"CONNOTE NO EVIL": JUDICIAL TREATMENT OF THE SECONDARY BOYCOTT BEFORE TAFT-HARTLEY

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One of President Biden's campaign promises, passing the Protecting the Right to Organize (PRO) Act, would remove the "secondary boycott" prohibition from the National Labor Relations Act, a provision which prevents unions from pressuring employers' customers and associates in order to bargain with those employers effectively. This long-standing prohibition prevents unions and their workers from engaging in what is otherwise considered protected speech under the First Amendment, including picketing in public places. Some labor historians and commentators view the 1947 Taft-Hartley amendments, which codified the secondary boycott prohibition, as a reversal of liberal, New Deal policies. This Note shows, in fact, that both state and federal courts were deeply suspicious of the secondary boycott throughout the 1930s and 1940s. Even as state legislatures seemingly liberalized the law of labor protest in the early 1930s, state courts soon nullified these anti-injunction statutes through the application of common law tort principles. Likewise, the First Amendment right to picket declared by the Supreme Court in 1940's Thornhill v. Alabama *was quickly rolled back in the following terms when cases involving secondary picketing arrived at the Court. The history of the secondary boycott is not simply a cyclical one of repression, liberalization, and repression's return. Labor advocates should approach reforms with a careful eye to prevent merely defederalizing the law of secondary boycotts by repealing the NLRA prohibition and leaving its regulation to the states, for even the most progressive jurisdictions in the New Deal era were hesitant to recognize secondary activity as a legitimate form of protest, and the Supreme Court's First Amendment cases on labor protest leave little recourse for a legal challenge.*

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INTRODUCTION

For the first time since 1947, the labor movement has within its reach the federal legalization of the secondary boycott.[1] The Protecting the Right to Organize (PRO) Act, which passed the House of Representatives in February 2020, was reintroduced on February 4, 2021 and passed the House of Representatives on March 9, 2021.[2] It contains a slew of reforms to the National Labor Relations Act (NLRA), including expansion of the definition of "employee" and the creation of a private cause of action under the Act.[3] One of its most radical reforms, however, would be its wholesale elimination of the NLRA's section 8(b)(4), which explicitly prohibits the secondary boycott.[4] The secondary boycott is a powerful tactic for workers—it allows workers to apply pressure on a "secondary" business in order to persuade the "primary" business, which employs the workers, to

[1] *Compare* Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020), *with* Employee Free Choice Act, H.R. 1409, 111th Cong. (2009), *and* Labor Law Reform Act, S. 2467, 95th Cong. (1978), *and* S. 2650, 83d Cong. (1954), *and* H.R. 2032, 81st Cong. (1949). *See also* John Logan, *"All Deals Are Off": The Dunlop Commission and Employer Opposition to Labor Law Reform*, *in* THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION 276, 277 (Nelson Lichtenstein & Elizabeth Tandy Shermer eds., 2012); Benjamin Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 INDUS. & LAB. REL. REV. 327, 337 (1958) (observing a "gradual diminution in the sense of urgency about amending Taft-Hartley"); Gerald E. Rosen, *Labor Law Reform: Dead or Alive?*, 57 U. DETROIT J. URB. L. 1, 40 (1979) ("[T]he battle for legislative reform of our labor laws . . . is, although not dead, lying dormant."); Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES (July 16, 2009), https://www.nytimes.com/2009/07/17/business/17union.html.

[2] *See* Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020); Protecting the Right to Organize Act of 2021 H.R. 842, 117th Cong. (2021); Jeanine Santucci, *House Passes Sweeping Pro-Union Bill That Would Reform Labor Laws*, USA TODAY (Mar. 9, 2021), https://www.usatoday.com/story/news/politics/2021/03/09/house-passes-pro-act-bill-would-reform-labor-laws/4636381001.

[3] H.R. 842 § 2.

[4] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(b)(4).

change its practices or come to the bargaining table. In doing so, secondary boycotts leverage supply chains to make otherwise invisible workers visible.[5]

In 1947, a Republican Congress overrode President Truman's veto to enact the so-called Taft-Hartley amendments to the 1935 NLRA.[6] These amendments, among other things, explicitly prohibited the secondary boycott.[7] Under the statute, secondary boycotts involve labor union protests, including strikes or pickets, that "threaten, coerce, or restrain any person engaged in commerce" that is not the workers' direct employer so that they might persuade that employer to end a labor dispute on the union's terms.[8] These provisions continue to impact workers' ability to publicize labor disputes with their employers today.[9]

Restrictions on secondary boycotts long predate the NLRA. In the late nineteenth and early twentieth centuries, both common law and antitrust law following the passage of the Sherman Act in 1890 prohibited all forms of secondary activity, including secondary boy-

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[5] *See* Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018) (arguing for repeal of blanket prohibition on secondary boycotts to give gig and contingent workers a way to leverage their voices and secure broader economic rights); Charlotte Garden, *The PRO Act and Workplace Fissuring*, THE CENTURY FOUND. (Nov. 25, 2019), https://tcf.org/content/commentary/pro-act-workplace-fissuring (noting the "special challenge" that the ban on secondary boycotting poses to worker protest in the fissured modern economy).

[6] PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 499 (2010).

[7] 29 U.S.C. § 158(b)(4). Section 303 of the LMRA, passed several years after Taft-Hartley, provides a private cause of action for those injured by secondary activity. 29 U.S.C. § 187.

[8] 29 U.S.C. § 158(b)(4)(ii).

