Secondary Consumer Picketing: The First Amendment Questions Remain

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I. INTRODUCTION

The United States Supreme Court has been faced many times with the question of the constitutionality of governmental restrictions on picketing in light of the first amendment protection of free speech. In these decisions, the Court has applied various approaches and tests in an effort to resolve the tension between governmental interests in controlling picketing and individual rights of expression consistent with the first amendment. The Court has confronted these issues particularly in the area of secondary consumer picketing, which is regulated by section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended.¹ These issues surfaced

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1. 29 U.S.C. § 158(b)(4)(ii)(B) (1976). Section 8(b)(4)(ii)(B) reads as follows:
   Section 8(b) . . . it shall be an unfair labor practice for a labor organization or its agents . . .
   (4)(ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an objective 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 159 of this title:
   Provided, That nothing contained in this clause (B) shall be construed to make
first in 1957 with the enactment of section 8(b)(4)(ii)(B), which was interpreted by the Supreme Court in 1964 in NLRB v. Fruit Packers Local 760 (Tree Fruits) and recently in NLRB v. Retail Store Employees Union Local 1001 (Safeco). Though confronted by difficult first amendment questions in both cases, a majority of the Court refused to come to grips with the inherent conflicts between governmental regulation of secondary consumer picketing and the first amendment guarantees of freedom of speech. Instead, the Court glossed over the issues, superficially concluding that no conflict exists.

This article will examine the Supreme Court's treatment of the constitutional issues involved in governmental control of picketing in general, and will identify the Court's varying approaches over the years. This discussion will, of course, involve a comparison of the Court's resolution of similar questions presented in cases involving different types of picketing. The Court's analysis of picketing in general will then be compared with the Court's treatment of secondary consumer picketing in particular, in an effort to identify whether the Court has been consistent in its approach to first amendment questions presented in all picketing cases. Such a comparison will reveal that the Court provides lesser protection of freedom of expression in the context of secondary consumer picketing, as opposed to political and other types of labor picketing. This lowered constitutional shield is apparently attributable to the Court's pragmatic approach to secondary consumer picketing. Analysis of case law in the area discloses that the Court has afforded reduced constitutional protection to secondary consumer picketing that has a substantial economic impact on the neutral secondary employer. The conclusion can be drawn, therefore, that control of effective picketing will be permitted by the Court. The danger of such an approach is that enforcement of first amendment rights is measured in monetary terms and will be protected only when picketing

unlawful, where not otherwise unlawful, any primary strike or primary picketing

. . . 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, 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. See the discussion of the legislative debate concerning the first amendment issues in the 1957 amendment to § 8(b)(4), at notes 38-39 infra and accompanying text.
4. 100 S. Ct. 2372 (1980).
is ineffectual.

II. THEORETICAL APPROACHES TO PICKETING AND THE FIRST AMENDMENT

During the past four decades, the Supreme Court has wrestled with the question of the validity of governmental regulation of picketing. The starting point for a discussion of these cases must be Thornhill v. Alabama.\textsuperscript{5} In that case, a state statute prohibiting loitering and picketing of businesses was applied against one of the members of a peaceful picket line. The picketer had peacefully asked an employee of the picketed business not to report to work. The United States Supreme Court reversed the conviction of the picket line member, finding the state statute unconstitutional under the first and fourteenth amendments.

Thornhill is significant for its strong statements in support of first amendment rights of individuals in labor disputes. The Court stated that "... the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." The Court emphasized that the means of disseminating such economic information may convince others not to engage in business relations with the picketed employer; such successful persuasion is, however, an improper basis upon which to impose governmental restrictions on methods of expression.\textsuperscript{7}

Since Thornhill, the Supreme Court has both upheld and struck down various state regulations of picketing, and has applied different theories to measure the constitutionality of a particular regulation. One such theory centers on the question of whether picketing is carried out in furtherance of an "illegal objective,"\textsuperscript{8} as described in federal or state legislation. This approach involves judicial analysis of the legitimate and substantial nature of the governmental interest sought to be fulfilled through regulation of picketing.\textsuperscript{9} Two early cases which reflect this approach are Bakery & Pastry Drivers Local 802 v. Wohl\textsuperscript{10} and Carpenters & Joiners Local No. 213 v. Ritter's Cafe.\textsuperscript{11} In Wohl, the union peacefully picketed in the vicinity of bakeries which sold goods to non-union independent bakery

