Primary v. Secondary Labor Boycotts: Is There a Rational Basis for the Distinction

Jeffrey H. Spiegler

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Is There a Rational Basis for the Distinction?

The law frequently creates fictional concepts as a useful, if perhaps novel, means to a proper end. In creating the concept of the secondary labor boycott, the law has inadvertently created what in many instances is a legal fiction which distorts the situation, often leading to an improper and unjustifiable end. The term “secondary labor boycott” is most frequently used in connection with Section 8 (b) (4) of the Labor Management Relations Act of 1947, more popularly called the Taft-Hartley Act. The term “secondary labor boycott” is not easily defined; indeed, that is one of the predominant themes of this comment. Basically, it has come to mean a situation wherein employees of Company A have a grievance against Company A. Rather than present the grievance to Company A, the employees decide to pressure Company B, a firm dealing with their employer, so that Company B will pressure Company A to accede to the demands of the latter’s employees. The term has been extended, as we will see, however, to cover any situation wherein labor organizations would apply illegal pressures (e.g. picketing) against one firm as a means of influencing another firm.

Before the Taft-Hartley Act

An overview on picketing

In order to gain a proper insight into the court’s conceptualization of secondary labor activity, it is necessary first to examine cursorily how the courts have characterized picketing in a labor context. After such it can be shown how concepts concerning picketing played a part in formulating concepts concerning secondary activity.

An important early case is American Steel Foundries v. Tri-City Central Trades Council, decided in 1921. The case involved a strike with an employer over wages. Picketing ensued, accompanied by some

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(b) It shall be an unfair labor practice for a labor organization or its agents —

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That Nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

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violence. The district court issued an injunction. In modifying the order, Chief Justice Taft wrote that there must be a balance between the rights of the strikers to peacefully persuade those who would break the strike and the protection of the rights of the individual to choose whether to work or not, free from any coercive pressures. The Chief Justice recognized that picketing can be carried on in a coercive or a non-coercive way and that in issuing an injunction, a court of equity must make this determination based on the facts of each case. It is interesting to note that he made no mention that such rights emanated from the Constitution. This early view can best be stated as viewing picketing to be a form of speech as long as it was peaceful and only persuasive. The facts of each case were to determine when picketing became more than speech.

By 1940 in the landmark case of *Thornhill v. Alabama*, the Supreme Court considered picketing to be a form of speech protected by the first and fourteenth amendments. In order for picketing to be enjoined, a state was obliged to show a clear and present danger to the life, property, or privacy of its citizens. “The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern.” Clearly, picketing was considered a form of speech. Unlawful acts conducted while engaging in picketing would necessarily have to be shown before the picketing could be proscribed, and then it was more likely that the courts would order the unlawful activity, rather than the picketing, to cease.

The idea of picketing’s being only a form of speech was short-lived. In *Hall v. Hawaiian Pineapple Co.*, the district court divided picketing into various categories, and depending upon the methods employed, the picketing was either a lawful exercise of speech, or an

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Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purpose 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, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:

2 257 U.S. 184 (1921).
3 Id. at 204-206.
4 301 U.S. 88 (1940).
5 Id. at 105.

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unlawful activity. Where an injunction would be issued, the "unlawful picketing" rather than just the illegal activity accompanying the picketing could be proscribed by the state or territory.

By early 1950, Thornhill was no longer the prevailing viewpoint. Justice Frankfurter in 1941 had fully endorsed Thornhill in American Federation of Labor v. Swing, but in Hughes v. Supreme Court of California, a 1950 case, Frankfurter, who wrote the majority opinion, stated that picketing was not the legal equivalent of speech. "Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."

In sum, the courts moved away from the position that picketing was a form of speech, fully protected by the first and fourteenth amendments, a view they had adopted in the early 1940’s, to a position of considering picketing as something more than speech. By the late 1940’s, it was considered a form of communication having more impact, more persuasive force, and more potential for coercive effect than the spoken or printed word. As will be seen, these conceptualizations of picketing have played an important part in the court's approaches to the secondary boycott question; that is, most of the cases that reached the Supreme Court concerning secondary activity, from the time of the demise of the use of the Sherman Act to proscribe secondary labor activity until the Taft-Hartley Act was passed, in-

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8 312 U.S. 321 (1941).
10 Id. at 465-66.
11 29 U.S.C. §52 (1913) Statutory restriction of injunctive relief:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other money or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; or shall any of the acts specified in the paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, §20, 38 Stat. 738.