[9] In December 2018, the General Counsel's office of the National Labor Relations Board (NLRB) circulated an advice memorandum calling "Scabby," the inflatable rat beloved by construction unions that dots cities like New York and Chicago, "confrontational, threatening and coercive." David Roeder, *Scabby the Rat in Jeopardy? Fuhgeddaboudit!*, CHI. SUN-TIMES (Aug. 11, 2019, 3:30 PM), https://chicago.suntimes.com/platform/amp/news/2019/8/11/20794184/scabby-the-rat-union-national-labor-relations-board. As of October 2020, the NLRB is set to consider this question, leaving open the possibility of overruling longstanding Board precedent on this subject, although newly-appointed Acting General Council of the NLRB, Peter Sung Ohr has requested to withdraw this action. *NLRB Invites Briefs on Bannering and Displays of "Scabby the Rat"*, NAT'L LAB. RELS. BD. (Oct. 27, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-on-bannering-and-displays-of-scabby-the-rat; *Do you Smell a Rat? Scabby gets a Lifeline*, NAT'L L. REV. (Feb. 11, 2021), https://www.natlawreview.com/article/do-you-smell-rat-scabby-gets-lifeline. To a layperson, attaching words like "threatening" or "coercive" to a rat-shaped balloon may appear overblown. Yet arguing that unions' use of Scabby in public is "coercive" is saying that it is—or should be—illegal under federal labor law. *See also* Tzvi Mackson-Landsberg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519 (2006).

cotts and sympathy strikes.[10] As noted by William Forbath in *Law and the Shaping of the American Labor Movement*, federal and state courts issued well over 4,000 injunctions against unions and workers between 1880 and 1930.[11] Nathan Greene and Felix Frankfurter, who became a Supreme Court justice only nine years later,[12] penned a notable treatise critiquing this prevalent practice in 1930.[13] By that time, some state courts had already begun a process of liberalizing the common law's treatment of worker protest,[14] though this judicial reform fell short of legalizing secondary boycotts.[15]

Between 1900 and 1930, the labor movement fought for a series of state legislative enactments to protect workers' ability to unionize, bargain with employers, and strike and protest without court interference; states passed over fifty anti-injunction statutes in order to combat judicial overuse of the labor injunction.[16] These statutes were largely invalidated by both state and federal courts, on the theory that they deprived employers of their constitutional right to property.[17] Furthermore, in 1921, the Supreme Court invalidated an Arizona anti-injunction statute that had stripped Arizona courts of equity jurisdiction over labor disputes, holding that the statute denied employers equal protection under the Fourteenth Amendment.[18]

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[10] *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59–60 (1991); *see, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077 (Mass. 1896) (holding that picketing is inherently coercive, constituting an intentional tort inflicted against the defendants' employer's right to freely employ who he chooses). Two prominent Supreme Court cases interpreted the Sherman Antitrust Act and, later, the Clayton Antitrust Act to prohibit secondary boycotts. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 477–78 (1921) (holding that secondary boycotts constituted restraints of trade under the Clayton Antitrust Act); Loewe v. Lawlor, 208 U.S. 274, 292–96 (1908) (same for Sherman Antitrust Act).

[11] FORBATH, *supra* note 10, at 61–62.

[12] Once on the Court, Justice Frankfurter played a significant role in the development of the Supreme Court's First Amendment jurisprudence regarding labor picketing. *See infra* Part II.

[13] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

[14] By 1921, Georgia, Indiana, Minnesota, Missouri, Montana, New York, Ohio, Oklahoma, and Virginia held peaceful picketing lawful, though, by contrast, the common law of California, Illinois, Massachusetts, Michigan, New Jersey, Texas, and Washington found all forms of picketing to be illegal. Truax v. Corrigan, 257 U.S. 312, 365 n.29 (1921) (Brandeis, J., dissenting) (summarizing the variety of states' positions towards secondary picketing).

[15] While strike-related conspiracy prosecutions had dwindled "to a handful each year," injunctions were doled out far more frequently. FORBATH, *supra* note 10, at 61–62. For example, fifteen percent of recorded sympathy strikes were enjoined in the 1890s, while forty-six percent of such strikes were enjoined by the 1920s. *Id.*

[16] FORBATH, *supra* note 10, at 149.

[17] *Id.* at 150–52.

[18] *Truax*, 257 U.S. at 331–34 ("[Employers] would have had the right to an injunction . . . in any kind of a controversy which was not a dispute between employer and former

The dawn of the New Deal brought with it a swift reaction to this traditional judicial hostility towards labor activity. A Democratic Congress passed the Norris-LaGuardia Act in 1932, withdrawing jurisdiction to issue injunctions in labor disputes from the federal courts and declaring as the policy of the United States that "it is necessary that [the individual unorganized worker] have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, or coercion of employers of labor . . . ."[19] A host of states followed suit, enacting their own statutes withdrawing such jurisdiction from state courts.[20] In 1935, Congress passed the NLRA, which gave workers the right to organize into unions and included the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[21] By the beginning of the 1940s, the Supreme Court had re-interpreted the Sherman and Clayton Antitrust Acts in light of the passage of Norris-LaGuardia, overruling its earlier antitrust decisions and finding that antitrust law no longer strictly forbade most forms of labor protest, including secondary boycotts.[22]

The secondary boycott prohibition first added to the NLRA by Taft-Hartley, then, appears to hearken back to the Gilded Age. Indeed, the labor historian Nelson Lichtenstein argues that the entire Taft-Hartley Act crucially recalibrated the balance of power between unions and management in the postwar era.[23] For Christopher Tomlins, Taft-Hartley's secondary boycott provisions, along with the ban of the closed shop and prohibition of the jurisdictional strike,

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employees. . . . [T]he equality clause . . . forbids the granting of equitable relief to one man and the denying of it to another under like circumstances . . . .").

[19] Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102).

[20] *See infra* Part I.

[21] 29 U.S.C. § 157. Congress had first enacted the National Industrial Recovery Act (NIRA) in 1933, which included protections for collective bargaining between unions and employers. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523–24, 551 (1935) (describing protections but then invalidating the NIRA under the nondelegation doctrine and impermissible use of congressional power under the Commerce Clause).