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\bibitem{5} 310 U.S. 88 (1940).
\bibitem{6} Id. at 102. See also, AFL v. Swing, 312 U.S. 321 (1941). Contrast, Hudgens v. NLRB, 424 U.S. 507 (1976), in which the Court found the first amendment inapplicable to labor picketing carried out on private property.
\bibitem{8} Etelson, supra note 7, at 1-10.
\bibitem{9} See Note, First Amendment Analysis of Peaceful Picketing, 28 Maine L. Rev. 203, 204 (1976).
\bibitem{10} 315 U.S. 769 (1942).
\bibitem{11} 315 U.S. 722 (1942).
\end{thebibliography}
route drivers. The state trial court enjoined the picketing, despite its finding that the picketing had neither caused any customers to cease doing business with the bakeries, nor caused economic loss to the non-union bakery route drivers, who were the subject of the picketing. The United States Supreme Court reversed, finding that the picketers did not "abuse . . . the right to free speech"13 by engaging in unlawful conduct such as "violence, force or coercion."14

Ritter's Cafe, decided the same day as Wohl, provides a contrast to the latter decision, as the Supreme Court upheld a state court injunction of picketing by union members. In Ritter's Cafe, union members picketed Ritter's restaurant in protest of Ritter's employment of non-union employees to construct a building not connected with the restaurant. The picketing resulted in a sixty percent business loss to Ritter's restaurant. The state court found that the picketing, "the avowed purpose" of which was to force Ritter to employ union members for the construction work, violated a state anti-trust law. In upholding the injunction, the majority made it clear that state legislatures could set limits on picketing by "imposing reasonable regulations for the protection of the community as a whole. . . ."14 The state could, therefore, enjoin picketing carried out in furtherance of an objective proscribed by governmental regulations.

The Supreme Court again applied the "illegal objective" theory to uphold a state injunction of picketing in Giboney v. Empire Storage & Ice Co.15 In Giboney, the state court enjoined union picketing of Empire Storage and Ice Company carried out to compel Empire to stop selling ice to non-union peddlers. This picketing, which resulted in an eighty-five percent business loss to Empire, was enjoined as a violation of a state anti-trade restraint law. The Supreme Court held the injunction to be lawful enforcement of the state policy, and found that the first amendment did not protect picketing conducted for an unlawful purpose.

In 1957, the Court found that the state had validly enjoined picketing carried out in furtherance of the illegal objective of coercing employees in the selection of a bargaining representative in Teamsters Local 695 v. Vogt, Inc.16 In Vogt, the Court confirmed that the "illegal objective" theory could take precedence over the picketers' first amendment rights, regardless of whether state policy was expressed in the form of a state statute or merely a judicial announcement.17

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12. Id. at 775.
13. Id.
14. Id. at 726.
17. Id. at 293; See Hughes v. Superior Court, 339 U.S. 460 (1950), cited by the Vogt Court as an example of state policy announced by the judiciary, rather than by the state
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The Court's use of the "illegal objective" theory reveals its progressively permissive view of governmental control of picketing that applies economic pressure to achieve its goals. In weighing first amendment interests against unlawful objectives, the Court went so far as to defer to state control when the unlawful objective had not even been enunciated in the form of legislation. Further, the cases reveal that the amount of economic loss suffered by the employer as a result of the picketing figured in the Court's protection or prohibition of the picketing under the "illegal objective" theory. In Wohl, the Court struck down the state injunction, and specifically noted that the picketing did not cause economic loss to the picketed business. In contrast, the Court noted the great economic impact on the businesses in Ritter's Cafe, Giboney, and Vogt and upheld the state regulations.

Another theory that the Court has applied in its analysis of picketing and the first amendment is based on the constitutional axiom that governmental control of speech cannot be based on speech content. This doctrine provides broad protection of speech and has been applied most often in political picketing cases. The Court recently confirmed the vitality of this first amendment doctrine in the context of picketing in Police Department v. Mosley when it struck down a city ordinance prohibiting all picketing within 150 feet of any school, except peaceful picketing of any school involved in a labor dispute. Mosley is interesting and significant because of the Court's strong wording of the grounds for the decision. First, the Court held that the "ordinance is unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing." With such broad language, the Court seemed to be holding that a state legislature may not deny a public forum of expression to one type of picketing if other types of picketing are permitted. Furthermore, the Court found that the "central problem" with the ordinance was its content-based method of describing lawful picketing, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or

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18. See Note, supra note 17, at 171. There have been cases where the Court has applied the "illegal objective" theory but has not stated the amount of economic loss suffered by the picketed business. See, e.g., Building Service Union v. Gazzam, 339 U.S. 532 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950).
21. Id. at 94. The Court found that this discriminatory distinction violated the equal protection clause of the fourteenth amendment. Id. at 102.
its content." Despite such unequivocal statements throughout the opinion, the majority left the door open for differential treatment of labor and political pickets by stating that "discrimination among pickets must be tailored to serve a substantial governmental interest."

