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Constitutional Law—State Trespassory Laws Are Insufficient Basis for Abridging a Union's First Amendment Right to Picket in a Shopping Center.

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test outlined above. The statute is, in effect, supporting religion and breaching the "wall of separation" that Jefferson stated the Establishment Clause built between religion and government. Religion and religious practices are private affairs and should not be supported by the public government.

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CONSTITUTIONAL LAW—STATE TRESPASSORY LAWS ARE INSUFFICIENT BASIS FOR ABRIDGING A UNION'S FIRST AMENDMENT RIGHT TO PICKET IN A SHOPPING CENTER.

Responding to the occupancy of a nonunion supermarket in a newly developed shopping center, members of a food employees' union picketed the supermarket, carrying signs which stated that the supermarket was nonunion and that its employees were not receiving benefits that union membership afforded. The pickets did not include any of the supermarket's employees. The picketing was conducted in that area designated as a parcel pickup area and that portion of the shopping center's parking lot which was immediately adjacent thereto. The picketing was carried on in an orderly and peaceful manner, without threats or violence. Logan Valley Plaza, Inc.,[1] the owner of the shopping center and Weis Markets, Inc.,[2] the owner of the supermarket obtained an injunction from the Court of Common Pleas of Blair County, Pennsylvania.[3] The injunction was granted based on the laws of Pennsylvania making trespass[4] on private property illegal conduct and it restrained the union from picketing upon the supermarket's parcel pickup area and the adjacent parking lot. The injunction had the practical

1. Hereinafter referred to as Logan.

2. Hereinafter referred to as Weis.

3. The rationale of the decision in the Court of Common Pleas of Blair County was twofold:

(1) that the picketing was upon private property and, therefore, unlawful in manner because it constituted a trespass (*see infra* note 4 for a definition of trespass);

(2) that the aim of the picketing was to compel Weis to require its employees to become members of the union and, therefore, the picketing albeit peaceful for an unlawful purpose.

The court relied on Wortex Mills, Inc. v. Textile Workers Union of America, C. I. O. et al., 369 Pa. 359, 85 A.2d 851 (1952) which summarized the case law: "A State Court may enjoin unlawful picketing or picketing which is conducted in an unlawful manner or for an unlawful purpose. Picketing, if peaceful, orderly and for a legitimate or lawful purpose, is legal and within the protection of the Constitution. However a State is not required to tolerate in all places and in all circumstances even peaceful picketing by an individual; it is well established that the method or conduct or purpose or objective of the picketing may make even peaceful picketing illegal." 85 A.2d at 857.

4. *See* Restatement (Second), Torts § 158 (1965):

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

effect of preventing all forms of communications in the shopping center and in particular, it limited the extent of picketing to the berm areas near the entrances and exits of the shopping center. The Pennsylvania Supreme Court affirmed the issuance of the injunction.[5]

The Supreme Court of the United States reversed. *Held* for first amendment purposes, the shopping center served as the functional equivalent of a community "business block"[6] since it was freely accessible and open to the people in the area and those passing through. The mere fact that the element of private ownership existed in the shopping center proprietors was not sufficient justification for imposing an absolute injunction against the peaceful pickets of a store in the shopping center. *Amalgamated Food Employees Union Local 590 et al. v. Logan Valley Plaza, Inc., et al.*, 391 U.S. 308 (1968).

The right to speak freely, to inform and to dissent, is a basic right protected by the first amendment of the United States Constitution. Picketing,[7] which has been called "the workingman's means of communication,"[8] is but one of the ways in which this right is exercised.[9] The Supreme Court of the United States has also been cognizant of the fact that picketing as an activity combines communication with conduct and this conduct may, in certain situations, be regulated or prohibited.[10] Peaceful picketing may be regulated where it violates a valid state law,[11] where it is contrary to public policy,[12] or where it occurs simultaneously with violent acts committed by the labor union.[13] But in every case a close examination must be made of the facts relating to the conduct and purposes of

5. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 590, 425 Pa. 382, 227 A.2d 874 (1967).