[22] United States v. Hutcheson, 312 U.S. 219, 231 (1941) ("[W]hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading . . . the Norris-LaGuardia Act as a harmonizing text . . . ."); Milk Wagon Drivers' Union, Loc. No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940); Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940); Wilson & Co. v. Birl, 105 F.2d 948 (3d Cir. 1939); Levering & Garrigues Co. v. Morrin, 71 F.2d 284 (2d Cir. 1934).

[23] Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 765 (1998); *see also* Rich Yeselson, *Fortress Unionism*, DEMOCRACY: J. IDEAS, https://democracyjournal.org/magazine/29/fortress-unionism.

were "innovations" that clearly reversed New Deal-era labor policy.[24] This Note grapples with the implications of whether the New Deal era was really as progressive on this issue as it superficially appears. As we shall see in Part I, although the Taft-Hartley amendments marked a significant moment in the apparent "federalizing" of labor law,[25] which included federalizing the prohibition on secondary boycotts, the common law was alive and well at the state level throughout the 1930s and 1940s. Part I focuses on New York, widely considered one of the most progressive jurisdictions on labor issues during this period.[26] Yet despite the passage of a 1935 anti-injunction statute modeled after Norris-LaGuardia, its supposedly progressive courts continued enjoining secondary boycotts by interpreting their statutes in light of the restrictive common law, a process which legal scholars of the period coined the "judicial nullification" of progressive state legislation.[27] This process was repeated across the country.[28] The history of the secondary boycott is not simply a cyclical one of repression, liberalization, and repression's return. Rather, this conduct was largely prohibited throughout the twentieth century.

Part II shows how this history is corroborated by the Supreme Court's treatment of picketing during the development of its First Amendment jurisprudence beginning in the 1930s. Many labor law scholars today argue that the secondary boycott prohibition contradicts the Constitution's otherwise broad right of free speech.[29] The

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[24] CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 299–300 (1985). *But see* Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 535–36 ("[I]n accusing the Court of 'com[ing] full circle,' Justice Douglas exaggerated the extent of the Court's retreat. The picketing decisions of the mid-twentieth century reflected a durable compromise . . . ." (quoting Int'l Brotherhood of Teamsters, Loc. 695 v. Vogt, Inc., 354 U.S. 284, 295 (1957) (Douglas, J., dissenting))).

[25] *See* TOMLINS, *supra* note 24, at 299 (citing Garner v. Teamsters Loc. Union No. 776, 346 U.S. 485 (1953)).

[26] *See infra* Part I.

[27] *Judicial Nullification of Anti-Injunction Acts*, 4 INT'L JURID. ASS'N MONTHLY BULL., no. 11, Apr. 1936, at 12 (discussing the judicial nullification of state anti-injunction statutes by the Supreme Courts of Minnesota and Washington).

[28] *See infra* Part I.

[29] *See, e.g.*, James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 190 (1984); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 225–28 (2015); Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015); Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 23–24 (2011); Ian Hayes, *The Unconstitutionality of Section 8(b)(4)(ii)(B) and the Supreme Court's Unique Treatment of Union Speech*, 28 A.B.A. J. LAB. & EMP. L. 129, 130 (2012); Michael J. Hayes, *It's Now Persuasion, Not Coercion: Why Current Law on Labor*

First Amendment protects civil rights picketing,[30] picketing outside of abortion clinics,[31] and picketing outside of private citizens' funerals.[32] By contrast, the Supreme Court has a long-standing doctrine of constitutional avoidance in labor disputes[33] and characterizes the secondary labor boycott prohibition as reflecting "Congress'[s] striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."[34] This "delicate balance" prohibits secondary union boycotts even when the object of the boycott is political, rather than economic—a clear reversal, as James Pope argues, of the normal First Amendment prioritization of political speech over economic prerogatives.[35]

Catherine Fisk, a labor law scholar, has argued that "[t]he past offers a guide" to envision what the First Amendment *could* look like for unions.[36] She argues that the period immediately before Taft-Hartley was marked by a Court which recognized worker speech at the First Amendment's core, "grant[ing] robust protection for labor protest from 1939 to 1942."[37] From this bedrock of constitutional precedent, Fisk derives a picture of a new, progressive First Amendment for labor.[38] A recent report produced by the Harvard Law School Labor & Worklife Program, *Clean Slate for Worker Power*, adopted Fisk's arguments as further justification for repealing Taft-Hartley's secondary boycott prohibition.[39]

Protest Violates Twenty-First Century First Amendment Law, 47 HOFSTRA L. REV. 563, 564 (2018) [hereinafter Hayes, *It's Now Persuasion*]; Zoran Tasiæ, *The Speaker the Court Forgot: Re-Evaluating NLRA Section 8(b)(4)(B)'s Secondary Boycott Restrictions in Light of* Citizens United *and* Sorrell, 90 WASH. U. L. REV. 237, 240 (2012).

30 NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

31 Hill v. Colorado, 530 U.S. 703 (2000).

32 Snyder v. Phelps, 562 U.S. 443 (2011).

33 *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 576–77 (1988).

34 *Claiborne Hardware Co.*, 458 U.S. at 912 (citing NLRB v. Retail Store Emps. Union, Loc. 1001 (*Safeco*), 447 U.S. 607, 618–19 (1980) (Blackmun, J., concurring)).

35 *See* Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225–26 (1982); Pope, *supra* note 29, at 197–98.

36 Fisk, *supra* note 29, at 2064.

37 *Id.* at 2066 (citing Cafeteria Emps. Union, Loc. 302 v. Angelos, 320 U.S. 293, 296 (1943); Bakery & Pastry Drivers Loc. 802 v. Wohl, 315 U.S. 769, 774 (1942); AFL v. Swing, 312 U.S. 321, 325 (1941); Carlson v. California, 310 U.S. 106, 112–13 (1940); Thornhill v. Alabama, 310 U.S. 88, 102–03 (1940); Schneider v. New Jersey, 308 U.S. 147, 160 (1939); Hague v. CIO, 307 U.S. 496, 515 (1939)).

38 *Id.* at 2076.