In Carey v. Brown, the Court was again faced with a state statute prohibiting all picketing but peaceful labor picketing, this time in residential neighborhoods. The Court found this statute to be "constitutionally indistinguishable from the ordinance invalidated in Mosley." Thus, as in Mosley, the Court struck down the statute as an impermissible attempt to regulate speech content in violation of the first and fourteenth amendments. Again, however, the Court acknowledged the possibility that there may be governmental interests "so compelling" that a narrowly drawn content-based regulation would pass constitutional scrutiny.

Another approach to the question of whether picketing can be regulated, although one which has not obtained the support of a majority of the Court, is the view of picketing as "speech plus." This theory, articulated by Justice Douglas in his concurring opinion in Wohl, identifies two elements present in picketing — speech and patrolling. The element of conduct is isolated under this theory to justify imposition of restrictions which could not otherwise be imposed on "pure speech." The fact that picketing has an element of conduct, however, does not automatically subject it to governmental control. As Justice Douglas recognized in Wohl, picketing that fulfills the purpose of relaying information concerning a labor dispute is protected by the first amendment, despite its difference from "pure speech."

23. 408 U.S. at 95. The Court supports this statement with seven case citations, all of which involved impermissible governmental restraints on political speech. The majority also cites Justice Black's concurring opinion in Cox v. Louisiana, 379 U.S. 536 (1965), as authority for its holding that the ordinance may not constitutionally regulate speech based on its subject matter. Id. at 97-8.

24. Id. at 95-96, 98, 99 n.6, 102.

25. Id. at 99.


27. Id. at 2289.

28. The Court found, however, that the statute in question did not constitutionally fulfill the state's interest in protecting the privacy of the home. Id. at 2296.

29. See Etelson, supra note 7, at 6; Note, supra note 9, at 206-07.


31. Id. See NLRB v. Fruit Packers Local 760, 377 U.S. 58, 76-80 (1964) (Black, J., concurring).
III. THE SUPREME COURT'S VARYING TREATMENT OF SECONDARY CONSUMER PICKETING

Each of the theoretical approaches to picketing cases has been applied by different justices of the Supreme Court when facing questions of governmental control of secondary consumer picketing. Before examining the Court's treatment of the first amendment issues inherent in this area of labor picketing, a brief outline of the legislative history of secondary consumer picketing will be helpful.

In 1947, Congress amended the National Labor Relations Act to prohibit secondary boycotts in section 8(b)(4). In 1959, Congress broadened section 8(b)(4) to prohibit union appeals to any person when the object of the appeal was to force or require that person to cease doing business with any other person. This amendment, section 8(b)(4)(ii)(B), was aimed at eliminating union picketing at the site of a neutral secondary employer doing business with the primary employer, with whom the union is in direct dispute. Such picketing, regardless of its appeal directly to the secondary employer or to consumers, was made illegal when the object was to exert pressure on the secondary employer to cease doing business with the primary employer.

Two provisos were added to this new section: the first explicitly provides that there is no prohibition of a primary strike or primary picketing; the second protects publicity, other than picketing, for the purpose of advising the public that the secondary employer sells a product produced by a primary employer with whom the union has a primary dispute.

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32. Section 8(b)(4)(A) of the Act (since amended as 8(b)(4)(ii)(B)) stated that it was an unfair labor practice for a labor organization to engage in or to induce any employees to engage in a:

strike or a concerted refusal . . . to use, manufacture, . . . handle or work on any goods . . . or to perform any services where an object thereof is . . . forcing . . . any employer or other person to cease using, . . . handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . .


33. For the text of § 8(b)(4)(ii)(B), see note 1 supra.


35. See Note, Labor Law, supra note 34, at 436.


37. Id.
Legislative debate concerning the proposed amendment to section 8(b)(4), before the provisos were added, reveals concern that a full prohibition on secondary consumer appeals would violate the first amendment. To quell such fears, the publicity proviso was added, although the proviso specified that picketing was not included as a valid means of disseminating information about a labor dispute. Despite this apparent legislative prohibition of secondary consumer picketing, however, the United States Supreme Court carved out an exception to section 8(a)(4)(ii)(B) in NLRB v. Fruit Packers Local 760 (Tree Fruits). In Tree Fruits, a union of fruit and vegetable packers picketed Safeway grocery stores in Seattle that sold Washington State apples packed by non-union employees of the primary employer. The picket signs clearly limited their appeal to consumers not to buy Washington State apples and clearly stated that the union’s dispute was with the primary employer, not with the secondary, Safeway.

In Tree Fruits, the Court held that secondary consumer picketing did not violate section 8(b)(4)(ii)(B) if the union appealed to consumers not to purchase a particular product produced by the primary employer against whom the union was on strike. The majority found that the picketing, directed only at the struck product, was permissible as there was no danger of the “isolated evil” which Congress intended to prevent. The Court described this “isolated evil” as the persuasion of consumers “to cease trading with [the secondary employer] in order to force him to cease dealing with, or to put pressure upon, the primary employer.” The appeal to consumers not to purchase the struck product, however, would not require consumers to cease trading with the secondary employer. This appeal, the Court found, “is closely confined to the primary dispute.”

It is important to note, for purposes of analysis of the Supreme Court’s most recent pronouncement on the question of consumer picketing, that the Tree Fruits Court rejected the court of appeals’ rationale in reaching the identical result in its consideration of Tree Fruits. Thus, the Supreme Court rejected, “for purposes of this case,” the use of the appellate court’s test of whether the secondary suffered or was likely to suffer economic loss. Instead, the Court worded its view of the secondary boycott prohibition as being “keyed to the coercive nature of the conduct, whether it

39. Id.
40. 377 U.S. at 58.
41. Id. at 63.
42. Id. at 72.
43. Id.
be picketing or otherwise.

Tree Fruits was, therefore, decided on a statutory basis. The majority summarily addressed the first amendment issues inherent in section 8(b)(4)(ii)(B) with a general statement of "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." However, despite this superficial reference to the constitutional issues, the rationale of the majority opinion parallels the "illegal objective" theory often applied by the Court when faced with first amendment questions in the context of picketing. The majority clearly identified the illegal objective of section 8(b)(4)(ii)(B) as the "isolated evil" of persuading consumers to cease doing business with the secondary employer in order to force the secondary to cease trading with the primary employer. As secondary consumer picketing is not conducted in furtherance of that illegal objective, it does not appeal to consumers to commit an illegal act. Therefore, the communication aspect of the picketing is protected speech. Furthermore, despite its rejection of the economic impact test, the minor loss to the picketed business surely must have influenced the Court in Tree Fruits, just as it appears to have influenced past Courts in Ritter's Cafe, Giboney, and Vogt.

Justice Black, concurring, and Justice Harlan, dissenting, in Tree Fruits reached their conclusions based on the "content based" and "speech plus" theories of picketing, respectively. Justice Black read the statute as prohibiting secondary consumer picketing on its face, thereby necessitating a finding on constitutional grounds. He reasoned that section 8(b)(4)(ii)(B) prohibited picketing based solely on the message conveyed by the picketing, and thus violated first amendment protection of free speech.

Justice Harlan, like Justice Black, found the statute to prohibit secondary consumer picketing. Unlike Justice Black, however, Justice Harlan found no constitutional infirmities under first amendment analysis. He based his opinion on Congress' ability to regulate the "non-communicative" aspects of picketing.

44. Id. at 68.
45. Id. at 63. As noted by the concurring and dissenting opinions in Tree Fruits, however, the statute, on its face, flatly prohibits all kinds of picketing. Id. at 76-93. Thus, the majority chose to ignore the clear language of the statute by carrying out the exception for secondary consumer picketing.
46. See text accompanying notes 14-18 supra.
47. 337 U.S. at 76 (Black, J., concurring).
48. Id. Furthermore, Justice Black found the "illegal objective" approach inapplicable, as the "struck product" pickets asked customers "to do something which [section 8(b)(4)(ii)(B)] itself recognizes as perfectly lawful." Id. at 79.
49. 377 U.S. at 80 (Harlan, J., dissenting). Justice Stewart joined in Justice Harlan's dissenting opinion.
Furthermore, Justice Harlan's dissent foreshadowed the practical problems of applying the struck product exception to other fact situations. In particular, he found the exception unworkable when a secondary employer's business consists primarily of sales of the struck product since consumer picketing directed at the struck product in this situation would, in effect, be identical to appeals to consumers not to patronize the secondary retailer at all.