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volved picketing. 12

Developmental Periods

While the federal courts relied on Section One of the Sherman Act to proscribe secondary boycotts, state courts built up a shaky body of common law holding such boycotts illegal. A typical case is *Opera on Tour v. Weber.* 13 Members of the Musicians Union pressured plaintiff by inducing the Stagehands Union to strike the plaintiff because he would not use live musicians. The Court of Appeals of New York declared this an illegal conspiracy. This appears to be the type of situation the courts labeled as a secondary boycott, but the New York Court did not approach it as such. It held that this was not a labor dispute in that it bore no relation to wages, hours of labor, health, safety, or right to collectively bargain. 14 As pointed out by Justice Lehman in his lengthy dissent, the majority opinion was based on fiction which was brought on by the court’s inability to distinguish between primary interests and secondary, unrelated interests, thus creating the necessity for them to look for another, more artificial basis upon which to ground their holding. He felt this “automation” to be of primary interest, having direct bearing on both unions, and thus felt the court had no basis to enjoin them from the exercise of their constitutional right to strike. 15

The courts were very troubled in their quest to protect the neutral employer, while at the same time assuring the worker of what was felt to be his fundamental right to protect and promote his self

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While seeming to be a wide proscription against court interference with peaceful labor activity, this was held not applicable to secondary boycotts, which were determined illegal as conspiracies in restraint of interstate commerce, violative of §1 of the Sherman Anti-Trust Act, 15 U.S.C. §1. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). After enactment of the Norris-LaGuardia Act in 1932, reading in part, “No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with provisions of this chapter...” 29 U.S.C. §101 (1932), the federal courts have refused to hear claims that unions have violated the Sherman Act, except in such instances where unions are acting not pursuant to a labor dispute, or in concert with employers. Allen Bradley Co. v. Local 3 Int’l Bhd. of Elec. Workers, 325 U.S. 797 (1945); see also United States v. Hutcheson, 312 U.S. 219 (1941).


13 285 N.Y. 368, 34 N.E.2d 349 (1941).

14 34 N.E.2d 349, 354 (1941)

15 Id. at 358.
interests. In the 1917 case of *Bossert v. Dhuy*, members of the carpenters union, while working for contractors, refused to use materials made by non-union manufacturers. The court went to great lengths to show how the carpenters would be affected by the material manufacturer's refusal to use union labor and were thus justified in bringing pressure upon the contractors using these materials. However, the Court of Appeals of New York was careful not to sanction "secondary" action. What arose was the "unity of interest" concept, grounded in the balancing of these conflicting interests.

Two United States Supreme Court cases, both decided the same day, show the delicate balance the court had struck between the interests of the laborers and the interests of the "secondary" firms. In *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl*, members of the union had worked as delivery drivers for various bakeries. This was during the depression, and the bakeries could no longer afford to pay their salaries or maintain the trucks. The bakeries laid off all the drivers and sold the trucks to those drivers who could afford them, and then contracted with them to deliver the baked goods to retail stores. Many of the former drivers were left without work. Many men who bought trucks agreed to let another man work for him one or two days a week, but soon the truck owners could not afford to do even this. The men without work were desperate. They appealed to their union. The union soon found that the only way they could pressure the truck owners into giving the men work was to peacefully picket the bakeries so that the bakeries, not desiring adverse publicity, would in turn pressure the truck owners into allowing the men to work. Wohl, a truck owner, took the union to court. The district court granted an injunction against picketing of the bakeries. The Supreme Court reversed that order. The Court felt that the slight harm which might come to the bakeries as a result of the peaceful picketing by the union, which was done in order to pressure the independent delivery men to unionize or at least use a union driver for one day per week, was too slight an interest to outweigh the interest of the union members and thus limit their fourteenth amendment right "... to make known their legitimate grievances to the public whose patronage was sustaining the peddler system. ..."