39 SHARON BLOCK & BENJAMIN SACHS, LABOR AND WORKLIFE PROGRAM, HARV. L. SCH., CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 58 n.132 (2020) ("Among other advantages, this change would bring labor law into compliance with the First Amendment.").

Yet a closer look at these older Supreme Court cases leaves it unclear as to whether they can provide a progressive vision of the First Amendment. In fact, as I will argue in this Note, the First Amendment right for labor picketing that the Supreme Court first set out in *Thornhill v. Alabama* included exceptions for violence or the protection of private property, which ultimately swallowed the rule.[40] Likewise, the Court struggled with whether labor speech involved the vindication of political or economic rights, a dispute which ultimately culminated in the application of rational basis review, rather than strict scrutiny, to states' regulation of picketing.

Finally, as developed in Part III, these analyses of both 1930s and 1940s state and Supreme Court cases show that the past should not be seen as a prologue to a progressive vision of the First Amendment, or of labor protest regulation in general,[41] for past practice was largely consistent with the spirit of the Taft-Hartley amendments. This consideration is all the more important given that passage of the PRO Act, which would eliminate the secondary boycott prohibition, was a linchpin of President Biden's workers' rights agenda during his 2020 campaign and is one of the AFL-CIO's top priorities for 2021.[42]

Labor advocates who want to protect secondary activity should approach such a reform with a careful eye, given that the Act's text would merely remove the prohibition without discussing its preemptive effect on state regulation of secondary boycotts. If the Act's framers are serious about legalizing secondary activity for all workers—as I believe they are[43]—then they must explicitly preclude states' attempts to define the scope of lawful labor activity more narrowly. After all, as this Note shows, even the most progressive states were historically hesitant to recognize secondary activity as a legitimate form of protest, and the Supreme Court's First Amendment cases governing labor protest leave little recourse for legal challenge.

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40 *See infra* Part II; *Thornhill*, 310 U.S. 88.

41 *Contra* Fisk, *supra* note 29.

42 *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, JoeBiden.com, https://joebiden.com/empowerworkers (last visited Feb. 3, 2021); *The Workers First Agenda: 5 Priorities for 2021*, AFL-CIO, https://aflcio.org/sites/default/files/2021-01/AFL-CIO%20Workers%20First%20Agenda.pdf (last visited Feb. 3, 2021).

43 *See* H.R. Comm. on Educ. & Lab., 116th Cong., Section-by-Section: Protecting the Right to Organize Act of 2019 (Comm. Print 2019), https://edlabor.house.gov/imo/media/doc/2019-05-02%20PRO%20Act%20Section%20by%20Section.pdf ("This section removes those prohibitions to permit unions to exercise these basic First Amendment rights.").

I
SECONDARY PICKETING BEFORE TAFT-HARTLEY IN THE STATES

In response to federal courts' traditional hostility to labor picketing, and two years after Felix Frankfurter and Nathan Greene's publication of *The Labor Injunction* in 1930, a Democratic Congress passed the Norris-LaGuardia Act.[44] The Act removed jurisdiction from federal courts to issue injunctions against acts "involving or growing out of any labor dispute," including refusing to work and publicizing labor disputes,[45] unless otherwise unlawful activity had been threatened or committed and the complainant had suffered "irreparable injury,"[46] the traditional requirement for obtaining an injunction at common law.[47] This was a significant move at the time. *Erie Railroad Co. v. Tompkins*, which declared "[t]here is no federal general common law," would not be decided until 1938.[48] In the meantime, Norris-LaGuardia prevented federal judges from applying federal common law to enjoin worker activity.[49] This defederalization of labor injunctions accompanied the passage of the NLRA in 1935, which guaranteed the federal right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[50] The framers of the NLRA may have intended the NLRB to exercise jurisdiction over all unfair labor practices, even if employees had engaged in activity considered tortious under state law.[51] Along those lines, the NLRB granted reinstatement to employees who engaged in conduct considered unlawful under state common law

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[44] *See generally* Ralph K. Winter, Jr., Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 71 (1960).

[45] 29 U.S.C. § 104.

[46] 29 U.S.C. § 107. The statute also prohibited yellow-dog contracts, i.e., agreements in which employees contracted with employers not to join a union. 29 U.S.C. § 103; *cf.* Winter, *supra* note 44, at 71–72 (noting "judicial protection" of yellow-dog contracts prior to 1932).

[47] *See generally* C. Griffith Towle & Robert Zarco, *Proving Irreparable Harm — Have the Standards Changed?*, AM. BAR ASS'N 35TH ANN. F. ON FRANCHISING (2012), https://www.americanbar.org/content/dam/aba/publications/franchising_past_meeting_materials/2012/w16.pdf.

[48] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[49] *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (upholding Norris-LaGuardia despite earlier precedent invalidating a state anti-injunction statute under equal protection).

[50] 29 U.S.C. § 157.

[51] Note, *Availability of NLRA Remedies to "Unlawful" Strikers*, 59 HARV. L. REV. 747, 766–67 (1946) (citing 79 CONG. REC. 7653–75, 9706–30 (1935); Am. News Co., 55 N.L.R.B. 1302, 1316 n.19 (1944) (Millis, dissenting)). *But see* Case Comment, *Labor Law—National Labor Relations Act—Refusal of Reinstatement for Unlawful Conduct*, 52 HARV. L. REV. 1017, 1018 (1939) (citing 79 CONG. REC. 7661, 9686 (1935); S. REP. NO. 74-573, at 6 (1935)).

throughout this period.[52] At the federal level, then, the secondary boycott seemed immune to censure.

