary Alliance, 282 P.2d 632; Construction & General Laborers Union v. Stephenson, 225 S.W.2d 958.)

I think probably the only ray of light which emerges from these decisions and the later decisions of the Supreme Court of the United States is that they have not been unanimous decisions. Particularly in the cases before the Supreme Court of the United States, there have been dissenting opinions. It should be borne in mind that the membership of courts changes from time to time either by resignation, or by death, and that in many cases, as

evidenced by the dissenting opinions of the late Justice Oliver Wendell Holmes, the dissenting opinion eventually becomes the law of the land, rather than just a minority view as of the time it was written. It has been said that the very fact that there are dissenting opinions is a healthy thing for the country -- it shows a divergence of opinion it shows that there are men who have farsighted views and who are thinking in broad terms, rather than with the shortsightedness that comes with living from day to day in the restricted orbit of the times. For example, the dissenting opinion of Mr. Justice Douglas in the Vogt case, in which Chief Justice Warren and Justice Black concurred, could become the law tomorrow if the membership of the court changed, or if two of the present members changed their views which is not an unheard-of proposition. Further reflection, further study, together with a case presented by possibly better informed attorneys might have the result of

making the dissenting opinion the law of tomorrow, rather than the minority view of today.

It must be remembered that judges are only human beings. When a man becomes a judge and dons his judicial robes, he takes with him his entire background including his social, economic and political philosophies which may have remained dormant during his private life. They become manifest immediately after he becomes a judge and is called upon to decide cases involving social, economic and political problems. The trend of the times is an important factor in bringing to light the leaning of the judge in the fields of activity in which prejudices, pressures and public sentiment are brought to bear in achieving a desired result. Many legislative enactments and too many court decisions are the result of these prejudices, pressures and public sentiment which should play no part in the law making process. There can be no doubt that the present trend is toward the restriction of activities of labor organizations which twenty

years ago were held to be nothing more than the exercise of fundamental constitutional rights. It must be conceded that the Constitution has not been changed but the personnel of the Supreme Court of the United States has changed and will continue to change as each new member takes his place on that court.

While I deplore the present trend in the decisions of that court which are designed to restrict and stifle the activities of labor organizations which are seeking to promote the social and economic welfare of the workers of this country, I have an abiding faith in the fairness of the great mass of the American people who I believe will unite in support of a leadership which has for its objective the establishment of a society where social equality and economic stability are not only Utopian theories but realities to the end that the unalienable rights to life, liberty and the pursuit of happiness may be enjoyed by all.