In the second case, *Carpenter & Joiners Union v. Ritter's Cafe*, Texas had enjoined the carpenter's union from further picketing Ritter's Cafe, under the authority of a Texas anti-trust (actually anti-
secondary boycott) statute. The facts were that Ritter, the cafe owner, had contracted with Plaster, for the latter to put up a building for him, about one mile from the cafe. Plaster used non-union labor, so the union peacefully picketed Ritter's Cafe in order to pressure Ritter to in turn influence Plaster to hire union labor. As a result of the picketing, Ritter suffered a sixty percent loss of business, his union employees refused to work, and union employees refused to make deliveries to the cafe. The five member majority, speaking through Justice Frankfurter, said,

The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

The majority opinion concluded that the interest of Texas "... to insulate from the dispute an establishment which industrially has no connection with the dispute..." must prevail. Thus, the basis for the decision is that unlike Wohl where "... the union members would only be following the subject matter of their dispute..." the union here was harming a sufficiently unrelated firm, and thus the state's interest in protecting such firms outweighed the union's interest, thus justifying abridgement of their fourteenth amendment rights.

The four dissenters felt that the interest of the union outweighed the state's interest in protecting the firm. They could see "no reason why the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales [one way or the other]." Apparently, Ritter's employees and other laborers servicing the cafe were considered part of the public. The dissenters relied heavily on Thornhill for the proposition that a labor dispute is a matter of public concern, and that government cannot constitutionally regulate speech concerning such a dispute, except in instances where there is a clear and present danger to the public health or safety. They treated the issue of injury to a neutral firm with two arguments. Citing Schneider v. State, the dissenters wrote: "One is not to have the exercise of his liberty of expression in appro-

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22 Id. at 723-24.
23 Id. at 724.
24 Id. at 727.
25 Id. at 727.
26 Id. at 730.
27 Id. at 730-31.
28 308 U.S. 147 (1938).

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priate places abridged on the plea that it may be exercised in some other place," and citing Thornhill, they stated that injury to a person's business is not sufficient reason to justify curtailment of free expression.\textsuperscript{30}

As was previously mentioned, the \textit{Ritter Cafe} case arose in a picketing context. It is important to note that Justice Frankfurter wrote for the majority, "Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication."\textsuperscript{31}

In sum, by the early 1940's, before abridging a labor union's right to free speech, free assembly, and free expression, the Supreme Court was to be very sure that harm done to the "secondary" firm greatly outweighed any benefits to be gained by the union.

\textbf{After Passage of the Taft-Hartley Act}

\textit{Is it Primary or Secondary?}

\textit{Early treatment}

Just as the state courts had failed to do, so Congress also failed to define where primary activity left off and secondary began. Rather, Congress passed a broad conscription against forcing or requiring any person to cease dealing with any other producer, manufacturer, or processor, through direct threats, coercion, or restraints, or indirect coercion through his employees. Congress also passed as broad an exception. Primary strikes and picketing were not to be made unlawful by \textsection{8} (b) (4)'s provisions.\textsuperscript{32} Section Two of the Labor Management Relations Act,\textsuperscript{33} the "definitions" section, defines neither primary nor secondary. The federal courts (and the N.L.R.B.) were left alone to determine this critical question.

In \textit{Douds v. Metropolitan Federation, Local 231},\textsuperscript{34} the first case to reach the courts under the new statute, the court was faced with a situation wherein strikers of a primary employer picketed a "secondary" firm to which their employer had subcontracted work. Judge Rifkind refused to hold that this was an illegal secondary boycott as the N.L.R.B. claimed. "In encouraging a strike [of the subcontractor], the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united

\textsuperscript{30} \textit{Id.} at 731.
\textsuperscript{31} \textit{Id.} at 727-28.
\textsuperscript{32} \textit{Supra}, note 1.
\textsuperscript{33} 29 U.S.C. \textsection{142}.
\textsuperscript{34} 75 F.Supp. 672 (S.D.N.Y. 1948) ("The Ebasco Case").
to it." 35 The Judge cited Wohl as authority. He found that there was no subcontractor in fact, but merely an extension of the primary firm. He further wrote, "It must be apparent that a construction of the act which outlaws the kind of union activity here would almost certainly cast grave doubts upon its constitutionality." 36 Thus, again we see the conflict between the workers' interests, and the evil of drawing neutrals into a conflict not of their making. But, before restricting first amendment rights the court was to be sure the third party was in fact neutral. 37 The question remains: how neutral is neutral enough?