Earlier attempts at labor reforms at the state level, whether to substantively change the common law and legalize all forms of picketing or to remove courts' equity jurisdiction, had ended in failure.[53] The passage of Norris-LaGuardia, however, inspired several states to pass new anti-injunction statutes, removing their own courts' ability to issue injunctions in labor disputes. Seventeen states—even those whose courts had determined at common law that picketing was unlawful—passed such statutes modeled after the federal Act.[54] Over a decade later, Democratic senators would look back on these state reforms as a progressive contrast to the proposed 1947 Taft-Hartley amendments.[55]

Yet a closer look at the operation of these states' anti-injunction statutes reveals that they did not have as radical an effect on the law of labor protest as may have been anticipated or assumed following their passage. During this post-enactment period, state courts mirrored their Gilded Age predecessors in abrogating the reach of these statutes by elevating common law property rights over the procedural rights granted by the state legislatures: By 1936, some legal commentators had already noted that state courts were narrowly interpreting the term "labor dispute," which defined the scope of these statutes' reach, to "judicially nullif[y]" anti-injunction statutes and declare that these statutes merely codified, rather than limited, the common law of picketing.[56]

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[52] *See, e.g.*, NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 504 (2d Cir. 1942); Columbia Pictures Corp., 64 N.L.R.B. 490, 525–26 (1945) ("[W]e think it most unlikely that Congress intended to exclude from the concerted activities protected by Section 7 all conduct deemed tortious under state rules of decision[] or statutes, or city ordinances, merely because of the objective sought to be accomplished." (quoting *Am. News*, 55 N.L.R.B. at 1312)). These decisions conflicted with the dicta of a series of Supreme Court cases during this period. *See* S.S.S. Co. v. NLRB, 316 U.S. 31, 38–39, 48 (1942); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 258 (1939); NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939) ("The Act does not prohibit an effective discharge for repudiation by the employe[e] of his agreement, any more than it prohibits such discharge for a tort committed against the employer."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45–46 (1937).

[53] *See supra* notes 15–18 and accompanying text.

[54] This included Colorado, Connecticut, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. *See* Irving Robert Feinberg, *Picketing, Free Speech, and "Labor Disputes*," 17 N.Y.U. L.Q. REV. 385, 386 n.10 (1940); Comment, *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, 53 YALE L.J. 553, 554 n.3 (1944).

[55] *See* S. MINORITY REP. NO. 105-2, at 20 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 482 (1948).

[56] *See, e.g.*, *Judicial Nullification of Anti-Injunction Acts*, *supra* note 27, at 12.

As a progressive jurisdiction in the 1930s,[57] New York presents an interesting case study of the dominance of common law principles as applied to secondary boycotts, even in the face of explicit legislative enactments to reduce courts' application of those principles against labor protestors. This Part shows how this dominance manifested in two distinct stages. Initially following the passage of New York's anti-injunction statute in 1935, some lower courts found that it merely codified past precedent and continued to enjoin both primary and secondary picketing.[58] In 1937, the New York Court of Appeals announced the so-called "unity of interest" test in *Goldfinger v. Feintuch*, which seemed to signal a newfound protection for secondary activity under New York law.[59] Democratic senators in 1947 would later compare Taft-Hartley's proposed prohibitions of the secondary boycott to the unity of interest test, assuming that the New York courts had liberalized the law of secondary activity.[60] But the development of that test was not so expansive; in the following years, courts created multiple carveouts, including for cases involving alleged violence or fraud (broadly understood) and protests of businesses who were only the "ultimate consumer[s]" of non-union goods.[61] Rather than being the center of a progressive liberalization of the law, New York exemplifies the continuity in courts' treatment of the secondary boycott throughout the interwar period as it struggled to define the valid boundaries of state regulation in light of the need to protect local and state economies against potentially disruptive labor protest.

A. The New York Anti-Injunction Statute: A Case Study

Many of the state anti-injunction statutes passed in the 1930s were modeled after the Norris-LaGuardia Act, and New York's was no exception.[62] Like Norris-LaGuardia, New York's statute withdrew

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[57] *See, e.g.*, Comment, *The New York Anti-Injunction Act*, 49 YALE L.J. 537, 537 (1940).

[58] *See infra* Section I.A.

[59] *See infra* note 78 and accompanying text (permitting unions to picket retailers of nonunion goods produced by the entity with which the union has a dispute, so long as the retailer and entity are in a "unity of interest").

[60] S. MINORITY REP. NO. 105-2, at 20 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 482 (1948) (asserting "an unmistakable trend in the law" and a "growing acceptance of certain forms of action . . . against parties . . . not immediately involved in a labor dispute when (1) such parties are found to possess 'unity of interest' with the disputing employer, and (2) such action is found to be necessary in order to promote the legitimate interests of the labor union").

[61] *See infra* Section I.C.

[62] *Compare* N.Y. Civil Practice Act § 876-a(10) (repealed 2015), *with* Norris-LaGuardia Act, 29 U.S.C § 101 ("No court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except in a

jurisdiction to issue injunctive relief "in any case involving or growing out of a labor dispute," unless certain procedural requirements were satisfied and the court made certain enumerated findings about the conduct at issue, including whether "unlawful acts have . . . been threatened or committed and that such acts . . . will be executed or continued unless restrained."[63] The definitions of "labor dispute" and "unlawful acts," then, became crucial questions under these statutes. The Supreme Court had interpreted "labor dispute" in the federal statute broadly, finding in 1938's *New Negro Alliance v. Sanitary Grocery Co.* that a peaceful picket to publicize a dispute with a store that refused to hire black workers constituted a statutory "labor dispute," even though the picketers were not store employees.[64]

In the two years following the passage of New York's anti-injunction statute,[65] however, the interpretation of a statutory "labor dispute" rested in the lower courts, and several cases indicated that courts would resist the application of this new statute altogether in order to protect the preexisting common law regime. One case, *Thompson v. Boekhout*, involved an injunction granted by a New York lower court which restrained a union from picketing a movie theater to protest its firing of a projectionist after refusing to pay him the union wage of forty-nine dollars per week: The Appellate Division affirmed.[66] While acknowledging the "evident" intent of the legislature to "prevent[] the use of law court machinery to protect property rights," the court read the statute "with the rights and claims of the public and of business men in mind."[67] Given the owner's right to hire whom he wished, the court "conclu[ded] that the legislature cannot have intended" to prevent injunctions in such a scenario and found that no statutory labor dispute existed.[68] In so doing, the court read the preexisting common law regime, which valued property rights over workers' speech rights, into the statute. In another case, *Remington Rand, Inc. v. Crofoot*, the Appellate Division made this explicit and justified the court's lengthy reliance on common law pre-

strict conformity with . . . this chapter; nor shall any such . . . injunction be issued contrary to the public policy declared in this chapter.").

