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The Protection Accorded Picketing by the First Amendment

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I. Introduction—Peaceful Picketing as a Form of Free Speech

In the context of labor law, the origin of the relationship between free speech and peaceful picketing is the case of *Thornhill v. Alabama.*[1] The speech aspects of picketing and the necessarily accompanying First Amendment protections were stressed by the Supreme Court in holding unconstitutional a state statute which constituted a broad ban on all picketing. The Court expressly limited the holding by recognizing that a narrowly worded statute, such as one merely interdicting picketing *en masse* or picketing portending imminent danger may be valid. An additional limitation of the decision is the fact that it was reached under a "balancing of interests" test; consequently, the holding is impliedly qualified.

The doctrine enunciated by *Thornhill* fluctuated in application until *Giboney v. Empire Storage and Ice Co.*[2] was decided by the Supreme Court in 1949. There the union had picketed respondent in an attempt to force him to stop sales to distributor-customers who had resisted unionization efforts. The state court enjoined the picketing, basing the injunction upon statutes prohibiting restraint of trade. The injunction was upheld and a general principle was announced that picketing can be regulated or prohibited, even if peaceful in nature, where it is used to accomplish an unlawful purpose. The determination of what represents an unlawful purpose was based on an ends-means test under which it is necessary to ascertain whether the state has authority to regulate the particular ends sought. In *Giboney,* the Court found that the state statutes against restraint of trade were valid and that picketing was an integrated speech-action activity which could not be separated into its component parts.

The unlawful purpose test was expanded in subsequent cases, which culminated in *International Brotherhood of Teamsters v. Vogt, Inc.*[3] In that decision the Supreme Court summarized the cases following *Thornhill's* broad doctrine and

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[1] *Thornhill v. Alabama,* 310 U.S. 80, 60 S.Ct. 736 (1940).

[2] *Giboney v. Empire Storage and Ice Co.,* 336 U.S. 490, 69 S.Ct. 684 (1949).

[3] *International Brotherhood of Teamsters v. Vogt, Inc.,* 354 U.S. 284, 77 S.Ct. 1166 (1957).

reached the position that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." The Court appeared to be more concerned with the coercive effects of picketing than with its speech aspects, and accordingly sanctioned all but a broad ban on such activity.

Although the Court appeared to give greater regard to the non-speech aspects of picketing in the *Vogt* case, the basic concept of peaceful picketing being "speech plus" had already been recognized and was clearly articulated in *Bakery Drivers Local v. Wohl*[4]: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[5] The early recognition of this distinction and its basic application in cases prior to *Vogt* clearly set the stage for *Vogt's* unrestrained acceptance of the doctrine into the field of labor law.[6]

Although the primary concern of this discussion is free speech in the labor law context, the effects of the First Amendment are obviously not so restricted, and the decisions based thereon in the other areas cannot be ignored. An early case recognizing the state's authority under properly drawn statutes to regulate public demonstrations is *Cox v. New Hampshire*.[7] However, the court there recognized that the First Amendment and the speech aspects of such demonstrations represent a re-

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[4] *Bakery Drivers Local v. Wohl*, 315 U.S. 766, 62 S.Ct. 816 (1942).

[5] Id. at 769, 62 S.Ct. at 819.

[6] In *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718 (1950) a state court injunction against peaceful picketing of a store to secure employment in a percentage equal to the racial origin of its customers was upheld by the Supreme Court because there was a valid state policy against involuntary employment on a racial basis.

In *International Brotherhood of Teamsters Union v. Hanke*, 339 U.S. 470, 70 S.Ct. 773 (1950) the Supreme Court upheld a state court injunction against picketing to procure a union shop where the business was operated by the owner himself without employees. The state injunction was again based on a valid state policy.

In *Building Service Emp. International Union v. Gazzam*, 339 U.S. 532 (1950) a state injunction against picketing following an unsuccessful attempt to unionize a small hotel was based on the state's valid policy against employee coercion of the employer's choice of bargaining agent. The Supreme Court upheld the injunction because of the state's valid policy.

[7] *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762 (1941).

straint upon the state's regulatory authority. The non-speech aspects of picketing and parading were stressed by the Court in *Cox v. Louisiana,*[8] where such attributes were recognized as subjecting picketing to a degree of regulation not possible in the case of *pure* speech. The Court quoted *Giboney* as follows: "(I)t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." The Court, nevertheless, reversed the conviction, declaring that the state statute was too broad and provided too much discretion in its application. Shortly after this decision, in *Brown v. Louisiana,*[9] the court reversed a conviction based on the same state statute. In this instance a number of persons protesting segregation had staged an orderly and peaceful "sit in" in a public library. Rather than mechanically vacate the conviction and remand on the basis of the *Cox* decision, the Court examined the facts and noted that the occurrence took place in a public library and that the basis of the conviction was commission of a breach of the peace. The Court then found that no breach of the peace had occurred and added that the First Amendment is not confined to verbal expression, but embraces appropriate actions, including the right to protest by silence and reproachful presence. Whether the "appropriate actions" the Court spoke of be considered as action literally or as a form of speech, it is apparent that not *all* such speech-action conduct can be prohibited. Picketing, recognized as speech plus, falls within this class of conduct, and similar First Amendment considerations arise when there is an attempt to regulate or prohibit it.

II. The Values of Free Speech

It would obviously be meaningless to argue that picketing, because of its speech aspects, should be protected if there existed no reason to protect free speech. The purposes of free speech protection are succinctly stated by Emerson[10] as being: assurance of individual self fulfillment, attainment of the truth, securement of participation by the members of society in social and political

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[8] *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453 (1965).

[9] *Brown v. Louisiana,* 383 U.S. 131, 86 S.Ct. 719 (1966).

[10] T. Emerson, *Toward a General Theory of the First Amendment* 20-24 (1966).

decision-making, and maintenance of the delicate balance between stability and change in society. Admittedly these purposes are broad, but there can be no doubt that the labor interests of employees, employers and unions fit exceptionally well within them.

The author contends that the best system of free expression is that permitting the maximum of freedom with the minimum of governmental restraint. The principal merit of this approach is that it compels a frequent re-evaluation of accepted ideas and concepts, because they are constantly being challenged. Another advantage of this approach lies in its recognition of the fact that it is difficult to establish limits on expression. Limitation is difficult, since the real desire is usually to eliminate the expected result of the expression, rather than the expression itself. This means that the task of trying to predict the future is placed upon those who seek to establish such limits.

III. The First Amendment Protection Afforded Secondary Consumer Picketing

Thus far the discussion has been largely of a general nature, in order to establish the relationship between free speech and picketing. The following paragraphs pertain mainly to the more narrow topic of secondary consumer picketing and the protection given the same. The discussion is not concerned with violent, *en masse* picketing or other illegal forms of same.

A general definition of a consumer boycott is: a campaign by a union having a dispute with an employer to persuade his employees and the public not to make purchases of his goods. This would be a primary consumer boycott. A secondary consumer boycott arises when the union extends its plea to discourage purchase of the employer's products at his retail outlets. The retailers are considered neutral as to the dispute in this instance. The distinction between a primary and a secondary boycott is not always clear and turns upon evidence concerning the object or intent of the union.

Congress has dealt with consumer or informational picketing in two sections of the National Labor Relations Act as amended by the Landrum-Griffin Act.[11] The most pertinent section, 8(b)

[11] Labor Management Reporting and Disclosure Act, § 704(a), 703 Stat. 542 (1959). 29 U.S.C. § 158(b)(4)(ii)(B), amending Labor Management Relations Act § 8(b)(4), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958).

4(ii)(B) provides: "It shall be an unfair labor practice for a labor organization . . . (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . (B) forcing or requiring any person to . . . cease doing business with any other person . . . Provided further that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . .". This legislation was a result of Congress's efforts to close certain loopholes in the prior act, which was itself considered an effort to outlaw all secondary picketing or boycotts.[12] The loopholes in the prior act were provided by such concepts as primary and secondary employers, the ally doctrine,[13] roving situs,[14] and individual inducement.[15] The use of these concepts, coupled with restrictive interpretations of "inducement," served to avoid the intent of Congress and lessen the impact of the law.

The new legislation on its face appears to prohibit all secondary employer pressure designed to force him to cease doing business with the primary employer. The statute does not enumerate the types of secondary pressures, but certainly they would appear to include picketing, and substantial evidence of this construction can be found in the legislative history. However, the real crux of the problem lies in the interpretation of the proviso to section 8(b)4. The proviso, which was not part of the original Act, was inserted as a result of a fear that the Act would outlaw all secondary consumer appeals, which would probably be unconstitutional.[16] The proviso, designed to avoid constitutional

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[12] G. Farmer, *Strikes, Picketing, and Secondary Boycotts Under the Landrum-Griffin Amendments* 10-11 (1960).

[13] *N.L.R.B. v. Business Machine & Office Appliance Mechanics Conference Board, IUE, Local 459, (Royal Typewriter Co.)*, 228 F.2d 553 (2nd Cir. 1955) Cert. Denied, 351 U.S. 962 (1956).

[14] *Sailor's Union of the Pacific v. Moore Dry Dock Co.*, 92 N.L.R.B. 547 (1950).

[15] *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 71 S.Ct. 961 (1951).

[16] 105 Cong. Rec. 6232 (1959), 2 U.S. NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959. (Hereinafter cited as Leg. Hist.) at 1037.

In criticism of the Landrum-Griffin amendment—before the proviso was inserted—Congressman Udall stated:

> "The Landrum bill forbids this elementary freedom to appeal to the general public for assistance in winning fair labor standards. The union could be enjoined upon the ground that it was coercing or restraining

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problems, did just that, except for those associated with *picketing*. Apparently Congress believed that picketing was not constitutionally protected and could be totally excluded from statutory protection, as evidenced by the proviso language and its legislative history.[17] It is noteworthy, however, that the picketing exception merely exists in a proviso, and one could argue that the prohibition would not extend to picketing which did not have as an object forcing or requiring the secondary employer to stop doing business with the primary employer.

One is not confined to an argument grounded solely on statutory construction, however, for an examination of the recent cases under the statute makes it evident that a complete ban on all secondary consumer picketing would be unconstitutional. Admittedly, the cases never reach this position directly, but the Supreme Court has been influenced by other considerations and has consequently chosen to reach this position in an indirect fashion. It is believed that the discussion that follows will establish the viability of the *Thornhill*—free speech/picketing doctrine and the Court's recognition (direct or indirect) thereof in the area of secondary consumer picketing.

IV. The "Speech" and "Action" Aspects of Secondary Consumer Picketing

The existence of a Constitutionally-protected license of free speech discloses that a balancing of issues (i.e. the desirability of free speech v. the possibly harmful results of such a liberty) has already occurred to a degree. The incorporation of such a

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the dealer. . . . As I understand it, one of the acknowledged purposes of the amendment is to prevent unions appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression."

[17] Id. at 17720, 2 Leg. Hist. at 1388-89

Senator Kennedy, reporting on the proviso, said:

"Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth."

Id. at 17898-99, 2 Leg. Hist. 1431-32

Senator Kennedy concluded his report on the proviso by saying:

"We were not able to persuade the House conferees to permit picketing in front of the secondary shops, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site."

liberty in the First Amendment precludes a full rebalancing of interests to justify regulations aimed at social objectives. The function of the court is to develop and apply a workable definition of the terms "no law," "which abridges," and "freedom of speech." Of course, this necessarily involves a weighing of competing considerations, but open-end balancing is no longer possible.

The regulation of picketing presents a problem, because picketing is not pure speech. Thus a functional definition of "freedom of speech" must be used to distinguish speech from action, the latter being subject to regulation but not the former. A factor which may cause picketing to fall into either of the classes at different times is whether or not the particular harm it threatens to cause is immediate and irremediable. It appears that consumer picketing examined in a context of action v. expression can conceivably fall within either of these classes.

Under the above-outlined approach to the First Amendment, secondary consumer picketing is not subject to a prior and complete interdiction. Such a prohibition is precluded by the possibility of the picketing falling within the protected expression category, which is not subject to regulation nor to an absolute prohibition based upon a complete rebalancing of interests.

V. Supreme Court Rulings on Secondary Consumer Picketing

A. *N.L.R.B. v. Fruit & Vegetable Packers and Warehousemen Local 760 (Tree Fruits)*[18]

Here the union was charged with a violation of section 8(b)(4)(ii)B when it engaged in consumer picketing of retail stores that distributed the product of the primary employer. The picketing did not disturb deliveries or interfere with the operations of the retail employers. It was designed merely to induce consumers not to purchase the specified product.

The N.L.R.B. found that a violation had been committed based upon a literal reading of the statute and its legislative history.[19] It concluded that all secondary consumer picketing had been prohibited. This conclusion indicates that the N.L.R.B. determined that Congress believed such picketing *always* threatens, coerces, or restrains the secondary employer, and that such

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[18] *N.L.R.B. v. Fruit & Vegetable Packers and Warehousemen, Local 760* (Tree Fruits), 377 U.S. 58, 84 S.Ct. 1063 (1964).

[19] See legislative history quoted in note 17.

activity is subject to a prior restraint, as it does not enjoy protection under the First Amendment.

The Court of Appeals reversed the action of the Board and declared that a conviction requires a showing of conduct that amounts to a threat, coercion, or restraint. The Board's reading of the statute would create substantial first amendment problems in the opinion of the Court of Appeals.[20] The Supreme Court affirmed, but disagreed with the lower court's interpretation of the statute. Somewhat surprisingly, the Court construed the statute as only prohibiting such picketing when it is designed to shut off all trade with the secondary employer (unless he aids the union in its dispute with the primary employer). The Court essentially adopted a theory recognized in the state courts, which have permitted a do-not-buy-the-product appeal but have prohibited a do-not-trade-at-all appeal.[21] The Court adopted a rule of construction requiring a clear indication by Congress in the legislative history to ban any picketing, including peaceful picketing. This rule of construction, used in conjunction with a policy of dealing with "isolated evils" [22] in this area by Congress, was utilized by the Court to reach its interpretation of the statute. The Court greatly discounted the legislative history relied upon by the Board on the ground that it was presented by the opponents to the bill.[23] The Court also noted that where Congress meant to ban picketing per se, it made its intentions very clear, as in section 8(b)(7). Finally, the Court invoked the maxim that statutes are to be narrowly construed in order to avoid deciding a constitutional question.

When the legislative history is reviewed as a whole and the literal language of the statute considered, the Court's construction cannot be regarded as that intended by Congress or expressed by it. Moreover, the decision does not seem supportable on the facts.[24] The real issues presented are: whether or not all secondary consumer picketing is by its nature coercive, threaten-

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[20] *Fruit & Vegetable Packers v. N.L.R.B.*, 308 F.2d 311 (D.C. Cir. 1962).

[21] *Goldfinger v. Feintuck*, 276 N.Y. 281, 11 N.E. 2d 910 (1937).

[22] *N.L.R.B. v. Drivers Local Union*, 362 U.S. 274, 284 (1960).

[23] *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsor that we look to when the meaning of the statutory words is in doubt."

[24] See Lewis, *The Questionable Yield of Tree Fruits*, 49 Minn. L. Rev. 479 (1965).

ing, or restraining; and whether or not Congress has (or could) prohibit it.

Examining the statute itself, it is obvious that the proviso was intended to permit publicity which does not induce a work stoppage at the secondary site. However, under the Court's construction such publicity is only saved if it entails simply a "do-not-buy-the-product" appeal. Thus the Court has in effect narrowed the scope of the proviso in its efforts to avoid a constitutional question. In addition, as Justice Harlan pointed out in his dissent, the Court's test does not solve the problem if the secondary employer *only* sold *the* single product. In that instance, a do-not-buy-the-product appeal would be a highly coercive pressure upon the secondary employer, which Congress sought to eliminate.

The Court of Appeals appeared to recognize the real issue and under its construction of the statute—requiring a showing of a coercive effect—no constitutional problems arise. (This construction also satisfies the problem posed by Mr. Justice Harlan.) Furthermore, the Court of Appeals sought to distinguish the speech and actions aspects of picketing. If the picketing was shown to be a coercive pressure, it would be properly classified as action and subject to regulation.

The Supreme Court, however, only alluded to the problem and did not resolve it without doing violence to the plain statutory language. In light of the legislative history, the Court may even have been obligated to overturn the statute as a prior restraint upon freedom of speech. It has generally been stated that First Amendment rights should be carefully guarded and, as Emerson stated the proposition:

> "The Court's obligation to bow to the will of the legislature and the executive is at a minimum where a serious claim of infringement of freedom of expression on the part of those institutions is presented. In this sense, from the judicial point of view, freedom of expression should be regarded as a *preferred* freedom." [24a]

B. *N.L.R.B. v. Servette*[25]

Servette was a wholesale distributor of food products and was engaged in a strike with the Wholesale Drivers Union. The union sought support by requesting local retail store managers

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[24a] T. Emerson, *supra* note 10, at 45.

[25] *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 84 S.Ct. 1098 (1964).

to discontinue handling of Servette products. The managers were also advised that if they refused to cooperate, handbills would be distributed to the public in front of their stores requesting that Servette products be not purchased.

The Supreme Court, reversing the lower court, held that no violation of section 8(b) (4) (ii) occurred. Although this is not a picketing case, but involves handbilling, which the N.L.R.B. distinguished from picketing in the *Lohman* case,[26] it does provide an interesting comparison to the *Tree Fruits* case, which was decided at the same time by the Court.

In both cases the unions sought protection for their actions under the proviso to section 8(b) (4) (ii)B. The Court in *Tree Fruits* construed legislative history so as to define the proviso as being applicable to "a do-not-buy-the-product plea" only. This conclusion was arrived at by attributing to Congress the intention to deal with the "isolated evil" of a general plea not to trade with the secondary employer. If this construction had been used in *Servette,* the case would have presented no problem to the Court, since the handbilling merely requested that consumers refrain from purchasing certain products, and therefore was noncoercive and clearly within the proviso's protection. The Court, however, did not content itself with this reasoning but deemed it necessary to find that the handbilling was *otherwise* noncoercive and within the proviso's coverage. Although this is a hair-splitting point, it is given weight by the fact that both decisions were handed down the same day. This suggests that the Court itself was somewhat dubious about its use of legislative history to reach the *Tree Fruits* decision.

The Court's tendency to avoid constitutional issues in the picketing area is further illustrated by *Youngdahl v. Rainfair,*[27] which was decided nearly seven years prior to the *Tree Fruits* case. As a result of earlier violence, the State court in *Rainfair* enjoined all picketing. The Supreme Court was faced with almost the identical situation which it confronted in *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies Inc.,*[28] where it upheld such an injunction, but it chose a different solution this time. Rather then create constitutional implications, the Court in *Rain-*

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[26] *N.L.R.B. v. Lohman Sales Co.,* 132 NLRB 901 (1962).

[27] *Youngdahl v. Rainfair,* 355 U.S. 131 (1957).

[28] *Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies Inc.,* 312 U.S. 287 (1941).

fair held that the State court could enjoin future acts of violence, but that it entered the preempted domain of the N.L.R.B. when it enjoined all picketing—including peaceful picketing. Thus, the Court relied upon the federal preemption doctrine rather than concern itself with free speech. The preemption doctrine undeniably has a substantial and practical basis. It serves to protect the statutory scheme adopted by Congress in the particular area and prevents state courts from disrupting that scheme by construing statutes in a manner inconsistent with Congress's intended plan. Moreover, in the circumstances at hand, Congress has attempted to balance the competing forces of the union-employee and the employer in an extremely delicate area. Consequently, the Court's deference to the will of Congress is understandable. However, the opposing consideration—protection of free speech—is considered to be of at least equal importance by many writers.

C. *Amalgamated Food Employees Union, Local 590 et al v. Logan Valley Plaza, Inc., et al.*[29]

Here the Union had peacefully picketed respondent store (Weis), which was located in the shopping center owned by respondent Logan Valley Plaza (Logan). Weis was not a union-organized store and the pickets' signs so stated. The pickets patrolled the parcel pick-up zone owned by Weis and the immediate parking lot area owned by Logan.

The union was enjoined by the State court from picketing in the pick-up zone and parking lot and was permitted merely to picket on the berm between the lot and streets, which was quite some distance from the store. (The Court recognized that this would render the picketing ineffective.) The State Supreme Court upheld the injunction, relying solely upon property-trespass principles. The union grounded its petition for certiorari solely upon the First Amendment. No question of Federal preemption was presented.

The Supreme Court reversed the decision of the state court and held that the shopping center was *quasi* public property similar to that involved in *Marsh v. Alabama,*[30] and that a state rely-

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[29] *Amalgamated Food Employees Union, Local 590 et al. v. Logan Valley Plaza, Inc., et al.,* 391 U.S. 308, 88 S.Ct. 1601 (1968).

[30] *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276 (1946). In this case, the Court held that a privately owned town was considered public property, at least for First Amendment purposes.

ing solely upon its trespass laws may not wholly deny the use of such an area to those desiring to exercise their First Amendment rights in a peaceful and appropriate manner.

Although there are several major issues raised by this case —such as that presented by the *quasi* public property finding— the application of the First Amendment to protect picketing is of primary concern here.

The Court first drew upon the *Thornhill* decision to invoke the First Amendment relationship to peaceful picketing. Then it recognized the speech plus quality of picketing, which makes possible regulation that would not be permissible if picketing were pure speech. Then, the Court stated: "Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." [31] The quote plainly and succinctly states what the Court believed (but only with great effort found Congress to believe in the *Tree Fruits* case decision), namely, that no complete prior ban on all secondary (peaceful) consumer picketing is constitutionally valid. Where injunctions against picketing have been upheld, as the Court notes, an illegal purpose has been found or a situation within the *Vogt* doctrine has existed. The Court declared that picketing may not be prohibited under a trespass theory where the property used is *quasi* public property. The case is even clearer, observed the Court, when the picketing constitutes an activity consistent with the typical use made of such property.

The most significant aspect of this case is the Court's reliance upon the First Amendment to protect peaceful picketing. The Court thereby affirmed the vitality of the *Thornhill* doctrine and unhesitatingly decided an important constitutional issue in the field of labor law.

VI. Conclusion

The thesis proposed earlier—that peaceful consumer picketing is constitutionally protected and therefore cannot be totally prohibited even when it is a secondary measure—seems to be correct.

True, the pertinent N.L.R.A. sections and the relevant legislative history appear to prohibit all such secondary picketing;

[31] 88 S.Ct. at 1606.

however, the relevant cases decided under those sections indicate otherwise. The Supreme Court has refused to directly overturn the legislation in question, but it has adopted other methods to arrive at essentially the same result.[32] The approach taken by the Court may be attributable: to its general policy of avoiding constitutional questions where other grounds are available for a decision; to a preference to apply the "Second Look Doctrine";[33] or to a desire to refrain from disturbing the statutory labor scheme provided by Congress. Because of the Court's circuitous approach, the stated proposition is never directly reached. Nevertheless, no one can reasonably doubt that a total prohibition of peaceful picketing, primary or secondary, would be invalidated by the Supreme Court.

The Court's seemingly hyper-cautious approach in this area is perhaps not unjustified when the sensitivity of labor policy problems is considered. However, the speech aspects of picketing provide a compelling reason for the Court to act in a more unequivocal manner. As noted earlier, a number of writers believe free speech to be a "preferred freedom" and one which the Court should aggressively protect.

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[32] The decisions in the *Tree Fruits* and *Logan Valley* cases and the dicta in the *Brown* controversy appear to support this statement.

[33] Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 Harv. L. Rev. 1 (1957). Employing this doctrine, the Court sometimes intentionally disregards the legislative will and purpose in order to force Congress to re-examine the legislation.