In I.B.E.W. Local 501 v. N.L.R.B., 38 a union member peacefully picketed a construction site because the electrical work was being done by a subcontractor who did not use union labor. The carpenters, after reading the picket sign, refused to work. The general contractor then removed the electrical subcontractor from the job. Judge Learned Hand concluded that this was a secondary boycott and that Congress may forbid conduct which induces such a boycott.

Dissenting Judge Charles Clark was not willing to go along with the majority's unsupported assessment of this as a "secondary" activity. He pointed out that a general contractor and subcontractor work hand in hand on the same end product; and that in a situation where a general contractor were large enough so as to do a job without subcontracting and were to employ union labor in some departments, but not in others, no one could dispute that the union laborers have an economic interest and thus a right to strike. A court must examine the economic realities of a situation before labeling activity "secondary" or "primary." He pointedly wrote:

Perhaps the difficulty comes from the use of those vague terms "primary" and "secondary," which are not terms of either science or art or of the statute and which serve only to confuse and to contradict. True, an avowed purpose of the act was to prohibit "secondary" boycotts; but the implied limitation of §8 (b) (4) (A), 29 U.S.C.A. §158 (b) (4) (A), 39 to permit "primary" boycotts in thus being properly held to include situations where other employers are at least incidentally affected." 40

35 Id., at 677.
36 Id. at 677.
38 181 F.2d 34 (2d Cir. 1950), aff'd, 341 U.S. 699 (1951).
39 Since 1959, §8(b) (4) (B), 29 U.S.C.A. §158(b) (4) (B).
From the opposing views of these two distinguished judges it can be seen that the question of neutrality is actually a question of degree, and an attempt to glibly label activity as "primary" and thus legal, or "secondary" and thus illegal, results in situations in which the interests of the opposing sides may not be properly balanced and thus rights of free expression may be unjustifiably abridged.

More recent court treatment: loopholes in the statute, or a return to the balance test?

In National Woodwork Association v. N.L.R.B.,\textsuperscript{1} the Supreme Court was faced with a situation which involved a dispute between construction workers and their contractor employer. The complaint was brought by the Woodwork Association, representing a member firm which dealt with the contractor. The Association argued that the firm which was located hundreds of miles from the worksite, and which had no contact with the workers, was being unjustly hurt by the men's refusal to use doors finished by the firm. They claimed that the firm was a neutral secondary party and that the workers had no right to refuse to use the doors, even though the workers had previously done the finishing work themselves. They claimed that the workers were pressuring their employer to stop using another firm's products and were thus engaging in an illegal "secondary" activity under 29 U.S.C. §158 (b) (4). The Supreme Court held that when a firm furnishes such supplies it is no longer a "neutral" or "wholly unconcerned" third party. The union may refuse to handle its products. The Supreme Court refused to abridge the labor union's right to free expression on the basis of an off-hand categorization of such activity as "secondary." In effect, what the Court had done was to find that the interests of laborers who had been deprived of work once done by them outweighed the interests of the firm that was supplying that work to their employer, and thus there was no justification for abridging the constitutional rights of the union members, even if pressure was exerted upon the firm to stop dealing with another firm. However, Justice Brennan, writing for the majority, still wrote in terms of "secondary" and "primary." He reasoned that since the dispute was between the workers and their own employer, it was a "primary" dispute. In reading the opinion one cannot help but feel that Court is leery about the "primary-secondary" distinction, and while not ready to attack Congress on the distinction, was hesitant to find

\textsuperscript{1} 386 U.S. 612 (1967).

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that a labor organization was engaged in "secondary" activity unless the complaining firm was indeed neutral, i.e., in no way involved in the dispute.

Many firms in dealing with another firm do contract for some service which the firms' employees could supply. It would seem now that in disputes over the supplying of this service, the "secondary" employer may not be protected by §8 (b) (4) (B). This is a great expansion upon the ally doctrine, extending it to components manufacturers.