[63] *Compare* N.Y. Civil Practice Act § 876-a (repealed 2015), *with* 29 U.S.C. § 107.

[64] 303 U.S. 552, 555, 561, 563 (1938).

[65] New York's anti-injunction statute was passed in 1935. *The New York Anti-Injunction Act*, *supra* note 57, at 537.

[66] 291 N.Y.S. 572, 573 (App. Div. 1936) (per curiam). For a description of the case's facts, see *id.* at 574–75 (Edgcomb, J., dissenting).

[67] *Id.* at 573.

[68] *Id.* One judge dissented, finding that the facts constituted a statutory labor dispute, and that New York's anti-injunction statute neither deprived the plaintiff of due process of law under the federal Constitution nor the courts of their power of general jurisdiction under the New York Constitution. *Id.* at 574–83 (Edgcomb, J., dissenting).

cedent by holding that the anti-injunction statute was "an elaborate and drastic statute" which was merely "declaratory of the existing law."[69] The "crowds" of striking workers outside the plaintiff's factory, in the court's view, unlawfully interfered with "[t]he right to carry on business" and could be enjoined.[70]

This resistance against the notion that the anti-injunction statute may have abrogated the application of the common law also manifested in *Grandview Dairy, Inc. v. O'Leary*, which involved a secondary boycott.[71] Dairy workers struck their employer when the corporation refused to renew its contract with the workers' union.[72] They then picketed locations at which the dairy's milk was sold.[73] "The public policy of this state," the court declared, "has consistently been opposed to secondary boycotts."[74] Given that "the law never countenances coercion," the court found itself bound to enjoin the secondary picketing, because it sought to "intimidat[e]" rather than persuade the dairy's customers to refuse the dairy's products.[75] The court warned that any interpretation of the statutory term "labor dispute" that included the conduct at issue could have ripple effects that would ruin the local economy.[76] The anti-injunction statute appeared to have done little to change preexisting judicial attitudes towards secondary picketing.[77]

B. Goldfinger v. Feintuch *and the Unity of Interest Test*

The scope of the statute appeared to shift when the New York Court of Appeals first addressed the meaning of "labor dispute" in 1937's *Goldfinger v. Feintuch*.[78] The Court of Appeals found that workers' protest of a third party in a "unity of interest" with the workers' employer constituted a "labor dispute" within the meaning

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[69] 289 N.Y.S. 1025, 1029 (App. Div. 1936).

[70] *Id.* at 1027 (quoting Dorchy v. Kansas, 272 U.S. 306, 311 (1926)).

[71] 285 N.Y.S. 841, 842–43 (Sup. Ct. 1936).

[72] *Id.*

[73] *Id.* at 842.

[74] *Id.* at 843.

[75] *Id.*

[76] *Id.* at 845. The court alternatively argued that the injunction was permissible under the statute's "fraud" exception, because some of the workers' signs had given a "false presentation of [the] situation." *Id.*

[77] Nor was this opinion limited to the courts. A contemporary law review article agreed with the courts' reasoning, declaring that the New York "statute is merely declaratory of the existing law on secondary boycotts." G.F. Whitley, Jr., Comment, *Legislation: Labor Law—New York Anti-Injunction Act*, 22 VA. L. REV. 83, 87 (1935); *see also* Osmond K. Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. CHI. L. REV. 577, 581 (1939).

[78] 11 N.E.2d 910 (N.Y. 1937).

of the New York statute.[79] A broad statement of that rule implies that this "unity of interest" test presumptively withdrew jurisdiction over all secondary boycotts. Yet it was not clear, even from the court's opinion itself, whether the holding was so radical. In particular, the Court of Appeals appeared reluctant to find that the statute deprived earlier common law decisions of any enforcement power.[80]

Goldfinger involved a dispute between Ukor, the only non-union manufacturer of kosher meat products in New York City, and Butcher Union Local No. 174. After trying and failing to negotiate with the owners of Ukor, the union solicited Ukor's customers not to buy Ukor meats. One of those customers was Isaac Goldfinger, who owned a delicatessen in the Lower East Side and insisted on selling Ukor meats. In response to Goldfinger's refusal, the union stationed pickets in front of Goldfinger's deli in both English and Yiddish: "Ukor Provision Company is unfair to union labor. Please buy union made delicatessen only."[81] Members of the picket line allegedly "accosted" customers frequenting Goldfinger's establishment, calling his wares "[s]cab merchandise,"[82] but were otherwise peaceful. When police were called, no one was arrested for disorderly conduct.[83] Nonetheless, Goldfinger testified before the lower court that he lost $100 a week as a result of the picket—the equivalent of over $1800 today.[84] Goldfinger sued to enjoin the picketing in state court, apparently with the help of Ukor's lawyers.[85]

The trial court relied on a liberal interpretation of prior common law to refuse the injunction: Noting that, at common law, "[p]icketing connote[d] no evil" in the absence of tortious conduct or overcrowding,[86] the court quickly distinguished five prior controlling cases in which injunctions had been granted because they, unlike in *Goldfinger*, involved "some element of fraud or coercion or intimida-

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[79] *Id.* at 913–14.

[80] *See id.* at 913.

[81] Goldfinger v. Feintuch, 288 N.Y.S. 855, 857 (Sup. Ct. 1936), *rev'd*, 295 N.Y.S. 753 (App. Div. 1937), *modified*, 11 N.E.2d 910 (N.Y. 1937).