The National Labor Relations Board grappled with the facts of Justice Harlan's hypothetical in 1974, in *Local 14055, United Steelworkers (Dow Chemical)*. In *Dow Chemical*, the union, which was on strike against Bay Refining Division, conducted consumer picketing against six gasoline stations selling Bay gasoline. The Board held that the picketing violated section 8(b)(4) due to the predictability of the economic impact of picketing on the secondary employers, which grossed between eighty percent and ninety percent of their revenues from sales of Bay gas. The Board misstated the *Tree Fruits* rationale as deciding the legality of consumer picketing based on the "minimal impact [of] the picketing . . . upon the total business of the secondary retailer. . . ." The large impact on the secondary retailer in *Dow Chemical* led the Board to find that the consumer picketing had the likely effect of totally discouraging consumers from patronizing the secondary retailers.

The Board's interpretation, or reinterpretation, of *Tree Fruits* was confirmed in 1980 by the Supreme Court in a six-to-three decision, *NLRB v. Retail Store Employee's Local 1001 (Safeco)*. In *Safeco*, the primary dispute was between the union and Safeco Title Insurance Company, against whom the union was on strike in Seattle. In furtherance of this dispute, the union picketed five local title companies. The companies derived over ninety percent of their gross revenues from the sale of Safeco insurance. The Board had held, consistent with its decision in *Dow Chemical*, that the picketing violated section 8(b)(4), as it was "reasonably calculated to induce customers not to patronize the neutral parties at all." The District of Columbia Circuit Court of Appeals set aside the Board's order in a literal interpretation of *Tree Fruits*, and found the picketing to fall within the protected exception of consumer picketing.

The Supreme Court upheld the Board's order in an opinion that reflects the absence of a theoretical basis for the result. Rather, the major-
ity shifted to a purely pragmatic approach to secondary consumer picketing. While it did not expressly adopt the "economic impact test" rejected by the *Tree Fruits* Court, the *Safeco* majority's statement that "the resulting injury to [the secondary retailers'] businesses is distinctly different from the injury... in *Tree Fruits*" indicates that the Court has indeed applied the economic impact test. This conclusion is reinforced by the Court's further statement that "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of [section] 8(b)(4)(ii)(B)."

Thus, unlike the Court in *Tree Fruits*, the majority in *Safeco* did not apply the "illegal objective" test of picketing. The rejection by the Court in *Safeco* of this test is easily explained. Had the majority been consistent in applying the "illegal objective" test, it could not have reached the desired result of prohibiting the picketing, as *Tree Fruits* established that secondary consumer picketing directed only toward the struck product does not advance an unlawful goal. The "illegal objective" test could not be manipulated under these facts, as had been done in the past, to enjoin picketing which resulted in great economic loss to the picketed business. Therefore, the majority, left without a legal rationale upon which to base its opinion, chose to ban the picketing based solely on its conclusion that the economic impact of the picketing was too harsh.

With regard to the first amendment issues at hand, the majority in *Safeco* was equally lax in its analysis. The Court found it a "well-established understanding" that picketing in furtherance of the "unlawful objective" of coercing customers to boycott a secondary employer does not violate the first amendment. As the dissent correctly pointed out, however, the holding in *Tree Fruits* had been that secondary consumer picketing furthers the illegal objective of coercion under section 8(b)(4) only when the picketing is directed at nonprimary goods. Obviously mindful of this inconsistency, the *Safeco* majority reshaped the "illegal objective" theory beyond recognition, and held that, when "picketing... predictably encourages consumers to boycott a secondary business," section 8(b)(4)(ii)(B) does not unlawfully restrict the first amendment.

The damage resulting from the majority's slipshod approach to first amendment analysis is clear. After *Safeco*, unions engaging in secondary consumer picketing must guess at the degree of their first amendment

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55. 100 S. Ct. at 2377.
56. Id.
57. See notes 9-18 supra and accompanying text.
58. 100 S. Ct. at 2378 (citing Electrical Workers v. NLRB, 341 U.S. 694 (1951)).
59. 100 S. Ct. at 2380 (Brennan, J., dissenting).
60. Id. at 2379 (emphasis added).
freedom to express their side of a primary labor dispute. The majority has balanced these constitutional freedoms on an undefined and unknown point at which the economic loss to the secondary business becomes so great as to outweigh the unions' constitutional rights. The Court admitted its uncertainty by leaving future cases to be decided on a case by case basis, dependent on the National Labor Relations Board's "expertise" in measuring economic impact.\(^\text{61}\)

The separate opinions submitted by the other justices reflect the continued disagreement over the proper theory to be applied to the first amendment questions involved in secondary consumer picketing. Justice Brennan, who delivered the majority opinion in *Tree Fruits*, authored the dissenting opinion in *Safeco*, joined by Justices White and Marshall. While remaining consistent in the statutory analysis of the issues, Justice Brennan continued his use of the "illegal objective" theory to test the lawfulness of the picketing. Therefore, according to the dissent, as secondary consumer picketing is illegal only if it coerces consumers to cease buying non primary goods, the union in *Safeco* acted lawfully in directing its consumer appeal solely to the struck product, regardless of the resulting economic loss to the secondary.\(^\text{62}\)

Justices Stevens and Blackmun each wrote separate opinions concurring in the result, but differing from the majority's treatment of the first amendment issues. Both Justices recognized that the regulation of picketing upheld in *Safeco* was based on the content of the message conveyed by the picketers, which would normally be an impermissible basis of control. Justice Stevens, however, viewed the regulation in *Safeco* to be constitutionally permissible as reaching only the "conduct element of picketing."\(^\text{63}\) Justice Blackmun also found the regulation to be constitutionally sound in light of the "greater weight" of the governmental interest in protecting neutrals from "coerced participation in industrial strife."\(^\text{64}\)

The concurring opinions, although more detailed than the majority's in first amendment analysis, are hardly more satisfying. Both justices acknowledged the content-based nature of the regulation, and yet seized unsound theories to support the governmental restrictions. Justice Stevens justified the restriction on secondary picketing by applying the "speech plus" theory. He found that section 8(b)(4)(B)(ii) regulates only the "conduct" of picketing. This restriction on the conduct of picketing, he concluded, is supported by the governmental purpose of protecting neutral employers from other parties' labor disputes. However, Justice Stevens did not justify his view that the conduct element in picketing in a

\(^{61}\) *Id.* at 2378.

\(^{62}\) *Id.* at 2381.

\(^{63}\) *Id.* at 2379 (Stevens, J., concurring).

\(^{64}\) *Id.* (Blackmun, J., concurring).
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labor context is a stronger force than in political picketing, and hence subject to greater regulation. Justice Blackmun's reasoning is reminiscent of the "illegal objective" approach applied by the Court in *Vogt*, which upheld regulation of picketing conducted in violation of a "state policy." Like the majority opinion, however, such an analysis leaves a void in defining the degree at which the governmental interest becomes so great as to override first amendment freedoms. Furthermore, it is unclear why the economic impact on the secondary employer transforms picketing in furtherance of a lawful objective, as in *Tree Fruits*, into picketing in furtherance of an unlawful objective, as in *Safeco*.

IV. CONTINUED VARYING TREATMENT OF SECONDARY CONSUMER PICKETING?

The narrowing of the *Tree Fruits* holding by *Safeco* and the corresponding expansion of the area of governmental regulation of consumer picketing has already made its way into one of the circuit courts of appeals. In *Kroger Co. v. NLRB*, the Sixth Circuit addressed the question of whether the union violated section 8(a)(4)(ii)(B) by its consumer picketing of Kroger supermarkets. The union's picket signs clearly identified the union's primary dispute with Duro Paper Bag Manufacturing Company and requested consumers to bring their own bags to hold their groceries. The National Labor Relations Board found that the union was engaged in lawful picketing. The Board reached this conclusion by applying the merged products doctrine, which holds secondary consumer picketing illegal when the boycotted primary goods or services have become fully merged into non-primary products. When the boycotted product is merged with non-primary products, the boycott necessarily urges consumers to cease buying non-primary products as well as the struck product.

The Board found, however, that the Duro brand paper bags had not become merged with Kroger's non-primary goods or services, as other means of carrying groceries were possible. Therefore, the secondary con-

65. *Id.* Compare Justice Stevens' reasoning in *Safeco* with the majority opinion in *Carey v. Brown*, in which Justice Stevens joined, and which held a state statute unconstitutional in its unjustified preference of labor picketing over political picketing.

66. See notes 16-18 *supra* and accompanying text.


68. In addition to picketing, the union also distributed handbills identifying the primary dispute. The distribution of handbills was not challenged. *Id.* at 2897.


consumer picketing, directed only at the struck primary product, was not unlawfully aimed at encouraging consumers to stop trading with the neutral secondary.

The Sixth Circuit, delivering its opinion in *Kroger Co.* after the Supreme Court's *Safeco* decision, mixed the merged products doctrine with the Court's theory in *Safeco* that picketing which "predictably encourages consumers to boycott a business" may be enjoined. The court of appeals, following this reasoning, held that "the Board should have restricted its inquiry to the likely result of the Union's appeal if it accomplished its boycott..." The court found, contrary to the Board, that the boycotted paper bags had merged into Kroger's business and thus concluded that the "likely result" of the secondary boycott would be to persuade consumers to cease doing business with the neutral secondary, Kroger.

In *Kroger Co.*, the Sixth Circuit made the error of identifying primary product boycotts of single product retailers with merged product boycotts. As the dissent noted in *Safeco*, the merged product doctrine follows logically from the *Tree Fruits* test. Since secondary consumer picketing of a struck primary product that has merged with non-primary goods necessarily goes beyond the primary dispute, the *Tree Fruits* test would allow the picketing to be enjoined. Furthermore, as the dissent in *Safeco* pointed out, a secondary retailer may carry other nonmerged products and allow the consumer to continue patronizing the secondary employer.

Although the majority in *Kroger* purported to read *Safeco* as retaining the *Tree Fruits* test of whether an object of the secondary consumer picketing is to involve the secondary in the primary dispute, its adoption of the *Safeco* test of the "likely result" of the picketing reveals the implications for future cases. In cases not involving merged product boycotts, there is no guide for predicting the likely result of a secondary picket of a business which normally derives over half of its gross revenue from sales of the struck primary product. This situation leaves the Board and the courts with complete discretion for determining the point at which the object of the secondary picketing is to coerce consumers not to do business at all with the secondary employer. Any movement from the *Safeco* dissent's position upholding all secondary consumer picketing aimed only at the struck product, therefore, must result in rule by judicial and administrative fiat.

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71. 100 S. Ct. at 2379.
72. 105 L.R.R.M. at 2900.
73. *Id.* at 2889. The circuit court set aside the dismissal of the complaint and remanded the case for further proceedings consistent with its opinion.
74. 100 S. Ct. at 2380.
75. 105 L.R.R.M. at 2889.
The dissenting opinion in *Kroger* presents the same problems of broad judicial discretion in future cases. Although the dissenting judge expressed concern for first amendment freedoms, he found that the governmental interest in enforcing consumer picketing that "threatens the employer with severe loss" outweighed the picketers' interest in free speech. The dissent, however, proposed no guidelines for determining the point at which the governmental interest overcomes the union's first amendment rights.

Therefore, lower federal courts as well as the National Labor Relations Board will be faced with a dilemma in future cases involving secondary consumer picketing. In attempting to follow both *Tree Fruits* and *Safeco*, judges and Board members must acknowledge the *Tree Fruits* holding that picketing aimed only at the struck product does not constitute an illegal object. This holding, however, is irreconcilable with the *Safeco* holding that consumer picketing of a struck product may be found to violate section 8(a)(4)(ii)(B). The lower tribunals will, therefore, have sole discretion to enjoin the picketing on a case by case basis. The result will be a grant of overly broad power to the Board and the courts to regulate a form of expression protected by the first amendment.

**V. Conclusion**

Since the Supreme Court decided *Thornhill v. Alabama*, there has been no doubt that "dissemination of information concerning the facts of a labor dispute" is protected by the first amendment. When faced with picketing as a form of expression used to disseminate labor information, however, the Court has been divided with regard to the proper theory to apply in deciding whether the picketing was constitutionally protected. Thus, the issue of governmental regulation of labor picketing has been addressed by the Supreme Court justices, who have applied in various cases the "illegal objective" theory, the "speech plus" theory, and the "content based" theory. Application of the "illegal objective" theory has been used by the majority most often in labor picketing cases. Examination of these cases reveals that the amount of economic loss suffered by the picketed employer appears to have influenced the Court in upholding or striking down governmental regulations of the picketing. In cases in which the economic pressure placed on the picketed employer had a more pronounced effect, the Court has shown greater willingness to permit the governmental control of expression.

While the "speech plus" and "content based" theories have not formed the basis of a Supreme Court majority opinion in labor picketing cases,

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76. *Id.* at 2901.
these theories have been applied by different justices in their separate opinions. These two theories take their places at opposite ends of the spectrum, with the "speech plus" theory permitting the greatest restrictions on picketing, and the "content based" theory serving as the broadest protection of expression through picketing.

In the narrower area of secondary consumer picketing directed toward the primary product, the Court is also divided on the issue of the proper first amendment theory to be applied. In Tree Fruits, while the majority purported to decide the case purely on a statutory basis, the reasoning of the decision paralleled the "illegal objective" theory in finding that the secondary consumer picketing was not carried out in furtherance of the statutory "isolated evil" of persuading consumers to cease all trading with the secondary employer in order to force him to cease dealing with the primary employer.

The "speech plus" and "content based" theories each surfaced in separate opinions in Tree Fruits. Predictably, application of the "speech plus" theory was recommended in order to uphold the restriction on picketing, while use of the "content based" theory would have found section 8(b)(4)(ii)(B) unconstitutional under the first amendment.

The last word from the Supreme Court on secondary consumer picketing came in the Safeco case. The Safeco majority opinion shows a breakdown of the theoretical base of Tree Fruits. In holding that section 8(b)(4)(ii)(B) allows restriction of secondary consumer picketing which "threaten[s] neutral parties with ruin and substantial loss," the majority takes a purely pragmatic approach with no guidelines for future cases.

The impact of Safeco on first amendment interests of unions conducting secondary consumer picketing is devastating. Unions are left to guess whether they may exercise their first amendment freedoms without penalty. The case by case approach approved by the Safeco majority will leave the unions continually uncertain of possible future liability, as each case will be decided on a factual basis. Furthermore, the irreconcilable nature of the Tree Fruits and Safeco holdings will result in inconsistent theories from the lower courts as they attempt to apply both holdings to future cases.

The full effect of Safeco on the first amendment rights of the picketers becomes clearer by comparing Safeco with past Supreme Court decisions. Safeco prohibits secondary consumer picketing based on the economic impact on the secondary employer. Therefore, the Safeco court would permit restriction of expression when the picketing is effective in conveying the message. This restriction violates the basic principle of Thornhill, which taught that methods of expression cannot be restricted merely be-

77. 100 S. Ct. at 2377.
cause the picketing is successful in persuading individuals to follow its requests. The restriction of expression in *Safeco* is not saved by the "illegal object" cases, since the picketing was not carried out in furtherance of an unlawful end. For, as the *Safeco* dissent pointed out, *Tree Fruits* held that picketing was not conducted in furtherance of an illegal objective when it is directed only at the struck product. Finally, the Court's recent cases of *Police Department v. Mosley* and *Carey v. Brown* bring home the difference in protection afforded political picketing as compared with labor picketing. The Court in *Mosley* and in *Carey v. Brown* used the "content based" theory to find unconstitutional ordinances, which, ironically, prohibited political picketing while allowing labor picketing. Apparently, in *Safeco*, the economic effects of the labor picketing earned it less protection than other types of expression.

The *Safeco* decision must be reevaluated in the light of the vital first amendment interests of the picketers. *Tree Fruits* clearly enunciated the finding that secondary consumer picketing does not fulfill an illegal objective when directed only at the struck primary product. By reshaping the definition of the illegal objective to depend on the economic impact on the secondary employer, the Court in *Safeco* distorted the *Tree Fruits* holding. As a result, first amendment interests will receive no protection when the amount of impact on the secondary employer is found to outweigh the picketers' first amendment rights. Such an arbitrary method of measuring constitutional rights will surely lead to inconsistent and inequitable results.

78. See notes 20-25 supra and accompanying text.
79. See notes 26-28 supra and accompanying text.
80. *Carey v. Brown*, note 26 supra, decided the same day as *Safeco*, found the state legislature's favoring of labor picketing over political picketing to be impermissible.