Perhaps the largest "loophole" in §8 (b) (4) (b) found by the Supreme Court was discovered in N.L.R.B. v. Fruit & Vegetable Packers, Local 760.42 The Court was confronted with a classic secondary boycott fact pattern. Members of the Fruit and Vegetable Packers Union — the "fruit pickers," were disgruntled over wages and work conditions. Direct pressure against the apple growers, their employers, had always been unsuccessful. They decided to picket supermarkets, appealing to consumers not to buy apples because of their dispute with the apple growers. Rather than holding this to be an illegal secondary boycott, the Court, concerned that "a broad ban against peaceful picketing might collide with the guarantees of the first amendment,"43 held that picketing of the markets, asking customers not to buy apples supplied from the farms with whom the union had the dispute, was not proscribed. Such activity was held to be "primary"; that is, directed against the disputing apple growers, not the markets. The retailers were not considered to be unreasonably harmed. The Court held that as long as the picketers did not ask the public to refrain from shopping at the markets altogether, they could continue to inform the shoppers of their dispute with the apple growers and appeal to them not to purchase apples at the market. A loophole in the statute? Or was this a careful consideration of all the facts and a weighing of the conflicting interests resulting in a Supreme Court decision on a delicate constitutional issue?

The reader has probably witnessed a situation similar to the "Tree Fruits" fact pattern, if he has seen any of the lettuce boycotters at the various supermarkets of late. A case involving them has recently been decided by the Cuyahoga County, Ohio, Court of Appeals (8th District). The case, C. Comella, Inc. v. U.F.W.O.C.,44 involved a situation where members of the United Farm Workers Union picketed a Cleveland lettuce wholesaler, Comella, and his customers (various supermarkets) because they refused to stop handling lettuce produced by Bud Antle, Inc., a California firm with whom the Farm Workers had a dispute. The defendants asked consumers not to patronize

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43 Id. at 63.
44 33 Ohio App. 2d 61, 292 N.E.2d 647 (1972).
Comella, or the supermarkets. Comella went to the Cuyahoga County, Ohio Court of Common Pleas asking for an injunction against the picketing. The court had jurisdiction to hear the matter because agricultural workers are exempt from the Labor Management Relations Act,\(^\text{45}\) and thus the state law was not preempted by federal statute. The trial court labeled this as an illegal secondary labor boycott and granted an injunction against further picketing.\(^\text{46}\)

On appeal, the Farm Workers claimed that their first and fourteenth amendment rights had been improperly limited. The Court of Appeals agreed, and modified the injunction to permit orderly picketing which clearly stated that the dispute was with Bud Antle, Inc., and asked consumers not to purchase Antle lettuce rather than asking the consumers not to patronize Comella or his customers.\(^\text{47}\)

It is of interest to note that Ohio has no labor code, and the decision rested entirely upon common law. The court adopted the "Tree Fruits" decision as being the common law of Ohio. Of interest is headnote five, wherein the court stated:

A product boycott or consumer boycott (including picketing), as defined in \textit{N.L.R.B. v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58} (1964), which is conducted at the site of a secondary employer, is valid and lawful. Such activity is guaranteed under the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 11 of the Ohio Constitution, but such activity must be peaceful, educational, informational and considered part of the primary labor dispute, and may not be forceful, coercive and directed against a secondary employer to such an extent that it is considered a traditional secondary boycott.\(^\text{48}\)

This takes on even greater significance when the court later states:

It must be determined how far the courts will go in protecting the rights of a neutral secondary employer and his right not to be intimidated and harassed, where he does not have a labor dispute of his own. These rights must be balanced with the rights of the union and employees to express their grievance against the primary employer and to advise the public concerning the grievance."\(^\text{49}\)

\(^{45}\) 29 U.S.C. §152(3).
\(^{47}\) \textit{Id}.
\(^{48}\) \textit{Id.} at 61-62, 292 N.E.2d 649.
\(^{49}\) \textit{Id.} at 75, 292 N.E.2d 657.
The court is obviously treating this as a question of degree: at what point the firm's interests outweigh those of the union and employees. The court had great difficulty in making the "primary-secondary" distinction, indeed stating that "the line between legitimate primary activity and banned secondary activity is not absolutely clear." The court often wrote of legal secondary activity as opposed to illegal secondary activity, thus further confusing the "primary-secondary" distinction. In reading the opinion, one cannot help but think that if the terms primary and secondary were deleted, there would be far less confusion.

As has been seen, the courts have had little success in defining the substantive evil "secondary boycotting." Circular catch phrases such as "lack of economic interdependence," "innocent third party," and "disinterested neutral" have hardly provided the basis for any meaningful tests to determine when an activity is "secondary" or "primary." At best, the courts have developed tests to determine when certain activity is not secondary, which is rather remarkable in that they have yet to determine exactly what secondary activity is. At the base of this quagmire is still the critical point at which the interests of protecting the business firm outweigh the interests of the employee. Congress has tried to define this point as the place where labor activity is secondary rather than primary, and as Judge Clark admonished, confusion has resulted, generally without proper attention being given to labor interests. The more recent trend of the Supreme Court has been to more carefully scrutinize the fact situations and weigh all the interests involved before abridging important rights of free speech, assembly, and expression. At this time it would do well to examine these "interests".

**Defining the Interests**

Congress and the courts have made it clear that their intent is to protect the "secondary" firm. Consider what Judge Learned Hand wrote in the *Electrical Workers* case: "Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and that of neutrals in avoiding involvements in quarrels not their own, decided to draw a line at secondary boycotts." Consider what the author of the provision, Senator Taft, had in mind: "This provision, makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." The statute speaks of protecting the employer from threats, coercion, or restraints, either directly or indirectly through his employees. There is also the interest of protecting the free flow of commerce, thus protecting the economic interests.
nation from economic harm. This would be a throwback to the doctrine enunciated in *Wickard v. Filburn* whereby it is felt that while the activity of the particular individual may have a harmful effect only locally, the activity, if not proscribed, will have a harmful interstate effect when cumulatively participated in.

In sum, Congress desires to protect the firm from economic harm. The question is, which firm? Distinguishing the firms to be protected from those not to be protected by the secondary-primary distinction, has shown itself to be an irrational exercise. Under such a distinction, a firm which is the leading factor in a labor dispute could be protected. Rather than focus on this distinction, the courts have sometimes spoken in terms of preventing the "neutral" firm from being brought into the controversy as being an important interest. This would seem a valid purpose to the extent that the courts actually determine that a firm is indeed neutral, rather than merely equate "neutral" to "secondary," a term in and of itself difficult to define, and clearly not synonymous with neutrality.

Balanced against the governmental interests is the interest of the laborer in his wages, hours, and conditions of employment, and in his power to effectively bargain for their betterment.

Focusing on the Constitutional Question

Prior to the enactment of §8(b)(4)(B), before consideration of the abridgement of the constitutional rights of labor organizations, the Supreme Court would carefully weigh the abovementioned interests to determine if restrictions upon union activity were justified, as per *Ritter's Cafe*, and *Wohl*.

The *National Woodwork* and *Fruit & Vegetable Packers* cases seemed to mark a return to this careful balancing as opposed to deciding cases on the "primary-secondary" distinction.

Soon after passage of the Taft-Hartley provision, this distinction was challenged. It was claimed that abridging the union's rights to picket on the basis of such a distinction, violated the first amendment. It is of interest to note on what authority the Supreme Court decided that §8 (b) (4) (B)'s wide proscriptions did not violate the first amendment. The court writes:

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317 U.S. 111 (1942).
36 315 U.S. 769 (1942).
36 386 U.S. 612 (1967).
The substantive evil condemned by Congress in §8 (b) (4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparable unlawful objectives. There is no reason why Congress may not do likewise.\(^6\) (emphasis added).

On what authority did the Supreme Court decide that §8 (b) (4) (B)'s wide proscriptions did not violate the first amendment? Cited as authority are Building Service Employees International Union \textit{v. Gazzam}\(^6\) (holding that the courts of the state of Washington did not violate the union's first amendment rights when it enjoined the union from further picketing plaintiff's establishment, the purpose of such picketing being to coerce plaintiff into forcing his employees to join the union against their wishes); \textit{International Brotherhood of Teamsters v. Hanke}\(^6\) (holding that the courts of the state of Washington could enjoin the union from picketing plaintiff's shop, the purpose of such picketing being to force plaintiff [who employed no one] to join the union himself); \textit{Hughes v. Superior Court}\(^6\) (holding that in order to protect against de facto racial discrimination by those who were themselves protesting alleged discrimination, California might enjoin picketing of a store the purpose of such picketing being to secure compliance with a demand that the store's employees be in proportion to the racial origin of its then customers); and \textit{Giboney v. Empire Storage & Ice Co.}\(^6\) (upholding Missouri's right to enjoin the union from picketing plaintiff, the purpose of such picketing being to force plaintiff to violate Missouri's criminal anti-trust laws).

The unlawful objectives in these cases are not comparable to the secondary boycott. They are clearly definable. In \textit{Gazzam} and \textit{Hanke} the governmental interest is prevention of forcing union membership upon unwilling persons. In \textit{Hughes} the interest is preventing de facto racial discrimination. In \textit{Giboney} the interest is in preventing illegal conspiracies in restraint of trade. The Supreme Court held that these interests were compelling enough to allow proscription of the fundamental right to free expression,\(^6\) at least in a peaceful picketing context. It is interesting to note that in \textit{Gazzam} and \textit{Hanke}, while the

\(^{6}\text{Id. at 705.}

\(^{61}\text{339 U.S. 532 (1950).}

\(^{62}\text{339 U.S. 470 (1950).}

\(^{63}\text{339 U.S. 460 (1950).}

\(^{64}\text{336 U.S. 490 (1949).}

\(^{65}\text{That the freedom of expression is fundamental, perhaps the most fundamental of all rights, is well established. See Cohen v. California, 403 U.S. 15 (1971); Thornhill v. Alabama, 310 U.S. 88 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925); see McKay, \textit{The Preference For Freedom}, 34 N.Y.U. L. REV. 1182 (1959).}
court felt that the states' interest could compel a restriction on picketing because the Court felt picketing involved inherent coercive aspects, other traditional means of communication were said to be still available. 

In §158 Congress has in effect created two classes: those engaged in primary activity, and those engaged in secondary activity. On the basis of these classifications, Congress has felt it could properly limit the labor organizations' fundamental first amendment right of free expression, because of a compelling need to protect the firm and/or the nation from economic harm.

For Congress to limit fundamental rights as the states did in the foregoing cases, it is necessary to first show that the interest to be protected is compelling. Is protection of the firm (and thus the nation's economy) from economic harm a sufficiently compelling interest? Consider what the Supreme Court said in *Thornhill*:

> We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion...

Consider further:

> It does not follow that the State [Federal Government] in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society.

Whether it is conclusive that economic harm to the firm can never be used to justify government-imposed limits on peaceful expression may be doubtful. It does weigh heavily, though, in showing that the court felt that the harm must be very serious and imminent before the governmental interest becomes compelling.

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65 "... this Court has not hesitated to uphold a states' restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.

66 Building Serv. Employees Int'l. Local 262 v. Gazzam, 339 U.S. 532, 537 (1950). "...[E]ven though the relief afforded to Hanke and Cline entailed restriction upon communication that the unions sought to convey through picketing, it was important to safeguard the value which the state placed upon self-employment, leaving all other channels of communication open to the union. The relatively small interest of the unions considerably influenced the balance that was struck." Teamsters Local 309 v. Hanke, 339 U.S. 470, 477 (1950)

67 See *Boiling v. Sharp*, 347 U.S. 497 (1954). *Boiling* held that concepts of substantive equal protection are not mutually exclusive from the concepts of due process embodied in the fifth amendment. The court held that being subject to an invidious class distinction (in that case, race) is a denial of one's liberty without due process. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).


69 Id. at 104.
If it were to be conceded that the governmental interest is compelling, the government still has the burden of showing that the interest is being effectuated in a rational way, before the government can limit fundamental rights. From what has been said previously, the class distinction between those engaged in "primary" activity and those engaged in "secondary" activity seems irrational. Such a distinction allows employees of one firm to legally engage in a strike and picketing that would ruin the firm, as long as such picketing is to promote an improvement in their wages, hours, or conditions of employment, no matter how good these benefits may currently be. Employees of another firm could be working for miserly wages and under deplorable conditions. They are unskilled and easily replaceable. They have no economic leverage if they act directly against their employer. The only means they have of effectuating an improvement in their lot is to put pressure on a second firm — which for our purposes can be a retailer who handles their employer's product — so that the second firm will in turn pressure the first employer to improve work conditions. They decide to put a solitary picket in front of firm two's store. The picket has no effect. No one refuses to patronize the store, work at the store, or make a delivery to the store. Under current law [29 U.S.C. §158 (b) (4) ] this picketing is illegal even though firm two feels no economic harm and makes no attempt to pressure firm one. 

The statutory scheme the government has set up cannot be enforced in a rational way. In our examples, one class will not have its first amendment rights limited even though not limiting them will result in great harm to the compelling interest the government wishes to protect. The other class will be limited in this fundamental right even when no harm, or at best a remote chance of harm, is shown. If it is conceded that protection of the truly neutral firms from being forced to enter the dispute is a compelling governmental interest, the statute is overbroad. It protects a class far greater than those firms which are truly neutral and brought into a dispute not of their making.

Even if the classes were changed to include those participating in a labor context as opposed to those participating in a non-labor context, Congress has set up an irrational enforcement scheme for protecting the firm from economic harm. Consider the following hypotheticals and their present legal consequences.

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77 See Steelworkers Local 4203 v. N.L.R.B. 294 F.2d 256 (D.C. Cir. 1961); N.L.R.B. v. Musicians Local 802, 226 F.2d 900 (1955), for interpretations of §8 (b) (4), where the picketing had been ineffectual, holding such picketing nonetheless illegal.

1. A group of housewives are disturbed over the recent price increases in beef. They decide to peacefully picket a local supermarket chain. Their picket signs ask people not to enter the stores because of the high prices of beef. As a result, the markets lose thirty percent of their business, twenty deliverymen refuse to make deliveries to the markets, and fifty employees will not come to work. The market owners, in desperation, look for another beef wholesaler who will charge lower prices. They cut their beef prices to below cost.

2. Employees of Acme Meat Wholesalers are dismayed over their low wages, long hours, and generally poor working conditions. Numerous lengthy strikes in the past have resulted in no improvement in conditions. Their union decides it is time to enlist public support. They decide to send out one man, Smith, to a busy local market which deals with Acme. Smith carries a sign asking people not to enter the market, in order that the market will then pressure Acme into bettering the work conditions of the union members. Smith has absolutely no effect. No person refuses to enter the market upon seeing him. No driver refuses to make a delivery to the market.

Can the housewives be stopped from further picketing? Can Smith? The housewives cannot, for Congress has clearly forbidden the courts from stopping them, in §20 of the Clayton Act. Smith, however can be stopped, for Congress has forbidden his activity through the enactment of Section 8(b)(4) of the Taft-Hartley Act.

Altering the facts slightly, instead of carrying a sign, Smith now hands out leaflets to the same effect. Jones, an employee of the market, and a long-time ardent supporter of the labor movement, reads a leaflet. He does not speak with Smith, but decides not to work for the rest of the day. Smith is still engaged in illegal activity under 8(b)(4).

It would seem that the interests of the union outweigh the interests of the housewives. The housewives are interested in a decrease in cost of one item on their grocery list. The union members are interested in their wages which enable them to purchase all grocery and non-grocery items. The union members are also interested in their general work conditions. The statutory scheme Congress has enacted forbids proscribing the fundamental right of free expression of the group with the lesser interest and causing the far greater harm, while the group with a seemingly greater interest and causing far less harm can be limited in their first amendment rights. Clearly the scheme Congress has chosen, for effectuating its arguably compelling interest of protecting the firm from economic harm, is irrational.

Conclusion

There is a far more innocuous way of effectuating the governmental interest. The key is the harm done to the firm. This must be weighed against the interests of the labor organization. In a labor context, these interests would include wages, hours, work conditions, organizational rights, and other traditional labor interests defined in the Labor Management Relations Act. The issue then becomes, at what point can first amendment rights be impinged upon in this quest for these valid objectives? The answer is: at the point where the firms’ influence over the labor organization’s objectives become so remote as to no longer justify the harm that will be done to the firm; in other words, when the firm is truly neutral as to the dispute.

Is this test as incapable of application as the primary-secondary test has been? No. This is a balancing test, the traditional test the courts have used for years when dealing with limitations placed on constitutional rights. It is the same test the Supreme Court used on March 30, 1942, the day Wohl and Ritter’s Cafe were decided. The N.L.R.B. should fare better with this test than it has to date with the primary-secondary test of determining into which of these irrational, hence constitutionally invalid classes the activity under question falls.

Once a few cases have been decided using the balancing test, the Court might at that point examine the arguable supposition underlying Congress’ entire foray into the area, i.e., that the government’s interest in protecting even a clearly neutral firm is a compelling interest. But, then, perhaps the Court might reverse the order, and if its conclusion is that the government’s interest in protecting a neutral firm is not a compelling one, it could save itself the bother of trying to make a thus-far unworkable law into a workable one.

Jeffrey H. Spiegler†

† Law Review Editor; third year student, The Cleveland State University College of Law.