[82] *Id.*

[83] *Id.*

[84] *Id.* at 856–57. For the data I used to calculate the value of a dollar in 1936 in real terms, see U.S. Bureau of Lab. Stat., *Consumer Price Index for All Urban Customers: Purchasing Power of the Consumer Dollar in U.S. City Average (CUUR0000SA0R)*, FRED, Federal Rsrv. Bank of St. Louis, https://fred.stlouisfed.org/series/CUUR0000SA0R (last visited Feb. 25, 2020).

[85] *Goldfinger*, 288 N.Y.S. at 857–58.

[86] *Id.* at 860–61 (noting that, though it may be accompanied by illicit "violence, trespass, threats, or intimidation, express or implied," inherently, "[p]icketing connotes no evil").

tion."[87] Given the state of the common law by 1936, these distinctions were a sleight of hand. One case the court cited involved the mere refusal to handle nonunion products, whose record involved activity as peaceful as the picket in *Goldfinger*.[88] Another was *Grandview Dairy*, whose facts were largely indistinguishable despite the court's holding that the conduct involved "fraud."[89] To bolster this decision, which only shakily relied on past precedent, the court balanced the parties' interests by evaluating the role that the picket played in New York's modern industrial economy:

> It is unfortunate that one not an immediate party to a dispute, and whose conduct did not provoke it, should be dragged into it. But this result is an incident, though a regrettable one, of our economic and social system. If this plaintiff has rights, so have the members of the defendant union. . . . As the plaintiff applies for equitable relief, the equities are to be weighed and measured, and judgment rendered accordingly.[90]

This reasoning, which relied not on statutory text or precedent but political economy, was quickly reversed by the Appellate Division, which granted the injunction.[91] The lack of reliance on the anti-injunction statute suggested, however, that despite the court's rejection of prior cases like *Grandview Dairy*, the court did not want to recognize this conduct as a labor dispute that would deprive it of jurisdiction to rule altogether.

The case then went to the Court of Appeals. Unlike the Supreme Court, the Court of Appeals definitively stated that under the common law, picketing "the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally" was illegal.[92] Nonetheless, they found that no illegal conduct was at issue, so long as a manufacturer and retailer were in a "unity of interest," a union could "follow the nonunion goods" to the retailer to persuade customers not to buy that nonunion product.[93] The Court of Appeals recognized an exception to the common law's prohibition of secondary boycotts, appealing to the

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[87] *Id.* at 861.

[88] The trial court had characterized the disputed picket as peaceful, though it granted the injunction. Auburn Draying Co. v. Wardell, 152 N.Y.S. 475, 505–06 (Sup. Ct. 1915), *aff'd* 178 A.D. 270 (N.Y. App. Div. 1917), *aff'd* 124 N.E. 97 (N.Y. 1919). The Court of Appeals ultimately agreed, finding the defendants' conduct inherently coercive. *Auburn Draying Co.*, 124 N.E. at 100.

[89] *See supra* text accompanying notes 71–77.

[90] *Goldfinger*, 288 N.Y.S. at 855.

[91] Goldfinger v. Feintuch, 250 A.D. 751 (N.Y. App. Div. 1937), *modified*, 11 N.E.2d 910, 912 (N.Y. 1937).

[92] *Goldfinger*, 11 N.E.2d at 912.

[93] *Id.* at 913.

impact that non-union manufacturers and their distributors could have on union workers' wages.[94] Further, the Court of Appeals found that New York's anti-injunction statute expressly applied, for the statute specified that labor disputes included "when the case involves persons who are engaged in the same industry, trade, craft . . . or occupation."[95]

Despite *Goldfinger*'s liberal holding, however, the decision marked the first step by New York's high court towards the judicial nullification of the anti-injunction statute. The *Goldfinger* court was clearly unwilling to see the anti-injunction statute as a threshold barrier to the exercise of jurisdiction in labor protest cases. Rather, akin to the trial court's decision to apply common law to the case at hand, the Court of Appeals shied away from interpreting the statute as a redefinition of what constituted "illegal" conduct, despite its broad definition of a "labor dispute."[96] In the end, the court merely modified the Appellate Division's injunction to enjoin all picketing that did not follow Ukor's product to Goldfinger.[97] The same test which Democratic senators would later hail as demonstrating "a growing acceptance" of certain forms of secondary boycott[98] was summarized in a Brooklyn *Daily Eagle* headline less optimistically: "Court Defines the Legal Limits of Activity—Bars Coercion of Outsiders."[99]

In the ensuing years, rather than refuse to exercise jurisdiction over labor picketing cases at all, the New York courts struggled to

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[94] *Id.* ("Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members.").

[95] *Goldfinger*, 11 N.E.2d at 914 (citing N.Y. Civil Practice Act § 876(f) (repealed 2015)).

[96] *Compare id.* at 912–13, *with* N.Y. Civil Practice Act § 876(f)(5) ("[G]iving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute . . . by any method not involving fraud, violence, or breach of the peace."). This presumption was reflected in the two concurrences and single dissent that accompanied the opinion. Justice Lehman concurred that all of the union's conduct was lawful, and therefore that the injunction should be reversed entirely. *Goldfinger*, 11 N.E.2d at 914 (Lehman, J., concurring). Justice Rippey argued that the conduct would be an illegal secondary boycott but for the finding of a unity of interest, and that the anti-injunction statute clearly did not apply. *Id.* at 915 (Rippey, J., concurring). Finally, Justice Hubbs argued in dissent that the conduct was clearly an illegal secondary boycott and therefore enjoinable. *Id.* (Hubbs, J., dissenting).

[97] *Goldfinger*, 11 N.E.2d at 915.

[98] *See supra* note 60 and accompanying text.

[99] *See* Brooklyn Daily Eagle, No. 340 (Dec. 8, 1937), https://www.newspapers.com/image/52674747. Funnily enough, that same day, an editorial in the *Daily Eagle* quoted *Goldfinger* in order to denounce Newspaper Guild strikers who, it claimed, had picketed the paper's advertisers—itself a secondary boycott. *See also id.* (discussing the refusal of courts after *Goldfinger* to apply the anti-injunction statute to newspaper workers picketing advertisers).

define what exactly constituted a "unity of interest." The *Goldfinger* court had gestured towards the necessity of recognizing the complexity of industrial supply chains for the benefit of workers—or else they would be unable to publicize their labor disputes.[100] But this idea was ultimately stymied by the application of common law which predated such views of workers' needs in an industrial economy.

C. Limitations on the Liberalization of the Law Governing Secondary Boycotts

Goldfinger made an impression on state courts across the country. Several states soon appealed to New York's unity of interest test to refine their common law definitions of an illegal secondary boycott, noting *Goldfinger*'s explicit distinction between the common law and the reach of state anti-injunction statutes.[101] Yet despite *Goldfinger*'s protection of some forms of secondary activity from injunction, in the ensuing years, the lower New York courts ran with *Goldfinger*'s presumption that the anti-injunction statute only withdrew jurisdiction to enjoin activity permitted by the common law.[102] Further, lower courts continued to demonstrate a resistance to *Goldfinger*'s liberalization of the common law by enjoining secondary activity. First, the courts broadly applied the common law's prohibition of picketing attended by violence or fraud, even in cases in which there was a labor dispute and much of the alleged behavior was peaceful. Second, the courts narrowed the meaning of the unity of interest test, restricting its application to cases that closely matched the facts of *Goldfinger*. Finally, the New York courts declined to use the policy rationale identified in *Goldfinger*, that modern workers needed to be able to publicize their labor disputes along their employers' supply chains, to generate new understandings of the

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100 *Goldfinger*, 11 N.E.2d at 913.

101 *E.g.*, Alliance Auto Serv. v. Cohen, 19 A.2d 152, 154 (Pa. 1941); Kingston Trap Rock Co. v. Int'l Union of Operating Eng'rs, Loc. No. 825, 19 A.2d 661, 667–68 (N.J. Ct. App. 1941); Johnson v. Milk Drivers & Dairy Emps. Union, 195 So. 791, 794–95 (La. Ct. App. 1940); Denver Loc. Union No. 13 of Int'l Bhd. of Teamsters v. Perry Truck Lines, Inc., 101 P.2d 436, 444–45 (Colo. 1940); Fortenbury v. Superior Court, 106 P.2d 411, 413 (Cal. 1940); *see also* McKay v. Retail Auto. Salesmen's Loc. Union No. 1067, 106 P.2d 373 (Cal. 1940) (refusing to enjoin secondary picket under California common law).

102 *See, e.g.*, May's Furs & Ready to Wear, Inc. v. Bauer, 26 N.E.2d 279, 285 (N.Y. 1940) ("[N]ow, since the enactment of section 876-a, the 'chancellor' is confined to restraining only unlawful acts."). Justice Lehman, who concurred in *Goldfinger*, later maintained that "intent and effect of the new statute is clear. It does not sanction acts previously unlawful; it does not ban acts previously lawful. It does not abridge the jurisdiction or power of the court to grant protection against acts which are unlawful . . . ." Busch Jewelry Co. v. United Retail Emps. Union, Loc. 830, 22 N.E.2d 320, 323 (N.Y. 1939) (Lehman, J., dissenting).

common law; rather, the courts were often motivated by the perceived danger that secondary activity could pose to state and city economies.

In New York, even before 1935, picketing alone "connote[d] no evil."[103] Yet there were exceptions: picketing accompanied by violence; threats; intimidation; or other tortious acts, like dissemination of falsehoods, could be enjoined.[104] By 1940, many of these exceptions used to restrict picketing had been read into the New York anti-injunction statute.[105] Any intimation of violence during a picket could be enough to allow an injunction, even if the court found that it concerned a labor dispute.[106] The fact that the Court of Appeals had to modify lower court injunctions in at least two instances to permit lawful, peaceful picketing indicates that those lower court judges prioritized restraining worker protest over the legislature's desire to restrict courts' jurisdiction over labor disputes.[107]

In one case, *Busch Jewelry Co. v. United Retail Employees' Union, Local 830*, the trial judge went even further than the common law rule, holding that all picketing could be enjoined, peaceful or not.[108] A bulletin for lawyers at the time denounced his injunction, noting that the judge had commented in court that he might "make some new law in this case."[109] Even though the bulletin claimed "there was no claim of any violence on the picket line,"[110] the judge wrote in his decision that "many instances of threats, intimidation and coercion" occurred.[111] The bulletin analogized the decision's use of language to the kind of "catch-all opprobrium" of picketing characteristic of the pre-New Deal courts.[112] It must be noted, too, that the

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[103] Exchange Bakery, Inc. v. Rifkin, 157 N.E. 130 (N.Y. 1927). This principle was referenced throughout labor injunction cases after the passage of the anti-injunction statute. *See infra* note 114.

[104] *See, e.g.*, Nann v. Raimist, 174 N.E. 690, 694 (N.Y. 1931).

[105] *See generally Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, *supra* note 54.

[106] *See id.* at 565 n.74 (noting that New York courts relied on elements like threats and retaliation to grant injunctions during this period).

[107] *May's Furs & Ready to Wear, Inc*., 26 N.E.2d 279 (modifying a blanket, permanent injunction against all picketing by the defendant-union against the plaintiff-store to cover only all picketing accompanied by violence); *Busch Jewelry Co*., 22 N.E.2d 320 (modifying injunction to limit its scope only to "picketing lawfully conducted").

[108] 5 N.Y.S.2d 575 (Sup. Ct. 1938), *aff'd*, 225 A.D. 970 (N.Y. App. Div. 1938), *aff'd*, 22 N.E.2d 320 (N.Y. 1939).

[109] *The* