The Thorny Path to *Thornhill*: The Origins at Equity of the Free Speech Overbreadth Doctrine

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The overbreadth doctrine¹ is a mainstay of free speech jurisprudence, yet few historians have investigated its origins.² Most commentators³ assert that the doctrine originated in the Supreme Court's landmark 1940 picketing decision in *Thornhill v. Alabama*.⁴ But these scholars have overlooked the labor injunction cases that preceded *Thornhill*.⁵ That line of cases, commonly considered to be hostile to labor,⁶ ironically gave rise to what would become one of labor's most significant doctrinal protections.⁷

1. Under the First Amendment overbreadth doctrine, courts analyze whether a statute potentially restricts protected speech, regardless of the constitutional status of a particular defendant's conduct. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1124–28 (2d ed. 1991); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 1–2; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970). Under current doctrine, a litigant must demonstrate that a statute is “substantially overbroad” before courts will hold it invalid on its face. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

2. Most commentators who have analyzed the overbreadth doctrine have focused on its conceptual underpinnings rather than its historical origins. See, e.g., Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Monaghan, *supra* note 1. Most free speech historians have focused on the origins of other doctrines, particularly those developed by Justices Holmes and Brandeis. See, e.g., David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) (tracing development of clear and present danger doctrine by Holmes and Brandeis); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 407–12 (1992) (attributing Justice Holmes's role in transforming free speech jurisprudence to his personal ideas and relationships).

3. See, e.g., Fallon, *supra* note 2, at 863; Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951); Monaghan, *supra* note 1, at 11. Even the Supreme Court has described *Thornhill* as the “source” of the overbreadth doctrine. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

4. 310 U.S. 88 (1940). In *Thornhill*, the Court invalidated an Alabama picketing statute under the First Amendment. *Id.* at 96–98.

5. For a comprehensive history of the labor injunction, see FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930).

6. The accounts of the abuse of the labor injunction are numerous. See, e.g., *id.* at 1, 132–33; CHARLES O. GREGORY, *LABOR AND THE LAW* 95–104 (2d ed. 1949); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 54–55 (1990).

7. The importance for organized labor of *Thornhill*'s overbreadth protection of picketing led Thurgood Marshall to describe that opinion as “one of the most important decisions of the Supreme Court.” Thurgood Marshall, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745, 748 (1950).

In labor injunction cases, courts of equity prior to the 1930s often abused their powers by issuing blanket decrees prohibiting picketing and union organizing.⁸ A minority of appellate courts held, however, that blanket injunctions were "too broad,"⁹ relying on traditional maxims of equity¹⁰ to develop a doctrine regarding the proper breadth of labor injunctions. These courts ruled that a decree was "too broad" if it reached beyond unlawful acts and swept within its ambit "lawful persuasion"¹¹ or "publication"¹² of information about a labor dispute. A significant aspect of this analysis was that courts permitted defendants to challenge the potential breadth of injunctions that would reach peaceful "persuasion" even if the defendants' own conduct had been unlawful and properly enjoined.¹³

In the crucible of the Great Depression and New Deal, courts increasingly began to recognize labor's right to organize as an important free speech issue,¹⁴ engrafting constitutional analysis onto the extant overbreadth doctrinal structure in labor injunction cases.¹⁵ As labor decrees became more limited, and as employers began to rely on equally expansive picketing statutes,¹⁶ state high courts used the overbreadth approach of equity to invalidate such statutes

8. See WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 62 (1991); VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER* 161 n.124 (1993); WALKER, *supra* note 6, at 54-55.

9. See, e.g., *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 200 P. 1, 7 (Cal. 1921); *Pierce v. Stablemen's Union*, 103 P. 324, 328 (Cal. 1909); *Goldberg, Bowen & Co. v. Stablemen's Union*, 86 P. 806, 808 (Cal. 1906); *Jones v. E. Van Winkle Gin & Mach. Works*, 62 S.E. 236, 239 (Ga. 1908); *Hotel & R.R. News Co. v. Leventhal*, 137 N.E. 534, 537 (Mass. 1922); *Plant v. Woods*, 57 N.E. 1011, 1015 (Mass. 1900); *Interborough Rapid Transit Co. v. Lavin*, 159 N.E. 863, 869 (N.Y. 1928); *Grassi Contracting Co. v. Bennett*, 160 N.Y.S. 279, 286 (App. Div. 1916); *Mills v. United States Printing Co.*, 99 A.D. 605, 608 (N.Y. App. Div. 1904).

10. A traditional maxim that gave rise to the overbreadth doctrine at equity was *aequitas sequitur legem*, which means "equity follows the law." For a description of this maxim, see JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 64 (Legal Classics ed. 1988) (London, Stevens & Haynes 1884). Another important maxim was that equity will not restrain in advance activities that have not been proven likely to occur. See 1 JAMES L. HIGH, *A TREATISE ON THE LAW OF INJUNCTIONS* § 22 (Chicago, Callaghan & Co. 3d ed. 1890).

11. *Plant*, 57 N.E. at 1015.

12. *Pierce*, 103 P. at 328.

13. See, e.g., *Iron Molders' Union v. Allis-Chalmers Co.*, 166 F. 45, 49-52 (7th Cir. 1908) (narrowing broad injunction to protect right of "persuasion" in labor dispute even though defendants had committed acts of violence); *Fenske Bros. v. Upholsterers' Int'l Union*, 193 N.E. 112, 121 (Ill. 1934) ("The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion."); *Plant*, 57 N.E. at 1015 (modifying injunction to protect "lawful persuasion" even though defendant's strike for closed shop was deemed unlawful). Courts allowed defendants to challenge the potential scope of injunctions even if defendants' conduct had been unlawful because "an injunction does not issue . . . as punishment for the past." *Nann v. Raimist*, 174 N.E. 690, 693 (N.Y. 1931).

14. See Joseph Tanenhaus, *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 U. PITT. L. REV. 397, 413 (1953).

15. See, e.g., *Lisse v. Local Union No. 31*, 41 P.2d 314, 316 (Cal. 1935); *Ex parte Lyons*, 81 P.2d 190, 196-97 (Cal. Ct. App. 1938).

16. See Note, *Constitutionality of Anti-Picketing Ordinances*, 48 YALE L.J. 308, 308-09 (1938) (explaining that employers increasingly relied on broad picketing ordinances in wake of increasing unavailability of broad injunctions); Eugene T. Kinder, Comment, 39 MICH. L. REV. 110, 112 (1940).

under the First Amendment.¹⁷ These opinions served as important precedents at the time the Court decided *Thornhill*, and their influence was evident in the Court's enunciation of the free speech overbreadth doctrine. Drawing from the approach at equity, the Court in *Thornhill* held that a picketing statute that was so broad as to restrict protected speech was unconstitutional, and that the defendant could challenge such a broad prohibition on its face regardless of whether his own conduct was not privileged.¹⁸

Part I of this Note traces the emergence of overbreadth analysis in the regulation of labor at equity, analyzing the rise of broad labor injunctions and judicial and legislative efforts to restrict them under the traditional principles of equity. Part II examines the constitutionalization of the overbreadth doctrine under the First Amendment in injunction cases, in state court statutory cases, and finally in the landmark case of *Thornhill v. Alabama*.

I. THE EMERGENCE OF OVERBREADTH ANALYSIS IN THE REGULATION OF LABOR AT EQUITY

A. *The Ascendancy of the Labor Injunction and the Abuse of Equity*

The rise of the injunction as the principal tool for regulating labor catalyzed the development of overbreadth analysis at equity. Prior to the 1880s, the primary means of regulating labor disputes in the United States had been criminal prosecution under the common law doctrine of conspiracy.¹⁹ In the late 1800s, however, the labor injunction supplanted criminal conspiracy trials,²⁰ largely as a result of employers' responses to changes in labor organizing tactics.²¹ The local strike by informal groups of workers gave way to far-reaching strikes organized by unions that often coordinated activity across cities, regions, and even the entire nation.²² Employers found that these new strategies were difficult to combat with conspiracy trials, which moved slowly and could affect only a limited number of people and range of activities.²³ The injunction, which did not require jury trials and could reach a wider range of people in speedier fashion,²⁴ was a more effective tool for

17. See *People v. Harris*, 91 P.2d 989 (Colo. 1939); *City of Reno v. Second Judicial Dist. Court*, 95 P.2d 994 (Nev. 1939).

18. See *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

19. See HATTAM, *supra* note 8, at 161; Joseph Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. PITT. L. REV. 170, 172 (1953); Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 832 (1925).

20. FORBATH, *supra* note 8, at 61; HATTAM, *supra* note 8, at 161; Witte, *supra* note 19, at 832.

21. For an excellent account of the historical circumstances surrounding the rise of the labor injunction, see FORBATH, *supra* note 8, at 63-97.

22. *Id.* at 61-63, 81-83.

23. HATTAM, *supra* note 8, at 161.

24. *Id.*

controlling the new coordinated strike strategies and hence became employers' preferred remedy.²⁵

In order to seek injunctive relief, employers had to bring suit at equity rather than at law. Under traditional conceptions, equity served as a supplement to the law, providing a remedy in the interests of justice and fairness where no adequate relief at law was available.²⁶ The typical remedy at equity was the injunction, or judicial decree, whereas the remedies available at law were damages or criminal prosecution. In requesting equitable relief, employers argued that the available legal remedies of damages or prosecution were inadequate because it would be impracticable to file a multiplicity of actions to redress a far-reaching labor conspiracy.²⁷

The first equitable decrees against far-flung strikes were issued in railway labor cases in the late 1870s and 1880s,²⁸ although the precise date of the first labor injunction is unknown.²⁹ Courts issued sweeping decrees to crush the national railroad strike of 1877³⁰ and the Pullman Strike of 1894.³¹ Observing the expansive potential of this new weapon against labor organizing, employers and manufacturers' associations eagerly sought injunctions in labor disputes outside the railway context and in smaller-scale disputes as well.³² Employers faced with strikes or other union activity increasingly went to judges, at times even judges who were not officially sitting, and alleged by affidavit that a labor conspiracy would do irreparable damage to their property unless restrained by court order.³³ Judges usually granted requests for broad preliminary injunctions forbidding union activity and later issued formal injunctions after bench trials between the parties.³⁴

25. *Id.*; see Clarence E. Bonnett, Jr., *The Origin of the Labor Injunction*, 5 S. CAL. L. REV. 105, 123 (1931).

26. FRANKFURTER & GREENE, *supra* note 5, at 47; GREGORY, *supra* note 6, at 96; GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* 5 (1982).

27. See EDWIN STACEY OAKES, *THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* § 543 (1927).

28. FORBATH, *supra* note 8, at 66–79. See generally Walter Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507 (1931) (arguing that labor injunctions likely originated in 1877 railroad strike in which railroads were in equitable receivership).

29. Witte, *supra* note 19, at 832.

30. The decree in this case was an order of the court of equity that held the railroad in receivership. Although it was not technically an injunction, it was an important precursor for the broad use of equitable powers to regulate labor. See FORBATH, *supra* note 8, at 66–68; Nelles, *supra* note 28, at 533.

31. FORBATH, *supra* note 8, at 73–76.

32. See Bonnett, *supra* note 25, at 123–24.

33. GREGORY, *supra* note 6, at 100. Other theories besides “civil conspiracy” included “inducing breach of contract” and “restraint of trade” under the common law. See Francis Bowes Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 686–91 (1930). In federal courts, employers relied largely on the Sherman Antitrust Act under a theory of conspiracy in restraint of trade. FRANKFURTER & GREENE, *supra* note 5, at 8–9.

34. GREGORY, *supra* note 6, at 100.

The scope of these formal injunctions was often expansive with respect to both the number of people and the types of activities covered.³⁵ The injunction issued against Eugene Debs and the Pullman railroad strikers in 1894, for example, ordered the defendants "and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist . . . from . . . in any way or manner interfering with . . . the business of any of the following named railroads."³⁶ Such a broad injunction put a large number of people at risk of contempt of court for engaging in peaceful efforts to persuade other workers to desist from work. In describing the problem of broad injunctions in 1915, Edwin Witte, a prominent contemporary commentator,³⁷ reported that "blanket clauses prohibiting interference in any manner with the business or property of complainants have occurred in probably more than one-half of all injunctions which have been issued in connection with labor disputes."³⁸ The broad reach of labor injunctions gave rise to the slogan "government by injunction,"³⁹ which reflected the growing discontent with the unbounded power of the equity courts in labor disputes.

In issuing these injunctions, courts abused the traditional principles of equity that customarily had limited the scope of injunctive powers.⁴⁰ One of the central principles that the labor injunction courts overlooked was the tenet that equity courts should tailor their decrees to the substantive law on the matter at hand.⁴¹ This principle is embodied in the maxim, *aequitas sequitur legem*, which means "equity follows the law."⁴² Courts ignored this maxim

35. HATTAM, *supra* note 8, at 161 & n.124.

36. *In re Debs*, 158 U.S. 564, 570 (1895) (Record on Appeal).

37. Tanenhaus, *supra* note 19, at 197.

38. Edwin E. Witte, *Industrial Comm.*, app. B at 155 (1915), *quoted in* FRANKFURTER & GREENE, *supra* note 5, at 99 n.82.

39. FRANKFURTER & GREENE, *supra* note 5, at 1.

40. *See* FORBATH, *supra* note 8, at 62 ("Courts cast aside customary limits on the purpose and scope of injunctions to accommodate the injunction's new role as a mode of lawmaking and law enforcement in industrial cities and regions."); GREGORY, *supra* note 6, at 98 ("And they completely ignored the policy behind the traditions of equity, which left people free from personal interference at the hands of the court, except in very special cases of unreasonably precipitated threatened harm to tangible property.").

By asserting jurisdiction to issue injunctions in labor disputes, courts generally contravened the principle of nineteenth-century doctrine that equity may only intervene to protect against damage to tangible property. *See* FORBATH, *supra* note 8, at 81–82, 85. By treating an employer's expectation of the continued services of his employees as property, Witte, *supra* note 19, at 834, the courts relied on a rather expansive definition of property that conflicted with the prevailing view of nineteenth-century equity jurisprudence that property consisted of dominion over objects, *see* FORBATH, *supra* note 8, at 81, 85. The courts' abstract definition of property in injunction cases gained greater legitimacy, however, in the decades following the first uses of the labor injunction as the rise of laissez-faire economics expanded the concept of property to include "the right to do business and [maintain] established relationships." Witte, *supra* note 19, at 836. *See generally* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 146–51 (1992) (explaining expanded concept of property in late 1800s).

41. GREGORY, *supra* note 6, at 102–03.

42. *See* McDOWELL, *supra* note 26, at 5, 76–77; STORY, *supra* note 10, § 64; Roscoe Pound, *On Certain Maxims of Equity*, in *CAMBRIDGE LEGAL ESSAYS* 259, 270 (1926).

when they issued blanket decrees without heed to the substantive law of labor conspiracies, which contained modest protections for labor activity.⁴³

Courts in labor injunction cases contravened, moreover, the traditional principle of equity that courts may only issue a decree to prevent irreparable injury that has been clearly proven likely to occur.⁴⁴ Courts violated this requirement by issuing injunctions against a wide range of actions that had not been pleaded or proven likely to transpire. In addition, by issuing decrees against virtually all the world, the courts violated the principle that equity should not interfere with the rights of innocent parties or third parties not privy to the suit.⁴⁵

B. *The Emergence of a Doctrine Against Broad Labor Injunctions*

As blanket injunctions proliferated, some of the more prudent state appellate courts⁴⁶ began to hand down decisions criticizing the broad scope of labor injunctions under the traditional principles of equity jurisprudence. One of the central maxims that undergirded these decisions was *aequitas sequitur legem*, which prompted some appeals courts to limit lower court injunctions to the ambit warranted by the common law of labor conspiracy.⁴⁷

Since the 1840s, the common law in the United States had held that labor organizing did not constitute unlawful conspiracy if both the means and the ends of the activity were legitimate.⁴⁸ Over time, courts had developed

43. See Witte, *supra* note 19, at 828 (explaining that, under conspiracy doctrine, legality of labor combination depended on purposes sought to be accomplished and means used to effect that purpose); *infra* text accompanying notes 48–53.

44. See 1 HIGH, *supra* note 10, § 22.

45. See *id.* § 33 (“So an injunction does not affect the rights of third parties which have been acquired in good faith when they are not parties or privies to the suit.”); see also GREGORY, *supra* note 6, at 101 (“Anyone violating the broad and comprehensive terms of such injunctions was punished for contempt, whether or not he had been served as a party in the suit.”).

46. See GREGORY, *supra* note 6, at 103 (“A few of the highest state courts . . . were also careful in the way they used their power to issue injunctions whenever they exercised it.”).

47. See, e.g., *Pierce v. Stablemen’s Union*, 103 P. 324, 328–29 (Cal. 1909); *Plant v. Woods*, 57 N.E. 1011, 1015 (Mass. 1900); *Mills v. United States Printing Co.*, 99 A.D. 605, 608–9 (N.Y. App. Div. 1904).

48. Archibald Cox, *The Influence of Mr. Justice Murphy on Labor Law*, 48 MICH. L. REV. 767, 774–75 (1950); Witte, *supra* note 19, at 828. The doctrine of lawful means and ends was first clearly articulated in the 1842 conspiracy case of *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842) cited in Witte, *supra* note 19, at 828. This doctrine was preserved in labor conspiracy cases during the era of the injunction, see Witte, *supra* note 19, at 828, and was even applied in cases involving other theories for injunctive relief, such as restraint of trade. See Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921*, 37 BUFF. L. REV. 1, 38–39 (1988/89). The doctrine of lawful means and ends was restated in slightly different form in the 1890s by Oliver Wendell Holmes, Jr., in his influential essay *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894) and in his judicial dissent in the Massachusetts labor case of *Vegehlahn v. Guntner*, 44 N.E. 1077, 1080–81 (Mass. 1896) (Holmes, J., dissenting). Holmes argued that the intentional infliction of economic damage by a union in a labor dispute could escape liability under the common law if accompanied by lawful justification. See *id.* (Holmes, J., dissenting). According to Holmes, such justification depended on whether the ends and means of the labor activity were legitimate in light of public policy concerns. See *Plant*, 57 N.E. at 1016 (Holmes, C.J., dissenting); *Vegehlahn*, 44 N.E. at 1080–81 (Holmes, J., dissenting); see also FRANKFURTER & GREENE, *supra* note 5, at 24–25 (explaining Holmes’s theory).

criteria for identifying legitimate or "justifiable" means and ends. The means of labor activity were deemed legitimate if they fell within relatively narrow constraints of socially acceptable behavior and did not pose a threat of physical injury or undue economic harm.⁴⁹ Courts characteristically distinguished, for example, between legitimate "persuasion" and unacceptable "intimidation."⁵⁰ This distinction was malleable,⁵¹ leading to varying levels of protection for picketing and organizing in different jurisdictions.⁵² As for labor's ends, courts found them to be legitimate if they fell within the immediate range of workers' economic self-interest and did not interfere with an employer's freedom of contract.⁵³

In following the law, a small number of equity courts at the turn of the century, particularly state appellate courts⁵⁴ of California,⁵⁵ Massachusetts,⁵⁶ and New York,⁵⁷ began to hold that injunctions were "too broad" if they prohibited labor activity with legitimate means and ends.⁵⁸ Although these decisions varied in their degree of substantive protection,⁵⁹ with some providing only nominal protection,⁶⁰ they were significant because they established an overbreadth form of analysis. A notable example of the emerging overbreadth doctrine was the opinion of the California Supreme Court in *Pierce v. Stablemen's Union*,⁶¹ handed down in 1909. The court held that a labor injunction that restrained members of a union from "'in any wise interfering with' plaintiff's business" was "broader in its terms than the law warrants."⁶² The court explained that the injunction was "too broad" because it reached "reasonable persuasion," "publication," and "secondary boycott[s]," which were "legal" means for achieving the union's objectives.⁶³ The court

49. Avery, *supra* note 48, at 38.

50. See Jerome R. Hellerstein, *Picketing Legislation and the Courts*, 10 N.C. L. REV. 158, 175 (1932).

51. FRANKFURTER & GREENE, *supra* note 5, at 34-35.

52. *Id.* at 30-31.

53. Avery, *supra* note 48, at 38.

54. See GREGORY, *supra* note 6, at 103 ("A few of the highest state courts consistently held fairly liberal views concerning the lawful ambit of union conduct.").

55. See *Pierce v. Stablemen's Union*, 103 P. 325, 329 (Cal. 1909); *Goldberg, Bowen & Co. v. Stablemen's Union*, 86 P. 806, 808 (Cal. 1906).

56. See *Plant v. Woods*, 57 N.E. 1011, 1015 (Mass. 1900).

57. See *Mills v. United States Printing Co.*, 99 A.D. 605, 608-09 (N.Y. App. Div. 1904).

58. Some appellate courts in other jurisdictions used a similar overbreadth approach. See, e.g., *Jones v. E. Van Winkle Gin & Mach. Works*, 62 S.E. 236, 239 (Ga. 1908) ("The form of the injunction is perhaps too broad, in that the strikers are enjoined from using all form of persuasion."); *Gray v. Building Trades Council*, 97 N.W. 663, 667-68 (Minn. 1903) (holding that injunction is too broad because part of it "goes beyond the limits of the law").

59. See FRANKFURTER & GREENE, *supra* note 5, at 30-31.

60. See, e.g., *Plant*, 57 N.E. at 1015.

61. 103 P. 325 (Cal. 1909). A similar overbreadth decision was rendered in *Goldberg, Bowen, & Co. v. Stablemen's Union*, 86 P. 806, 808 (Cal. 1906) (finding an injunction to be "too comprehensive" because some parts "seem to enjoin appellants from the mere expression of an opinion").

62. *Pierce*, 103 P. at 328.

63. *Id.* at 328-29. The court's analysis was characteristic of some of the early overbreadth decisions because the court focused on protecting means of communication that the union might use, such as "persuasion" and "publication," without explicitly linking those means to a range of possible ends that

did not, however, protect picketing, which it found to be an unlawful means.⁶⁴ Thus, the court applied overbreadth analysis to tailor the decree to the scope warranted by the substantive law.

Similarly, the Supreme Judicial Court of Massachusetts in *Plant v. Woods*⁶⁵ held that a lower court decree restraining a decorators' union from striking for a closed shop was "too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts."⁶⁶ Thus, the court found the injunction to be overly broad because it might cover lawful labor activity. In *Mills v. United States Printing Co.*,⁶⁷ moreover, a New York court held that an injunction against picketing and organizing a strike was drafted "in terms too broad" because it would forbid efforts to organize a strike to seek better working conditions, which was an instance of lawful activity undertaken for a lawful purpose.⁶⁸ Thus, these courts found injunctions to be "too broad" because they prohibited legitimate organizing activity without regard for the substantive law of labor disputes.

In addition, the emerging doctrine against broad injunctions was not predicated exclusively on the notion that equity should follow the substantive law. Concern for traditional principles of equity also led some courts to refuse to prohibit offenses that had not been proven likely to come about. In 1907, the Supreme Judicial Court of Massachusetts reasoned, for example, that unlawful conduct that had not been "pleaded and proved" could not properly be enjoined with a blanket injunction against "any interference in the future" with the plaintiff's business.⁶⁹ Courts also found some injunctions to be too expansive because they violated the principle that equity should not enjoin the conduct of innocent parties; in these cases, courts modified broad injunctions to protect the rights of parties who had not engaged in unlawful conduct.⁷⁰

A salient aspect of the emerging overbreadth jurisprudence was that courts allowed parties to challenge the prospective scope of injunctions even if their

would be permissible. Perhaps due to a reluctance to legitimize a variety of ends of union organizing, the court simply implied that the means it was protecting would be used for lawful ends.

64. *Id.* at 328.

65. 57 N.E. 1011 (Mass. 1900).

66. *Id.* at 1015. The court in *Plant*, like the court in *Pierce*, applied overbreadth analysis to protect future legitimate acts of persuasion while only implicitly linking them to a possible range of ends. *Id.*

67. 99 A.D. 605 (N.Y. App. Div. 1904).

68. *Id.* at 608-09.

69. *Aberthaw Constr. Co. v. Cameron*, 80 N.E. 478, 479 (Mass. 1907); *see also Goyette v. C.V. Watson Co.*, 140 N.E. 285, 291 (Mass. 1923) (finding that decree was "too broad in scope" and should be modified by expressly limiting it to conduct as alleged in bill); *Hotel & R.R. News Co. v. Leventhal*, 137 N.E. 534, 537 (Mass. 1922) ("The decree however is too sweeping. The defendants are not shown to have threatened to inaugurate a strike . . .").

70. *See Pope Motor Car Co. v. Keegan*, 150 F. 148, 151 (N.D. Ohio 1906) ("[I]t would be a gross injustice to attach to persons who have not been shown to be participants in these transactions the stigma of an injunction."); FRANKFURTER & GREENE, *supra* note 5, at 124 n.163 (citing cases for which "[i]njunctions have been dissolved as to innocent parties defendant").

own conduct had been unlawful.⁷¹ Regardless of whether the party challenging an injunction had engaged in unlawful conduct such as intimidation or even violence, the courts eliminated portions of injunctions that could conceivably restrict efforts at peaceful persuasion by that party or unnamed parties in the future.⁷² This jurisprudence stemmed from equity's concern for restricting the prospective impact of injunctions on the rights of the parties before the court as well as on third parties. I shall argue that this strain of jurisprudence later influenced the Supreme Court in creating the free speech overbreadth exception to the constitutional standing rule that parties whose own conduct is not privileged may not vindicate prospective violations of rights not currently before the court.⁷³

The analytic framework of the emerging overbreadth doctrine was important not only for its eventual theoretical implications for free speech jurisprudence, but also for its practical effect. The practice of striking provisions that prohibited peaceful persuasion while upholding the power of lower courts to regulate "illegitimate" means and ends allowed courts to achieve a pragmatic balance between freedom and regulation.⁷⁴ Courts found this balance to be useful for stabilizing volatile labor conflicts because it created a safety valve of expression while preserving the power of courts to ban tactics they viewed as more threatening.⁷⁵ This balance would assume even greater importance in the tumultuous 1930s.

C. *The Clayton Act and Its Aftermath*

Most courts in the early 1900s, however, did not adopt the emerging doctrine against broad injunctions,⁷⁶ which remained largely confined to a

71. See, e.g., *Iron Molders' Union v. Allis-Chalmers Co.*, 166 F. 45, 49 (7th Cir. 1908) ("[S]urely men are not to be denied the right to pursue a legitimate end in a legitimate way, simply because they may have overstepped the mark and trespassed upon the rights of their adversary."). Courts that adopted the overbreadth doctrine generally permitted defendants to challenge the overly broad portions of injunctions even if most of their own conduct was unlawful. See, e.g., *Goldberg, Bowen & Co. v. Stablemen's Union*, 86 P. 806, 808 (Cal. 1906); *Plant v. Woods*, 57 N.E. 1011, 1015 (Mass. 1900).

72. See, e.g., *Iron Molders' Union*, 166 F. at 48, 52.

73. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."); see also *STONE ET AL.*, *supra* note 1, at 1124.

74. See HATTAM, *supra* note 8, at 162 (explaining that courts used labor injunctions to find a "middle ground" or pragmatic balance allowing labor organization to be both accepted and regulated).

75. See *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 F. 171, 189 (N.D. Ohio 1919) ("[Picketing] was ordered and allowed in this case as a convenient means of stabilizing a very uncertain situation.").

76. See Witte, *supra* note 38, app. B at 155 (estimating that blanket clauses were issued in more than half of all injunction cases before 1915). It is difficult to specify the exact number of cases that issued blanket injunctions since many such injunctions were unreported, see FRANKFURTER & GREENE, *supra* note 5, at 91 n.40, but most sources indicate that a majority of courts abused their equity power, see, e.g., GREGORY, *supra* note 6, at 103-04. In addition, the task of specifying the exact scope of the problem is difficult because the leading authorities on injunctions were not impartial or above the fray with regard to

minority of state appellate courts.⁷⁷ The problem of broad injunctions was particularly serious in the federal courts, which were typically the most hostile to labor.⁷⁸ In response to the repeated abuse of equity by federal courts, the American Federation of Labor (AFL) began to lobby for legislation to curb the power of federal equity courts in labor disputes.⁷⁹ After years of AFL lobbying, Congress passed the Clayton Act in 1914.⁸⁰

The key provision of the statute from labor's standpoint was § 20, which restricted the scope of injunctions in disputes between "employers and employees."⁸¹ Section 20 limited injunctions by requiring federal courts to follow the traditional principle of equity that an injunction shall not be granted unless "necessary to prevent irreparable injury to property," and by insisting that the property right be described "with particularity."⁸² Congress thereby sought to cure the problem of broadly phrased injunctions that were issued in the absence of proof of actual or highly probable harm. Section 20 also forbade courts to enjoin workers from "peacefully persuading" and "communicating information," and protected labor's right of "peaceably assembling in a lawful manner, and for lawful purposes."⁸³ The Act was described by one of its leading proponents, John W. Davis, as an "effort to crystallize into law the best opinions of the best courts."⁸⁴ Although this statement was motivated by salesmanship, it did embody an important element of truth. As we have seen, some courts had protected "peaceful persuasion" and had limited injunctions by requiring proof of an actual threat of harm under a nascent overbreadth doctrine at equity. Thus, the Clayton Act represented the first instance in which Congress exerted pressure on the federal courts to adopt the emerging equitable overbreadth doctrine of labor injunction cases.

Interestingly, the debate surrounding the Clayton Act foreshadowed the link between the overbreadth doctrine at equity and constitutional principles that would become central in the 1930s. Samuel Gompers, President of the AFL, hailed the Act as labor's "Magna Carta,"⁸⁵ and some of its proponents

this socially charged issue. The treatise by Felix Frankfurter and Nathan Greene on the labor injunction, which remains the classic work on the subject, HATTAM, *supra* note 8, at 161 n.123, was written largely to contribute to the lobbying effort for passage of anti-injunction legislation. See WALKER, *supra* note 6, at 87.

77. See GREGORY, *supra* note 6, at 103 (explaining that a few state high courts were careful in issuing injunctions).

78. *Id.* at 103-04; see FRANKFURTER & GREENE, *supra* note 5, at 96.

79. See FORBATH, *supra* note 8, at 154-56; GREGORY, *supra* note 6, at 104.

80. Clayton Antitrust Act, Pub. L. No. 212, 33 Stat. 730 (1914).

81. *Id.* § 20.

82. *Id.*

83. *Id.*

84. 48 CONG. REC. 6438 (1912) (statement of Rep. Davis), quoted in FRANKFURTER & GREENE, *supra* note 5, at 160.

85. Samuel Gompers, *The Charter of Industrial Freedom*, 21 AM. FEDERATIONIST 971, 972 (1914), quoted in FORBATH, *supra* note 8, at 157.

touted it as a bill of rights for labor in equitable proceedings.⁸⁶ This propensity to characterize a law codifying labor's rights at equity as possessing the majesty of the Magna Carta illustrates the conceptual roots of the later constitutionalization of the overbreadth doctrine of equity.

Despite labor's hopes for a new Magna Carta and the sincere efforts of Congress to limit injunctions to the best principles of equity, the federal courts remained recalcitrant.⁸⁷ The United States Supreme Court, in its first pronouncement upon the Clayton Act, declared that § 20 did not protect union members who were peacefully persuading employees of other companies not to work with machines built by their company.⁸⁸ The Court, relying on a narrow reading of the Act, reasoned that § 20 was inapplicable because a secondary boycott was not within the statutory definition of a dispute between employers and employees. With the Supreme Court's guidance, lower courts continued to issue broad injunctions against interference with business.⁸⁹

It is important to point out, however, that in the wake of the Clayton Act some courts did take the principles of equity more seriously.⁹⁰ Most of these tribunals were state courts, which technically were not bound by the federal Clayton Act.⁹¹ Nevertheless, they continued to apply the principles of equity and to develop the overbreadth doctrine.⁹² In *Grassi Contracting Co. v. Bennett*, for example, a New York court found that an injunction forbidding any type of strike was "altogether too broad" because it was "warranted neither by the facts nor the law."⁹³ The court reasoned that the injunction was too broad because it prohibited publishing "in any manner" that the plaintiff's business was being blacklisted and forbade the defendant from calling a strike

86. See Note, *The Labor Provisions of the Clayton Act*, 30 HARV. L. REV. 632, 632 (1917).

87. Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 964 (1988).

88. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

89. See, e.g., *Kinloch Tel. Co. v. Local Union No. 2*, 275 F. 241 (8th Cir. 1921); *Quinlivan v. Dail-Overland Co.*, 274 F. 56 (6th Cir. 1921); *Buyer v. Guillan* 271 F. 65 (2d Cir. 1921); *Charleston Dry Dock & Mach. Co. v. O'Rourke*, 274 F. 811 (E.D.S.C. 1921).

90. See, e.g., *Gasaway v. Borderland Coal Corp.*, 278 F. 56, 63 (7th Cir. 1921) ("But no injunction, preliminary or final, should forbid more than the particular unlawful invasions which the court finds would be committed except for the restraint imposed."); *Great N. Ry. v. Brosseau*, 286 F. 414, 420 (D.N.D. 1923) (criticizing ways other courts misapplied Clayton Act and seeking to apply it correctly).

91. Some state legislatures also passed anti-injunction legislation, but these statutes were often invalidated or effectively nullified by parsimonious judicial construction. See FORBATH, *supra* note 8, at 150.

92. See, e.g., *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 200 P. 1, 7 (Cal. 1921); *International Pocketbook Workers' Union v. Orlove*, 148 A. 826, 831 (Md. 1930); *Interborough Rapid Transit Co. v. Lavin*, 159 N.E. 863, 869 (N.Y. 1928); *Grassi Contracting Co. v. Bennett*, 160 N.Y.S. 279, 286 (N.Y. App. Div. 1916).

93. 160 N.Y.S. at 286. For other examples of courts holding injunctions to be too broad for reaching lawful activity, see *Gasaway v. Borderland Coal Corp.*, 278 F. 56, 64-65 (7th Cir. 1921) (finding that "broad sweep of restraint" of preliminary injunction was erroneous because it reached "lawful union arguments" and "lawful union speeches"); *Interborough Rapid Transit Co.*, 159 N.E. at 869 (holding that "broad scope" of injunction was beyond power of court because reached lawful ends undertaken for lawful means).

"for any reason."⁹⁴ In other words, the court held that the injunction extended beyond equitable bounds by prohibiting activity with lawful means and ends.⁹⁵ The decree was also too broad, according to the court, because the evidence did not indicate that the defendant "ha[d] threatened or intend[ed] to do any of these things."⁹⁶ The court thereby based its overbreadth holding both on analysis of means and ends and on the principle that courts of equity should issue injunctions only against actual rather than hypothetical threats of harm. Similarly, in the *Southern California Iron & Steel Co.* case, a California court held that an injunction was "too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done."⁹⁷

Significantly, as the more liberal state courts continued to develop overbreadth analysis, their rationale acquired new subtleties in some cases. In *International Pocket Book Workers' Union v. Orlove*,⁹⁸ for example, a Maryland court observed that "in so far as the injunctions may be so broad that their meaning and content depend upon the unpredictable views of the court in particular applications, they may operate as mere screens for subsequent ex post facto . . . punishments."⁹⁹ The court thereby expressed concern over arbitrary enforcement of broad injunctions, noting that the possibility of such enforcement would make it difficult for defendants to know when their conduct was lawful. Hence, the enjoined parties' only viable course of conduct would be "abandonment of all picketing and other efforts; and that . . . cannot be required."¹⁰⁰ This concern that the possibility of arbitrary enforcement of broad prohibitions might deter prospective exercise of picketing rights reappeared later in the Supreme Court's free speech overbreadth jurisprudence.¹⁰¹

Some courts also continued to develop the principle that injunctions could be found to be too broad because they prohibited lawful activity even if the defendant's own action had been unlawful.¹⁰² The rationale some courts developed, as stated by Judge Cardozo, was that "[a]n injunction does not issue in such circumstances as punishment for the past. Its only legitimate end is protection for the future."¹⁰³ Since an injunction was a purely prospective

94. *Grassi Contracting Co.*, 160 N.Y.S. at 287.

95. *See id.* at 286-87.

96. *Id.* at 287.

97. *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 200 P. 1, 7 (Cal. 1921).

98. 148 A. 826 (Md. 1930).

99. *Id.* at 831.

100. *Id.*

101. *See Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

102. *See Note, Prior Illegal Acts as a Ground for Blanket Injunctions Against Picketing*, 44 HARV. L. REV. 971, 975 (1932) (discussing cases that refused to uphold blanket injunctions that were granted in response to prior illegal acts).

103. *Nann v. Raimist*, 174 N.E. 690, 693 (N.Y. 1931).

remedy, some liberal appellate courts held that its proper scope should be evaluated not on the basis of past action, but rather on the basis of ongoing or threatened future conduct.¹⁰⁴ Hence, a New York court noted that a blanket injunction against picketing may be too "broad" despite allegations of past unlawful acts.¹⁰⁵ In this manner, the courts continued to elaborate the view that prohibitions against picketing and persuasion could be held to be too broad even if some of the defendant's past conduct was proscribable.

Although the Supreme Court generally viewed labor activity unfavorably in this era, in the 1920s the Court began to apply a version of the overbreadth analysis that had emerged in the liberal lower courts. In *American Steel Foundries v. Tri-City Central Trades Council*,¹⁰⁶ the Court eliminated from the injunction at issue the word "persuasion" as it applied to two of the defendants, on the grounds that persuasion was a "lawful" form of labor activity.¹⁰⁷ The Court expressed reservations about permitting picketing, however, and allowed only one picket at each factory gate.¹⁰⁸ Although this holding provided only limited protection for picketing, the Court showed signs of embracing the emerging overbreadth approach.

D. *The ACLU and the Continued Push to Codify the Traditional Practices of Equity*

The persistent tendency of lower federal courts to issue broad injunctions,¹⁰⁹ with only a few exceptions,¹¹⁰ became one of the central concerns of the community of civil liberties advocates in the 1920s.¹¹¹ Although most courts continued to refuse to recognize picketing and labor organizing as implicating free speech rights,¹¹² civil liberties activists began to view restrictions at equity on labor's speech as significant infringements of First Amendment liberties. In particular, labor's efforts at opposing blanket injunctions drew the attention of Roger Baldwin, a prominent free speech

104. See, e.g., *Fenske Bros. v. Upholsterers' Int'l Union*, 193 N.E. 112, 121 (Ill. 1934) ("The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion."); *J.H. & S. Theatres v. Fay*, 183 N.E. 509, 511 (N.Y. 1932); *Nann v. Raimist*, 174 N.E. 690, 693 (N.Y. 1931).

105. *J.H. & S. Theatres*, 183 N.E. at 511-12.

106. 257 U.S. 184 (1921).

107. *Id.* at 208, 212-13.

108. *Id.* at 205-07.

109. See HATTAM, *supra* note 8, at 164.

110. See *Great N. Ry. v. Brosseau*, 286 F. 414, 415 (D.N.D. 1923); see also *Gasaway v. Borderland Coal Corp.*, 278 F. 56, 64-65 (7th Cir. 1921) (holding that preliminary injunction may not prohibit lawful acts of persuasion).

111. See WALKER, *supra* note 6, at 54-55.

112. See, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) (stating that spoken words in furtherance of boycott exceeded individual's speech rights because they had the force of "'verbal acts'").

activist.¹¹³ In late 1919 and early 1920, Baldwin argued for reorganizing the National Civil Liberties Bureau, a leading free speech organization, declaring that “the cause we now serve is labor.”¹¹⁴ At Baldwin’s urging, the American Civil Liberties Union (ACLU) was founded in 1920, and one of its principal missions was to defend labor’s rights against judicial incursion.¹¹⁵

In late 1920, Baldwin convened a national conference on the problem of the labor injunction, admitting that the ACLU was uncertain about how to address the problem in light of continuing judicial hostility.¹¹⁶ Felix Frankfurter, the nation’s leading expert on labor injunctions, recommended a legislative solution and outlined a possible lobbying effort for a federal statute to restrict the scope of injunctions.¹¹⁷ The ACLU, together with the AFL, began lobbying for this legislation in 1925 and persuaded Congress to hold hearings two years later.¹¹⁸ By 1930, Roger Baldwin took charge of the campaign, forming the National Committee on Labor Injunctions to carry it out.¹¹⁹

The efforts of Baldwin and the ACLU paid off in 1932 when Congress passed the Norris-LaGuardia Act.¹²⁰ The Act was designed to place more specific and comprehensive restrictions on the power of federal courts of equity in labor disputes than those of the largely ineffectual Clayton Act.¹²¹ In limiting the range of equitable powers,¹²² Congress was especially intent on protecting the rights of workers to give publicity to the facts of disputes, “whether by advertising, speaking, [or] patrolling.”¹²³ Congress limited the scope of injunctions by requiring that they be based on “findings of fact” and confined to the “specific act or acts as may be expressly complained of.”¹²⁴ Furthermore, the statute restricted injunctions to acts that “will be committed unless restrained.”¹²⁵ Congress thereby drafted the statute to limit injunctions to actual rather than hypothetical harms and to ensure that they would be clear and precise. In this manner, the Act codified the restrictive doctrines of equity that a minority of courts had developed and observed. As one contemporary

113. WALKER, *supra* note 6, at 54–55.

114. *Id.* at 46–47.

115. *Id.* at 46–47, 54–55.

116. *Id.* at 55.

117. *Id.*

118. *Id.*

119. *Id.* at 87.

120. Pub. L. No. 65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (1994)).

121. See Ernest Feidler, Comment, 11 WISC. L. REV. 552, 552–53 (1936).

122. See 29 U.S.C. §§ 104–07 (1994); see also Tanenhaus, *supra* note 19, at 196; Comment, 30 MICH. L. REV. 1257, 1257 (1932).

123. 29 U.S.C. § 104 (1994).

124. *Id.* § 109.

125. *Id.* § 107(a).

commentator noted, "it is safe to say that the Norris-LaGuardia Act did little more than codify the attitude of the more liberal courts."¹²⁶

In the wake of the Norris-LaGuardia Act, seventeen states adopted laws that likewise sought to codify the restrictive equity doctrines that formed the core of overbreadth analysis.¹²⁷ The passage of the Norris-LaGuardia Act and its state analogues marked a turning point in the development of the overbreadth doctrine. Norris-LaGuardia reflected the mounting public support for restricting the broad prohibitions that courts had placed on labor's rights to organize and advocate.¹²⁸ This support was particularly strong in the early 1930s due to the dire economic downturn of the Great Depression. Norris-LaGuardia and its analogues served as clear legislative endorsements of the liberal courts that had taken an expansive view of the legitimate means and ends of expression in labor disputes. Thus, Norris-LaGuardia was largely effective in curbing the issuance of broad injunctions by federal courts.¹²⁹ The state law counterparts also helped limit broad injunctions, although some courts in jurisdictions without such statutes or with inadequate statutes continued to abuse their equity power.¹³⁰

The legislative debates surrounding the passage of the Norris-LaGuardia Act evinced free speech overtones. One Representative expressed his support, for example, for the free speech rights of members of labor unions: "If the Constitution means anything in the matter of freedom of speech, it should be applied just as fully to men who belong to a union"¹³¹ Thus, the Act, which marked the triumph of the equitable principles underlying the overbreadth doctrine, was also bound up with an emphasis on free speech that reflected the goals of its proponents and lobbyists.

II. THE CONSTITUTIONALIZATION OF OVERBREADTH ANALYSIS

The history of the Norris-LaGuardia Act indicates that the growing support for traditional principles of equity in the 1930s was linked to an increasing emphasis on freedom of speech. As labor gained political strength and public approval during the Great Depression and New Deal, it began to win not only congressional but also judicial recognition of its picketing and organizing

126. J. Louis Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 MINN. L. REV. 255, 301-02 (1939); see Mozart G. Ratner & Norton J. Come, *The Norris-LaGuardia Act in the Constitution*, 11 GEO. WASH. L. REV. 428, 432 (1943).

127. See Tanenhaus, *supra* note 19, at 197.

128. See WALKER, *supra* note 6, at 87.

129. GREGORY, *supra* note 6, at 104.

130. Cox, *supra* note 48, at 775-76; Tanenhaus, *supra* note 19, at 197.

131. 75 CONG. REC. 5467 (1932) (statement of Rep. Greenwood); see also *id.* at 4507 (statement of Sen. Norris) (expressing concern that labor injunctions have abridged constitutional rights of workers); *id.* at 4620 (statement of Sen. Blaine) (expressing concern for constitutional freedoms of workers).

activities as exercises of free speech.¹³² Thus, courts began to introduce free speech principles into the emerging equity jurisprudence,¹³³ taking an important initial step toward the constitutionalization of the overbreadth doctrine that occurred at the end of the decade.

A. *The Influence of Free Speech Principles in Labor Injunction Cases*

The growing recognition of labor's speech rights among courts of equity in the 1930s stemmed both from labor's enhanced political clout¹³⁴ and from its increasingly political message.¹³⁵ Throughout the decade, labor played a central role in national politics, pressing Congress to pass such momentous legislation as the Wagner Act¹³⁶ and the Fair Labor Standards Act.¹³⁷ Labor activism also became increasingly politicized, or politically charged, as labor became the backbone of the New Deal coalition¹³⁸ and as some sectors of the labor movement became more involved with radical politics.¹³⁹ These political overtones led some courts in labor injunction cases to reconceive of labor's picketing and protesting as activities central to democracy rather than vulgar instances of intimidation or economic coercion.¹⁴⁰

Another factor prompting some courts to consider free speech principles in labor injunction cases was the general rise in the prestige of free speech in the 1930s. Support for free speech increased in the United States partly because Nazi and Bolshevik repression in Europe stimulated sentiments in favor of greater protection for liberty at home.¹⁴¹ In addition, the formation of the New Deal coalition brought about greater tolerance of pluralism and

132. Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 293-94 (1994); David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 237, 237-38, 258 (David Kairys ed., 1990).

133. See, e.g., *Lisse v. Local Union No. 31*, 41 P.2d 314, 316 (Cal. 1935); *Ex parte Lyons*, 81 P.2d 190, 196-97 (Cal. Ct. App. 1938); *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 199 A. 598, 602-03 (N.J. 1938); *John R. Thompson Co. v. Delicatessen & Cafeteria Workers Union, Local 410*, 8 A.2d 130, 133 (N.J. Ch. 1939); see also Tanenhaus, *supra* note 14, at 413 (noting that courts increasingly recognized labor's free speech rights in 1930s).

134. See Kairys, *supra* note 132, at 258 (explaining that power of labor movement in 1930s led judges to protect labor's free speech rights).

135. Labor's objectives became more explicitly political after the establishment in 1937 of the Congress of Industrial Organizations (CIO). The CIO, which extended union organizing into the unskilled industrial occupations, focused not simply on traditional labor objectives, but also on other issues such as housing, education, public health, price control, and foreign policy. ARCHIBALD COX ET AL., *LABOR LAW* 91 (11th ed. 1991).

136. National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935).

137. Pub. L. No. 718, 52 Stat. 1060 (1938).

138. See Berman, *supra* note 132, at 293-95, 297-98.

139. See SIDNEY LENS, *THE LABOR WARS* 286-87 (1974).

140. It is instructive to compare the view of labor organizing in a 1939 case, *John R. Thompson Co. v. Delicatessen & Cafeteria Workers Union, Local 410*, 8 A.2d 130, 133 (N.J. Ch. 1939) ("When a court of equity grants an injunction in a case of this kind . . . it touches rights dear to every American.") with the view of a 1905 case, *Atchison T. & S.F. Ry. Co. v. Gee* 139 F. 582, 584 (S.D. Iowa 1905) ("There is and can be no such thing as peaceful picketing . . . any more than there can be . . . lawful lynching.").

141. WALKER, *supra* note 6, at 112.

diversity in American life, as working people, Catholics, and Jews were increasingly accepted into the American political mainstream.¹⁴²

Courts of equity increasingly recognized labor's free speech rights, moreover, as a result of a famous dictum by Justice Brandeis in the 1937 case of *Senn v. Tile Layers Protective Union*.¹⁴³ In that opinion, the Court upheld a Wisconsin anti-injunction act that protected peaceful picketing, rejecting a claim that the act violated the Due Process Clause.¹⁴⁴ Justice Brandeis noted that "members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."¹⁴⁵ Since this was the first instance in which the Court hinted that it considered picketing to be a form of free speech,¹⁴⁶ the Brandeis dictum exerted significant influence on lower courts.¹⁴⁷

Despite its role in encouraging courts to apply free speech principles in labor cases, the *Senn* dictum did not provide much doctrinal guidance as to the parameters of free speech protection of labor activity.¹⁴⁸ In its brevity, the Brandeis dictum left many questions unanswered.¹⁴⁹ In the absence of clear guidance, courts in labor cases turned to the doctrinal structure that already existed at equity for protecting labor's rights of picketing and persuasion, engrafting their discussion of free speech onto the preexisting analytical structure of equity.¹⁵⁰ In the process, the discussion of free speech often strengthened the protections that had emerged at equity.

Some courts in the 1930s used the overbreadth analysis typical of equity cases as a doctrinal framework to perform both free speech analysis and

142. *Id.*; Berman, *supra* note 132, at 293–94. Prestige for free speech also increased as the Supreme Court handed down a series of decisions expanding political and religious liberties under the First Amendment. *See, e.g.,* Lovell v. City of Griffin, 303 U.S. 444 (1938); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937).

143. 301 U.S. 468, 478 (1937).

144. *See id.* at 478–82.

145. *Id.* at 478.

146. Tanenhaus, *supra* note 14, at 398; John F. Cushman & H. Terhune Herrick, Jr., Note, *A Re-examination of Picketing and Free Speech*, 34 CORNELL L.Q. 81, 81 (1948).

147. 3 SIDNEY FINE, FRANK MURPHY 169 (1984) (noting that more than 30 cases between *Senn* and *Thornhill* treated peaceful picketing as form of speech); Tanenhaus, *supra* note 14, at 413.

148. Tanenhaus, *supra* note 14, at 403–04.

149. *See id.*

150. *See, e.g.,* Lisse v. Local Union No. 31, 41 P.2d 314, 316 (Cal. 1935); *Ex Parte Lyons*, 81 P.2d 190, 197 (Cal. Ct. App. 1938); *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 199 A. 598, 602–03 (N.J. 1938); *John R. Thompson Co. v. Delicatessen & Cafeteria Workers Union*, Local 410, 8 A.2d 130, 133 (N.J. Ch. 1939). Even cases that rejected challenges to the breadth of injunctions used the means and ends doctrinal framework in order to assess the appropriate scope of free speech rights. *See, e.g.,* Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E.2d 320, 321–22 (N.Y. 1939); *Moreland Theatres Corp. v. Portland Moving Picture Mach. Operators' Protective Union*, Local 159, 12 P.2d 333, 338 (Or. 1933) ("Defendants . . . contend that the constitutional guaranty of free speech . . . justifi[es] their conduct [This is] true only when the combination is formed for a lawful purpose."); *see also* Tanenhaus, *supra* note 14, at 408.

inquiry into means and ends.¹⁵¹ In *Lisse v. Local Union No. 31*,¹⁵² for example, the California Supreme Court invalidated a decree against picketing and distributing leaflets for the following reasons:

[The decree is] too broad, for the reason that, not only do the terms thereof go so far as to infringe upon the constitutional right to freely circulate and offer said newspaper . . . but [also] . . . the comprehensive terms of the injunction herein enjoin appellants from doing some of the acts . . . it may lawfully do in furtherance of a secondary boycott.¹⁵³

The court thus invalidated an injunction as "too broad" on the dual grounds that it violated free speech rights and reached lawful activity undertaken for legitimate ends. The court thereby utilized the overbreadth approach from equity as a single doctrinal umbrella for carrying out both free speech analysis and the means and ends inquiry of equity jurisprudence.

Sometimes courts synthesized the overbreadth approach of equity with free speech principles, moreover, by finding injunctions to be too broad in violation of free speech rights if they did not withstand the analysis of means and ends. For example, in *Ex parte Lyons*¹⁵⁴, a 1938 California Court of Appeal decision, the court held that an injunction violated the free speech guarantee because it proscribed lawful picketing activity undertaken for lawful ends. The court explained that peaceful picketing was legitimate under the statutory and decisional law of California, and that furtherance of a secondary boycott was a lawful objective. Thus, the court held that "a secondary boycott peacefully and properly conducted is legal in California under the constitutional guaranty of the right of free speech."¹⁵⁵ In reaching this conclusion, the court cited the overbreadth analysis of *Lisse v. Local Union No. 31*¹⁵⁶ and *Southern California Iron & Steel Co.*,¹⁵⁷ which had been central in establishing overbreadth analysis at equity. The court found that the injunction in question, like the decrees in the earlier cases, was "too broad" because it forbade peaceful picketing in violation of free speech principles.¹⁵⁸

In a number of labor injunction cases of the 1930s, the courts applied overbreadth analysis in tandem with free speech principles, allowing for overlap and synthesis. Although the doctrinal link was not uniform in its

151. See Berman, *supra* note 132, at 317 (noting that in some instances scope of labor's rights and free speech issues were "decided under a single doctrinal framework").

152. 41 P.2d 314 (Cal. 1935).

153. *Id.* at 316.

154. 81 P.2d 190 (Cal. Ct. App. 1938).

155. *Id.* at 197.

156. *Id.* at 195-96 (citing *Lisse*, 41 P.2d at 316).

157. *Id.* (citing *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 200 P. 1 (Cal. 1921)).

158. *Id.* at 196-97.

development, the labor injunction cases stamped overbreadth analysis with a constitutional imprimatur that would contribute to its incorporation into First Amendment doctrine in statutory cases.

B. The Extension of Overbreadth Analysis to Statutes Under the First Amendment

As a result of the increasing limitations placed on labor injunctions in the 1930s, many employers sought to regulate labor activity in a different manner by urging states and municipalities to pass regulatory ordinances or to apply existing statutes. A pair of commentators, writing in 1938 and 1940, noted that employers had begun to rely on municipal and state picketing statutes as substitutes for the increasingly limited labor injunction.¹⁵⁹ These statutes placed restrictions on picketing that were similar in scope to the broad injunctions they replaced. For example, a section of the Reno, Nevada, picketing ordinance imposed fines or imprisonment on ““whoever shall watch, beset or picket the premises of another, or any approach thereto for the purpose of inducing others to refrain from entering such premises.””¹⁶⁰ According to one commentator, these statutes were often broad enough in scope to bring about the “complete nullification” of the gains labor had made in limiting injunctions.¹⁶¹

The role of picketing statutes as substitutes for blanket injunctions led some state courts to rely on past labor injunction cases in invalidating local and state picketing statutes under the First Amendment. In 1939, two state supreme courts handed down opinions that extended the overbreadth doctrinal approach from equity to picketing statutes under the First Amendment.¹⁶² These courts invalidated the ordinances under the Free Speech Clause on the grounds that they reached too far in prohibiting even peaceful picketing with a lawful purpose. In this manner, the courts helped to convert the overbreadth approach that had been developed at equity into a First Amendment doctrine in statutory cases.

The clearest example was the opinion of the Supreme Court of Nevada in *City of Reno v. Second Judicial District Court*.¹⁶³ In that case, the court facially invalidated two sections of Reno’s picketing ordinance on the ground that they violated the First Amendment.¹⁶⁴ The court began its opinion by

159. See Note, *supra* note 16, at 308–09; Kinder, *supra* note 16, at 110, 118.

160. See *City of Reno v. Second Judicial Dist. Court*, 95 P.2d 994, 996 (Nev. 1939) (quoting Reno picketing ordinance, § 2).

161. Note, *supra* note 16, at 309.

162. See *People v. Harris*, 91 P.2d 989 (Colo. 1939); *City of Reno*, 95 P.2d 994.

163. 95 P.2d 994 (Nev. 1939).

164. The two sections of the Reno ordinance that the court invalidated imposed a blanket ban on picketing. See *Reno*, 95 P.2d at 996 (quoting § 2 of Reno picketing ordinance); *id.* (quoting § 4 to the effect that, ““Whoever, in association or agreement with one or more persons, shall assemble, congregate,

quoting at length from a series of labor injunction cases that had protected "peaceful persuasion for the promotion of a lawful purpose."¹⁶⁵ After emphasizing this means and ends rule, the court proceeded to hold that the sections at issue violated the First Amendment because they reached all forms of picketing regardless of the lawfulness of means and ends:

[The sections] go beyond regulation. They are a sweeping prohibition of any form of picketing, irrespective of its nature, purpose or number of pickets, and constitute an interdiction of all activities and free speech sought to be exercised in the form of peaceful picketing. The federal constitution guarantees freedom of speech.¹⁶⁶

The court in the *Reno* case invalidated the ordinance sections as violations of the free speech guarantee because they did not delimit the scope of the prohibition by taking account of either the form or the purpose of the picketing. The court thereby characterized the manner and the ends of picketing as the touchstone for establishing the proper breadth of picketing prohibitions under the First Amendment. The court held that the sections were too broad because they forbade all picketing in all forms for all ends. The court thereby used overbreadth analysis characteristic of equity as a basis for reaching its free speech decision.

The court's analysis in *Reno* was analogous to the approach at equity, moreover, because the court sought to strike a balance between protecting freedom and allowing regulation, acknowledging that the state may "regulate" picketing but emphasizing that it may not "prohibit" picketing altogether.¹⁶⁷ Furthermore, just as courts of equity had permitted defendants who had engaged in intimidation or unlawful conduct to challenge the breadth of injunctions that reached peaceful persuasion, so too the court in *Reno* allowed the defendants to challenge the breadth of the provisions that reached peaceful picketing regardless of whether their own conduct was peaceful.¹⁶⁸ The court stated that, in deciding the constitutional question, "the agreed statement of facts will be laid out of consideration" and that the validity of the provisions would be decided "as a matter of law."¹⁶⁹ Thus, the court was not concerned with the application of the statute to the facts in the instant case but rather with the facial and prospective constitutionality of the provisions.

or meet together in the vicinity of the premises of another, or upon the streets . . . for the purpose of inducing others to refrain from entering such premises . . . shall . . . be fined [or] imprison[ed] . . .").

165. *Id.* at 998-1000.

166. *Id.* at 1000.

167. *Id.* at 1004.

168. *See id.* at 997.

169. *Id.*

The other major state court decision regarding a picketing statute in 1939 was the Colorado Supreme Court's decision in *People v. Harris*.¹⁷⁰ Like the *Reno* court, the court in *Harris* surveyed the law of numerous labor injunction cases, noting that labor has the right to engage in "peaceful picketing when done for a lawful purpose."¹⁷¹ The court proceeded to invalidate the Colorado statute as applied in the instant case on the grounds that it was an "unqualified prohibition" and that it reached "peaceful picketing" in violation of the free speech guarantee, quoting from past injunction cases, such as *Ex parte Lyons*,¹⁷² that protected peaceful picketing under the First Amendment.¹⁷³ Thus, the court in *Harris*, like the court in *Reno*, drew from the analysis of means and ends characteristic of equity's overbreadth approach in rendering its free speech decision.¹⁷⁴

The major innovation of *Reno* and *Harris* was their extension of the basic framework for protecting picketing at equity to statutory cases under the First Amendment. This was a significant step on the path to *Thornhill* because the statutes in those cases were analogous to the Alabama picketing statute invalidated in *Thornhill*. In fact, the court in *Harris* noted that "[o]nly one other state, Alabama, has a similar law."¹⁷⁵ In addition, the *Reno* court discussed and distinguished an Alabama state court opinion upholding the picketing statute that the Supreme Court would subsequently hold unconstitutional in *Thornhill*.¹⁷⁶ Thus, the decisions in *Reno* and *Harris* provided salient precedents on picketing statutes in general, and Alabama's in particular, when the Supreme Court heard arguments in *Thornhill*.

C. *Thornhill v. Alabama: The "Fountainhead"*¹⁷⁷ of the Free Speech Overbreadth Doctrine

The Supreme Court heard oral arguments in *Thornhill* in February 1940.¹⁷⁸ The Alabama statute at issue declared it a misdemeanor for any person "'without a just cause or legal excuse'"¹⁷⁹ to "'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

170. 91 P.2d 989 (Colo. 1939).

171. *Id.* at 992.

172. 81 P.2d 190 (Cal. 1938).

173. *Harris*, 91 P.2d at 993.

174. The court in *Harris* did not have the opportunity to invalidate the statute on its face because the litigants brought an "as applied" challenge.

175. 91 P.2d at 990.

176. *Reno*, 95 P.2d at 1002.

177. See Monaghan, *supra* note 1, at 11.

178. 3 FINE, *supra* note 147, at 170. The *Thornhill* case was argued on the same day as another picketing case, *Carlson v. California*, 310 U.S. 106 (1940). 3 FINE, *supra* note 147, at 170.

179. *Thornhill v. Alabama*, 310 U.S. 88, 91 (1940) (quoting ALA. CODE § 3448 (1923)). The Court found that this qualifying phrase "does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical." *Id.* at 100.

any lawful business.”¹⁸⁰ The law had been applied to prosecute Byron Thornhill, a union president, who had walked a picket line with six or eight other men at the plant of the Brown Wood Preserving Company in Brownsville, Alabama.¹⁸¹ Thornhill’s offense was that he approached Clarence Simpson, a nonunion worker entering the plant, and told him that the union was on strike and that he should not report to work.¹⁸²

The Alabama statute, in its rhetoric and scope, was similar to blanket injunctions that prohibited unions from “congregating, picketing . . . or otherwise interfering with the employees, business, or working organization of the plaintiff.”¹⁸³ The statute, like sweeping injunctions, left little room for peaceful picketing and persuasion. The *Thornhill* Court thus faced a similar set of circumstances to those that arose in the *Reno* and *Harris* cases: the application of an expansive picketing statute that was analogous to the picketing injunctions that had been used to stifle labor activity. The *Reno* case played a particularly important role in framing the issues of *Thornhill*. In his brief in *Thornhill*, the petitioner stated that he had decided to abbreviate his free speech argument and simply append the *Reno* decision as an “exhaustive citation[] of all relevant authority.”¹⁸⁴

The Court’s analysis and rhetoric in *Thornhill* closely tracked that of the *Reno* opinion in key places. The Court found that the state picketing statute constituted a “sweeping regulation”¹⁸⁵ that was invalid on the following grounds:

The statute . . . leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.¹⁸⁶

The Court in *Thornhill* found the Alabama statute to be too broad because it prohibited all picketing without regard to the “nature of [the] dispute” and the “restrained character” of the picketing, thereby anchoring its analysis of the proper breadth of the statute in a means and ends inquiry. Significantly, the Court cast this overbreadth analysis explicitly in free speech terms at another point in the opinion, finding the statute to be too broad because in reaching peaceful picketing the statute interfered with protected speech: “[The statute]

180. *Id.* at 91 (quoting ALA. CODE § 3448 (1923)).

181. *Id.* at 93–94.

182. *Id.*

183. Injunction issued in *Interborough Rapid Transit Co. v. Lavin*, 159 N.E. 863 (N.Y. 1928), quoted in FRANKFURTER & GREENE, *supra* note 5, at 271.

184. Brief for Petitioner at 18, *Thornhill* (No. 514).

185. *Thornhill*, 310 U.S. at 96.

186. *Id.* at 99.

sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech”¹⁸⁷ Thus, the Court applied an overbreadth framework analogous to that of *Reno* and prior equity cases in developing its free speech approach.

The Supreme Court’s use of doctrine from prior picketing cases in *Thornhill* was noted by Professor Ludwig Teller in 1942.¹⁸⁸ Teller argued that the *Thornhill* Court still “recognized the traditional conception of picketing” as an activity protected only when it possesses “legal justification.”¹⁸⁹ Hence, Teller suggested that the Court in *Thornhill* had preserved the doctrine of lawful means and ends in deciding whether picketing should be protected. He argued, however, that the link between the Court’s lawful justification analysis and its free speech doctrine was “obscure” in the opinion.¹⁹⁰ Teller might have missed the connection between the Court’s free speech overbreadth doctrine and means and ends analysis because he did not recognize that free speech overbreadth analysis had been predicated on analysis of means and ends in the closely analogous case of *Reno* and in earlier equity opinions.

Teller may also have missed the connection because the Court in *Thornhill* did not cite *Reno* and failed to cite many prior equity cases to support its free speech overbreadth approach.¹⁹¹ In the segment of the opinion that closely resembled the analysis of the *Reno* decision, the Court did not cite *Reno* or any other case.¹⁹² This failure to cite likely stemmed from the Supreme Court’s reluctance in that era to rely on lower court opinions, a reluctance evidenced by the fact that the Court relied exclusively on Supreme Court precedent in the *Thornhill* opinion.¹⁹³ The one labor injunction case at equity that the Court cited was its own 1921 decision in *Tri-City*,¹⁹⁴ in which it upheld parts of a decree that were, in the words of the *Thornhill* Court, “narrowly drawn to cover the precise situation.”¹⁹⁵ Thus, the Court cited the *Tri-City* equity decision for the proposition that only a narrowly drawn prohibition of picketing could withstand free speech scrutiny.

Even though the Court in *Thornhill* did not cite many cases at equity to support its analysis, the injunction cases formed the doctrinal backbone of the Supreme Court briefs of both the petitioner and the respondent. The respondent’s brief emphasized the centrality of injunction cases, stating that the

187. *Id.* at 97.

188. See Ludwig Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 184–86 (1942).

189. *Id.* at 185. Teller’s use of the term “justification” stems from Holmes’s formulation of the theory of “justifiable” means and ends. See *supra* note 48.

190. *Id.*

191. See *Thornhill*, 310 U.S. at 99–101.

192. See *id.* at 99.

193. The Supreme Court did, of course, cite Alabama state court opinions construing the statute but did not treat them as decisional authorities.

194. *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921).

195. *Thornhill*, 310 U.S. at 105.

largest body of relevant precedents "are found in the multitudinous injunction proceedings."¹⁹⁶ The petitioner similarly relied on a series of past equity cases involving picketing, including the free speech and equity discussion in *Ex parte Lyons*.¹⁹⁷ Thus, labor injunction cases, including those that had synthesized means and ends analysis with free speech principles, constituted the vast majority of supporting authority in both briefs.

The respondent also specifically argued that the Alabama statute did not violate the restrictive doctrines of equity, stating that the statute was "definitely qualified" rather than sweeping and crystallized the "best considered opinions of the best courts [of equity]."¹⁹⁸ The respondent proceeded to canvass a series of equity decisions that applied the analysis of "legitimate" or "justifiable" means and ends, including cases such as *Tri-City* and *Plant v. Woods*.¹⁹⁹ Significantly, the respondent linked means and ends analysis to free speech, arguing that the free speech guarantee should not protect picketing with unlawful means or ends and asserting that petitioner's picketing had unlawful means and ends.²⁰⁰

The briefs, contemporary commentary, and the language of the opinion all point to the direct doctrinal connection between *Thornhill* and prior picketing jurisprudence at equity. An important question arises, however, as to why, besides fidelity to precedent, the Court followed the overbreadth approach of picketing cases at equity in *Thornhill*. One explanation is that the Court wanted to protect a range of means and ends of picketing as legitimate while still upholding the power of the state to "set the limits of permissible contest open to industrial combatants,"²⁰¹ which had also been a goal of prior equity courts. The Court in *Thornhill* showed reluctance to declare unequivocally that picketing was in all instances a protected exercise of free speech. The overbreadth approach allowed the *Thornhill* Court, like courts of equity, to protect a range of means and ends as legitimate while still permitting more precise regulation of picketing tactics deemed coercive or threatening. The overbreadth approach was different in the statutory context, however, because a court could not rewrite a statute to protect legitimate forms of picketing as equity courts could rewrite judicial decrees.²⁰² Instead, the Court invalidated the statute on its face,²⁰³ insisting that the legislature be responsible for

196. Brief for Respondent at 33.

197. See Brief for Petitioner at 13.

198. Brief for Respondent at 29.

199. See *id.* at 14–15, 42–45.

200. See *id.* at 61–62.

201. *Thornhill*, 310 U.S. at 104.

202. Some commentators have argued that courts may permissibly sever unconstitutional portions of a statute or impose narrowing constructions. See, e.g., Monaghan, *supra* note 1, at 14–23; see also STONE ET AL., *supra* note 1, at 1125–26. The Court is generally reluctant to ask state courts to impose a limiting construction. See *City of Houston v. Hill*, 482 U.S. 451, 471 (1986) ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute.").

203. See *Thornhill*, 310 U.S. at 96–97.

drafting a more precise prohibition of unlawful forms of picketing. Although the Court thus shifted responsibility to the legislature for modifying broad prohibitions to protect picketing, the practice of striking a balance between protecting freedom and permitting regulation remained.

The Court's desire to strike this balance may have stemmed in part from the influence of Justice Murphy, the author of *Thornhill*. A former Governor of Michigan, Murphy had long been associated with the labor movement²⁰⁴ and had urged the state legislature to pass a statute protecting picketing. Yet he had also been willing to place some restrictions on picketing.²⁰⁵ In a note to Justice Huddleson, Justice Murphy explained that "our job as I see it . . . is to write a reversal without serious prejudice to the police power of the state which I believe [it] is imperative to safeguard without unduly curtailing the right of free expression."²⁰⁶

Justice Murphy's desire to strike such a balance had roots in the approach that had long been used to regulate picketing at equity. In a memo to Justice Huddleson, Murphy expounded, "We don't want to end picketing . . . but what about its abuse? We want above all to preserve the freedoms but what about using them as a cloak for activities that are properly unlawful?"²⁰⁷ Murphy thus expressed the objective of protecting picketing under the free speech guarantee while allowing the state to regulate picketing that was "unlawful." Murphy's discussion of the case reflected the connections between the "lawful justification" approach at equity and the overbreadth analysis adopted in *Thornhill*.

D. *Equity and the Overbreadth Standing Exception in Thornhill*

The Court's adoption in *Thornhill* of the overbreadth approach from equity was not confined to the use of means and ends language and the striking of a balance between protecting freedom and allowing regulation. Another important element, indeed a crucial element for modern free speech doctrine,²⁰⁸ was that the *Thornhill* Court allowed the defendant to challenge the potential breadth of the statute regardless of whether his own conduct was

204. Frank Murphy was renowned for his role in facilitating the success of the famous Flint Sit-Down Strike of 1936-37, in which the United Automobile Workers Union became firmly established. According to Sidney Fine, Murphy "delayed the enforcement of a court order that could have broken the strike" and "sent the National Guard into Flint not to break the strike but to preserve the public peace and, in effect, to protect the strikers from possible attack." SIDNEY FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937, at 311 (1970).

205. 3 FINE, *supra* note 147, at 170.

206. 3 *id.* at 171 (quoting letter from Frank Murphy to E.W. Huddleson, undated, in Frank Murphy's Papers).

207. 3 *id.* at 172 (quoting letter from Frank Murphy to E.W. Huddleson (Mar. 31, 1940)).

208. See PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 78 (3d ed. 1994) (explaining that standing exception is "heart" of overbreadth doctrine).

privileged.²⁰⁹ The Court held that “[p]roof of an abuse of power in the particular case” was not “a requisite for attack on the constitutionality” of a statute that regulates free speech.²¹⁰ This aspect of the *Thornhill* opinion has come to be known as the overbreadth exception to the conventional constitutional standing rule²¹¹ that a party may only seek to vindicate her own rights.²¹² This overbreadth exception is one of *Thornhill*’s most significant innovations in free speech jurisprudence.²¹³

By permitting a defendant to challenge a picketing statute regardless of whether his own conduct was proscribable, the Court in *Thornhill* followed the practice at equity that allowed defendants who had committed enjoined acts to challenge the potential breadth of an injunction against labor activity. As in the *Reno* opinion, as well as earlier injunction cases, the *Thornhill* Court held that the facts of the case before it should not preclude the defendant from challenging the prohibition on picketing.²¹⁴ Like some of the decisions at equity,²¹⁵ the Court’s decision in *Thornhill* was based on a concern for the prospective deterrent effect that a broad prohibition could have on the legitimate exercise of rights. The Court explained that an overly broad statute could be challenged even by a party whose conduct might be unprotected because such a prohibition “results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.”²¹⁶ In light of the *Thornhill* case’s strong doctrinal links to prior picketing cases at equity, it is likely that the Court was influenced by the equity approach in establishing the free speech overbreadth exception to the constitutional standing rule.

It is important to note, however, that in creating the overbreadth exception the court cited its prior free speech decisions in the 1930s cases involving “licensing” or “censorship.” In the cases of *Lovell v. Griffin*,²¹⁷ *Hague v. CIO*,²¹⁸ and *Schneider v. State*,²¹⁹ the Court had struck down municipal ordinances that required licenses or permits for distributing literature or holding public meetings. Relying on a “standardless licensing” doctrine, the Court had

209. See *Thornhill v. Alabama*, 310 U.S. 88, 96–98 (1940).

210. *Id.* at 97.

211. See STONE ET AL., *supra* note 1, at 1124.

212. See *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973).

213. See Freund, *supra* note 3, at 539.

214. See *Thornhill*, 310 U.S. at 97.

215. See discussion *supra* Sections I.B–C.

216. *Thornhill*, 310 U.S. at 98. Although the Court has recently emphasized its concern for the effect of overbroad prohibitions on the rights of “third parties,” see *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984), the *Thornhill* Court expressed concern for restraint of free discussion in general, which presumably included prospective acts of expression by the parties before the Court as well as by third parties. See *Thornhill*, 310 U.S. at 97–98. The *Thornhill* Court’s concern for the prospective impact of a broad prohibition on the rights of defendants as well as of third parties mirrored the jurisprudence at equity.

217. 303 U.S. 444, 451 (1938).

218. 307 U.S. 496, 516 (1939).

219. 308 U.S. 147, 162–65 (1939).

invalidated the ordinances on their face on the ground that licensing speech without clear standards posed an unacceptable risk of the arbitrary suppression of free expression.²²⁰ These decisions supported the *Thornhill* holding to the extent that the Court invalidated the statutes on their face. These decisions did not, however, indicate that a defendant whose own conduct was not privileged could challenge such statutes. As the Supreme Court has since noted in *City Council v. Taxpayers for Vincent*,²²¹ these licensing cases “did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights.”²²² The Court in *Taxpayers for Vincent* explained that, under the licensing statutes considered in those cases, “any enforcement carries with it the risk that the enforcement is being used merely to suppress speech, since the statute is not aimed at a substantive evil within the power of the government to prohibit.”²²³ Thus, the licensing statutes were unconstitutional as applied to the defendant’s conduct as well as in every other application because “any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas.”²²⁴ Hence, the Court in the licensing cases invalidated the ordinances on their face under the rationale that the statutes “could never be applied in a valid manner” because they allowed for standardless prior licensing of speech.²²⁵

According to the Court in *Taxpayers for Vincent*, the statute in *Thornhill* was held facially invalid, in contrast, because “the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected.”²²⁶ The Court invalidated the statute on its face not because it could never be applied in a valid manner but rather because the very existence of the broad prohibition threatened, or in modern terms, “chilled,”²²⁷ the legitimate exercise of free speech rights. Thus, the Court permitted the defendant to challenge the statute on its face on the ground that it imposed a “pervasive restraint”²²⁸ on freedom of discussion rather than on the ground that it could never be applied constitutionally. Viewed against the backdrop of picketing cases at equity, the Court’s “pervasive restraint” concern likely originated in the practice of the courts of equity rather than in the licensing cases.

Even though the Court’s “pervasive restraint” analysis did not originate in the licensing cases, the Court artfully integrated the rationale of those cases

220. *Schneider*, 308 U.S. at 162–65; *Hague*, 307 U.S. at 516; *Lovell*, 303 U.S. at 451.

221. 466 U.S. 789 (1984).

222. *Id.* at 796.

223. *Id.* at 797 n.14.

224. *Id.* at 797.

225. *Id.* at 798.

226. *Id.*

227. For a discussion of the “chilling effect” rationale, see Note, *supra* note 1, at 852–58.

228. *Thornhill*, 310 U.S. at 98.

into the *Thornhill* opinion. The Court referred to the "arbitrary suppression" rationale of the licensing cases as a reason why an overly broad statute constituted a pervasive restraint on free speech.²²⁹ Although the Court in the licensing cases had discussed "arbitrary enforcement" in light of the potential for misapplication in particular cases, the *Thornhill* Court pointed to the possibility of arbitrary enforcement as a justification for the notion that overbroad statutes pose a general and continuous threat to free speech. In this manner, Justice Murphy, writing for the Court, deftly subsumed the rationale of the licensing cases under the rubric of his analysis, derived from equity, that a broad prohibition acts as a constant deterrent to the prospective exercise of speech rights. Hence, Justice Murphy was able to forge a link between the traditional concerns of labor cases at equity and the Supreme Court's major free speech precedents.

Justice Murphy likely situated the *Thornhill* opinion in line with the Supreme Court's major free speech precedents in order to solidify the gains labor had made. By drawing analogies to the Court's prior free speech opinions, Murphy sought to constitutionalize the doctrine that had emerged at equity in order to ensure that it would be faithfully applied. Whereas equity doctrines were discretionary in nature, the Court's pronouncements on the Constitution were binding. In addition, Justice Murphy likely was trying to increase the prestige of labor's rights by cloaking in constitutional splendor the doctrinal approach that had emerged from the thorny history at equity.

Justice Murphy emphasized the significance of his *Thornhill* opinion by writing "'labor's magna carta'" at the top of a printed copy.²³⁰ This was the same designation that labor supporters had optimistically bestowed on the Clayton Act twenty-six years before. But where the Clayton Act had failed to protect labor's right to picket and organize, Justice Murphy sought to succeed under the First Amendment. Under the Constitution he sought to bring to fruition labor's long battle to secure protections for picketing that had begun with the best courts of equity and had continued through the Clayton and Norris-LaGuardia Acts, culminating in *Thornhill*.

III. CONCLUSION

The history of the overbreadth doctrine is a tale of the gradual transformation of a body of law from an oppressive force into an emancipatory

229. *Id.* at 97-98. Although the Court explicitly relied on the licensing cases for the arbitrary-enforcement rationale, it is important to note that courts of equity had offered a similar rationale for holding that injunctions were "too broad." See, e.g., *International Pocket Book Workers v. Orlove*, 148 A. 826, 831 (Md. 1930); see also discussion *supra* Section I.C.

230. 3 FINE, *supra* note 147, at 177.

one.²³¹ We may attribute this transformation partly to labor's persistent political struggles and the resulting changes in social attitudes toward unions. We may also attribute the transformation to the capacity of legal doctrines to adapt to divergent purposes.²³² The flexibility of legal doctrines enabled courts to use an overbreadth form of analysis that had provided modest protection in early cases to establish significant protection for picketing in *Thornhill*. The "adaptability" of legal doctrine also enabled courts to use the traditional principles of equity to advance progressive purposes. Originally conceived to place limits on courts' ability to provide individualized justice according to the judicial sense of conscience,²³³ the restrictive doctrines of equity were eventually placed in the service of social justice according to popular sentiment. Thus, as a result of the flexibility of legal forms, courts were able to use the ancient doctrines of equity to forge a bold new free speech doctrine.

231. In discussing the "transformability" of legal doctrine, I draw from the analysis of William Forbath. See FORBATH, *supra* note 8, at 171.

232. See J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870-71 (1993) (arguing that "political valence" of legal doctrines varies in "new contexts and situations").

233. See McDOWELL, *supra* note 26, at 5.