6. The use of the term business block may be somewhat confusing in that it is never specifically defined by the Court. One might, however, find it easier to use the term shopping area as a more recognizable substitute. However, since the term business block was used by the Court in the instant case and in *Marsh*, its use will be continued throughout the remainder of the paper.

7. In its labor law context picketing is: Patrolling or standing usually at the approach to a business establishment by one or more persons, ordinarily representatives of a union in order to persuade or otherwise influence workmen employed there to withhold their labor, or suppliers to withhold their services, or customers to withhold their patronage. Often picketing is designed to achieve two, or all three, of those immediate objectives. The ultimate objectives may be any which the union thinks desirable: higher wages, shorter hours. . . . 3 CCH 1966 Lab. L. Rep. (Lab. Rel.) ¶ 5110, at 10,411.

8. Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

9. In Thornhill v. Alabama, 310 U.S. 88 (1940) the United States Supreme Court held that peaceful picketing is entitled to the same constitutional protection as other forms of free speech. In *Thornhill*, the pickets were employees of the picketed employer with whom they had a labor dispute. Only a year later the United States Supreme Court extended the constitutional protection under *Thornhill* to a situation where the pickets were not the employees of the picketed establishment, but were members of a union which had unsuccessfully attempted to organize the establishment's employees. [A. F. of L. v. Swing, 312 U.S. 321, (1941)].

10. Wortex Mills, Inc. v. Textile Workers Union of America, C. I. O. et al., 369 Pa. 359, 85 A.2d 851, 857 (1952).

11. Building Service Employees Local 262 v. Gazzam, 339 U.S. 532, 541 (1950).

12. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

13. Drivers Union Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941).

the picketing. Neither state courts nor state legislatures may indiscriminately prohibit all picketing.[14]

A private property owner's right to prevent trespassory invasions of his property is clearly established.[15] On the other hand, when one purports to use his private property for commercial purposes, the resulting increase in accessibility to the general public transforms the nature of the property from purely private to quasi-public.[16] Consequently, when a property owner attempts to enjoin picketing on such property based upon a trespassory theory,[17] the two distinct rights are drawn into conflict.[18]

The Supreme Court of the United States dealt with this conflict in *Marsh v. Alabama*.[19] In that case a member of the Jehovah's Witnesses distributed religious literature on the sidewalk of a company owned town[20] contrary to the postings of the town's management.[21] Criminal sanctions were then imposed upon the appellant pursuant to a state statute which made it a crime to enter or remain on the premises of another after having been warned not to do so. The issue before the Court was whether the imposition of such sanctions was consistent with the first and fourteenth amendments of the United States Constitution. Balancing the social interest in private property with the interest in freedom of expression, the Court stated:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[22]

Thus, the Court recognized that the right of free speech occupied a preferred position with respect to the rights of a property owner, when his privately owned property is quasi-public in nature and function.[23]

14. Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 294 (1957).

15. *See* Fairlawn Meats, Inc. v. Amalgamated Meat Cutters Local 427, 99 Ohio App. 517, 135 N.E.2d 689 (1955), *appeal dismissed*, 164 Ohio St. 285, 130 N.E.2d 237 (1955), *rev'd on other grounds*, 353 U.S. 20 (1957); Exchange Baker & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130, *reargument denied*, 245 N.Y. 651, 157 N.E. 895 (1927).

16. State v. Williams, 44 L.R.R.M. 2357, 2364 (Balt. Md. Crim. Ct. 1959).

17. The basis upon which the theory of trespass is applied in attempting to enjoin picketing is that since pickets have not been invited, either expressly or impliedly, upon an owner's property, then presence upon such property constitutes an unauthorized entry; and since picketing acts as a deterrent to the public in patronizing commercial establishments, such acts therefore result in an economic interference with the owner's possession. *See*, Nakas v. Local 905, Retail Clerks International Association, 144 Cal. App. 2d 808, 301 P.2d 932, 936 (1956).

18. Compare the following cases: Schwartz-Torrance Inv. Corp. v. Bakery Workers' Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 223 (1964), *cert. denied*, 380 U.S. 906 (1965); Amalgamated Clothing Workers v. Wonderland Shopping Center Inc., 370 Mich. 547, 122 N.W.2d 785 (1963).

19. 326 U.S. 501 (1946).

20. *Id.* at 502; The Supreme Court noted that regardless of the fact that the town was privately owned, it still had all the characteristics of any other American town.

21. *See infra* n.27 and accompanying text. The type of posting that was used in *Marsh* was identical in substance to that which was found in *Williams*, which is set forth in the indicated footnote.

22. *Id.* at 506.

23. *Id.* at 509.

Just as there existed a conflict between the right to distribute printed religious matter in a company town and a statute restricting such activity, so too there existed a conflict between a union's right to picket peacefully and a shopping center's policy not to permit such activity within the boundaries of the center. While the Supreme Court of the United States had failed to make a combined application of the principles enunciated in *Thornhill v. Alabama*,[24] *A.F.L. v. Swing*,[25] and *Marsh* in determining the right to picket upon quasi-public property,[26] state courts did not hesitate to make such a determination.[27]

In *State v. Williams*,[28] a union representative was arrested for the organizational picketing of a drugstore in a privately owned shopping center contrary to an express exclusion by the landlord.[29] The defendant refused to leave the premises and was subsequently convicted of violating two state trespass statutes. On appeal, his conviction was reversed on the ground that he had not committed a trespass, because the shopping center property was quasi-public, and not purely private in nature. Consequently, the defendant's right to freedom of speech under the first and fourteenth amendments of the United States Constitution protected his right to picket on the premises. The court stated:

> Because the private property . . . has been opened to the public it has taken on the nature of a quasi-public place. By opening it to the public, the owner's property rights have become secondary to broad use by the public which includes the right of a labor union to engage in peaceful picketing. The fact that the property is posted makes no difference at all.[30]

Accordingly, the *Williams'* court, relying on *Marsh*, granted the picketing a preferred position since the nature of the property was quasi-public.[31]

In *Schwartz-Torrance Investment Corp. v. Bakery and Confectionery Workers' Local 31*,[32] the California Supreme Court considered the problem as

24. Thornhill v. Alabama, 310 U.S. 88 (1940), *See supra* note 9 and accompanying text.
25. A.F.L. v. Swing, 312 U.S. 321 (1941), *See supra* note 19 and accompanying text.
26. *See*, Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).
27. State v. Williams, 44 L.R.R.M. 2357 (Balt. Md. Crim. Ct. 1959); Schwartz-Torrance Investment Corp. v. Bakery Workers' Local 31, 61 Cal. 2d 766, 394 P2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965); Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963).
28. 44 L.R.R.M. 2357 (Balt. Md. Crim. Ct. 1959).
29. Notices were posted at every entrance to the shopping center: "No solicitors, peddlers, picketers permitted on Mondawmin property without the consent of the owners. Those not securing such consent will be considered trespassers and will be prosecuted to the full extent of the law. Mondawmin Corp."
30. 44 L.R.R.M. 2357, 2360. (Balt. Md. Crim. Ct. 1959).
31. *Accord*, People v. Barisi, 193 Misc. 934, 86 N.Y.S.2d 277 (N.Y.C. Magis. Ct. 1948). The employer operated a newsstand on space he leased in Pennsylvania Station. The station contained many shops doing a variety of business, just as one might find in a shopping center. Defendants who were peacefully picketing the newsstand refused to leave the premises. Relying on *Marsh*, the court upheld their position, reasoning that the premises were not a private place and said that the owners "by becoming realtors, by opening up their property to the general public . . . have made it a quasi-public place, and as such their ownership 'is circumscribed by the constitutional rights of those who use it'." 193 Misc. at 935, 86 N.Y.S.2d at 279.
32. 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965).

one of balancing competing interests. The court held that the interest of the union in exercising its right to picket outweighed the interest of the shopping center proprietors to control their property. The court reasoned that when an owner opens his property to the public for commercial purposes he converts the nature of the property from purely private to quasi-public. The court succinctly voiced the core of the idea in stating:

> The interest of the union thus rests upon the solid substance of public policy and constitutional right; *the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage.*[33]

Thus, state court decisions have given a preferred position to picketing conducted on quasi-public property; the proprietary interest of an individual being held to be an insubstantial basis for a state court injunction prohibiting the exercise of first amendment rights.[34]

During the nearly thirty years since *Marsh*, shopping centers have undergone an extensive social and economic development so as to cast a new light on their quasi-public characterization.[35] The shopping center, which was the retail industry's answer to population decentralization has substantially altered the shopping habits of the American consumer. Responding primarily to the demands for convenience goods by the suburban population, shopping centers have grown increasingly larger until today they satisfy virtually all the shopper's needs. A modern shopping center is a complex, emerging economic phenomenon involving new uses of private land for commercial and public purposes.[36] The number of shopping centers in the eight years from 1957-1965 has more than tripled while the aggregate space they consumed has increased

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33. 394 P.2d at 926 (1964) [Emphasis added].

34. *See also*, Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W.2d 785 (1963). By an equal 4-4 division the Michigan Supreme Court affirmed an order enjoining a shopping center owner from interfering with handbilling within the center; one branch of the court observing that a shopping center "is simply a modern market place," no different from "the historic public markets of earlier days," and the "public outdoor walkways and malls are equally as public during business hours regardless of whether the fee rests with a public or private freeholder" 122 N.W.2d at 796-97; Weis Markets v. Retail Store Employees' Union, Local No. 692, 66 L.R.R.M. 2166 (Md. Cir. Ct., Aug. 18, 1967), involving the very respondent employer in this case in its operation of a store at Hagerstown, Maryland. The Court observing that:

> The Court finds that there was no trespass. A modern shopping center has characteristics differentiating it from private property. A shopping center, inviting the public to come patronize it, takes on the nature of a quasi-public place. The owner's rights become secondary to broad use by the public, which includes the right of a labor union to engage in peaceful picketing.

66 L.R.R.M. at 2167.

35. *A Profile of the Shopping Center Industry*, Chain Store Age, May, 1966.

36. *See* R. Myers, *Suburban Shopping Centers 1*, U.S. Small Business Administration, Small Business Bulletin No. 27 (1963).

At Tyson's Corner in Fairfax County, Virginia, newspaper accounts have reported that a gigantic shopping center is being erected which will include both office and apartment buildings as part of a single, self-contained community. This is doubtless the economic ware of the future.

fivefold.[37] At the end of 1966, the multitude of shopping centers[38] in the United States accounted for approximately 37% of the country's retail sales.[39]

Recently the American consumer has seen the advent of a new concept in shopping center development—the super regional. Usually contained in these centers are a variety of stores, theaters, and offices, inter-related in an environment conducive to shopping.[40] The dominant characteristic of the new super regional is the climate controlled enclosed mall extending between the individual units of the center. In addition to its functional purpose of linking merchandising units and providing a control over weather and lighting, the mall serves as a vehicle for other amenities which enhance the magnetism of the center. The addition of playground equipment, supervised play areas for children and similar features, has provided additional inducements which have strengthened the role of the shopping center as a community focal point.[41] In addition to these amenities, the convenience afforded by the center is further enhanced by decreased traffic congestion, adequate parking and the avoidance of other disadvantages traditionally associated with the central business district.[42] The shopping center has thus developed past the quasi-public stage to become a "public institution" in itself. The center has come to play such an important role in the every day life of the consumer, that it must be treated as an integral and essential part of the community.

In the instant case, the respondents sought to justify the lower court's injunction as a regulation of petitioner's first amendment rights rather than as a suppression of those rights. The Supreme Court recognized that picketing involved the intermingling of protected and unprotected elements, namely speech and conduct respectively. Consequently, the Court agreed with respondents' contention that picketing could be subjected to regulation which could not be constitutionally permitted if pure speech alone were involved.[43] However, the Court concluded that the injunction in the instant case was not a proper regu-

37. *A Profile of the Shopping Center Industry*, Chain Store Age, May, 1966. In the United States from 1957 to 1965 the number of shopping centers have increased from about 2200 to over 8,000 which represent approximately one billion square feet in area.

38. By the end of 1966 there were 10,512 shopping centers in the United States. It has also been estimated that by 1977 there will be 25,000 shopping centers in the United States. National Research Bureau, 9 Directory of Shopping Centers in United States and Canada (1967).

39. *A Profile of the Shopping Center Industry*, Chain Store Age, May, 1966, at 17. In the nation's 116 largest cities, the percentage of department store sales registered in central business districts declined from 57.6% in 1958 to 37.6% in 1963. Conversely from 1958 to 1963, general merchandise sales (of which 68.5% are department store sales) outside central business districts had a spectacular rise of 89% compared with the increase of 54% from 1954 to 1958. This phenominal growth in department store sales has been largely the result of their opening branches in suburban areas. It is estimated that shopping center branches now produce about half of all sales among the nations' largest retailers. U.S. Census of Business-Urban Land Institute Bulletin, March, 1966.

40. *See* T. Harrison, *The Advent of the Super Regional Shopping Center*, The Appraisal Journal, January, 1968, 90-97.

41. *Id.* at 94.

42. *Id.* at 97.

43. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313. *See also supra* note 14 and accompanying text.

lation but rather effectuated a suppression of the labor union's first amendment right to freely express to the public the nature of its dispute with Weis. The Court stated:

> Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. . . . One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.[44]

The Court, being well aware of the rapid economic and social development of shopping centers,[45] was also cognizant that shopping centers are open to the public to the same extent as the commercial center of a normal town.[46] Recognizing this, the Court held that for first amendment purposes shopping centers contained enough of the social criteria of a community as to functionally equate them to the "business block" in *Marsh*.[47] The Court stated:

> The state may not delegate . . . power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[48]

The Court concluded, in reversing the lower court's judgment, that the mere existence of the element of private ownership was not a sufficient justification for imposing an absolute injunction against the peaceful pickets of a store in the shopping center.[49]

Mr. Justice Black, in a dissenting opinion, contested the majority's reliance on *Marsh* and subsequent holding that "respondents' property had been transformed to some type of public property."[50] It was Mr. Justice Black's contention that *Marsh* was never intended to apply to a shopping center situation but only to the very special situation involving a company owned town. And, since the shopping center lacked many of the characteristics that a town possessed, reliance on *Marsh* was improper. Therefore, Mr. Justice Black concluded that based upon the fifth amendment of the United States Constitution,[51] there existed "no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets."[52]

In the instant case, the abridgement of the picketer's first amendment rights

44. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 323.
45. *Id.* at 324. *See also supra* notes 33-40 and accompanying text.
46. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319.
47. *Id.* at 318.
48. *Id.* at 319.
49. *Id.* at 325.
50. *Id.* at 330.
51. "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
52. 391 U.S. 308, 330 (1968).

was brought into focus as a direct result of the breadth of the lower court's injunction. The picketing was being conducted on Weis' supermarket property, yet, the injunction by its terms prevented picketing *anywhere* in the Logan Valley Center. Thus, it had the practical effect of suppression rather than regulation of the union's constitutionally protected rights. It seems apparent that if an injunction were to be granted at all, its restraining effect should have been limited to preventing picketing solely on Weis' property, the location where the alleged illegal conduct was being perpetrated. However, the issue before the Supreme Court was not whether the union members had a right to picket specifically on Weis' property, but rather solely to determine the validity of the lower court's injunction. To make the determination the Court had to decide whether shopping centers reflected enough of the social context of a community so as to extend the first amendment right of free expression to the private property of the shopping center proprietors.

While indicating that the state courts may still regulate picketing on respondent Weis' private property,[53] the Supreme Court properly reversed the lower court's judgment. In accordance with the principles of *Thornhill, Swing* and *Marsh*, a shopping center which is quasi-public in nature should not be closed to a sector of the public which seeks to disseminate to the community the facts of a labor dispute. The shopping center takes the community in its entirety or not at all. Moreover, the trespassory theory relied upon by the lower court in seeking to enjoin the picketing, is an insubstantial basis for abridging the exercise of an individual or a union's constitutionality protected rights. As Mr. Justice Frankfurter pointed out in his concurring opinion in *Marsh:*

> Title to property as defined by State law controls property relations; it cannot control issues of civil liberties. . . . And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decisions regarding the scope of vital liberties guaranteed by the Constitution.[54]

The Court in reversing the lower court's decision, granting the injunction, made a sound policy choice between the rights of private property owners and an individual's rights which are protected by the first amendment. However, the characterization of the shopping center property as "quasi-public" is quite misleading, in that such a classification has no significant bearing on the solution of the existing problem. The Court is not setting up a separate category of property, the attainment of which, renders first amendment rights a preferred

53. The majority opinion contains the following statement:
Because the Pennsylvania courts have held that picketing and trespassing 'can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot. 391 U.S. 308, 321.

54. 326 U.S. 501, 511 (1946).

position. The reason for the result is that, *under the circumstances* as stated previously, the law of private property can not be used to prohibit the exercise of any individuals first amendment rights.

In equating the shopping center to the "business block" in *Marsh* the Court properly protected the union's right to effective communication. This could not be effectuated if the pickets were limited to the berm areas of the highways since their ideas could not be communicated to the shoppers already in the center.[55] The ideas of a union can only be effectively expressed if they are directed towards the customers of the specific store involved in the dispute. If picketers are required to conduct their activities at another place they are being deprived of their rights.[56]

The Court also precluded what might have become an effective means of combating unionism. Picketing has been organized labor's most effective way of communicating the nature of its labor disputes to the public.[57] A contrary decision would have given the merchants of a shopping center a powerful weapon against trade unions, in that they would be able to induce the landlord to prohibit picketing anywhere on the premises, thus severely hampering union activity.[58] It seems logical to conclude that shopping center merchants deserve no special immunity from effective union activity as opposed to merchants whose businesses are located on public thoroughfares.[59]

Since *Marsh*, the preferred position of free speech and effective expression have been more clearly delineated. It must constantly be emphasized that the "right of all members of society to form their own beliefs and communicate them freely to others" is "an essential principle of a democratically organized society."[60] The holding of the instant case clearly serves to advance this critically important policy.

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55. 391 U.S. 308, 322 (1968).

56. *See* Schwartz-Torrance Inv. Corp. v. Bakery Workers' Local 31, 61 Cal. 2d 766, 394 P.2d 921, 923, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965).

57. R. Smith, Labor Law 348 (1950).

58. Perhaps the unions could retaliate by picketing the entrances to the shopping center, but the NLRB has yet to pass upon the legality of such picketing. *Cf.*, Retail Clerks, 116 N.L.R.B. 856 (1956). Further, such picketing would seem unfair since it exerts economic pressure on the merchant-tenant with whom the union has no labor dispute. Hence, the instant decision seems sound because it avoids injustice to unions as well as innocent shopping center merchants.

59. *See* Note, 1960 Duke L. J. 310, 313 (1960).

60. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 883 (1963).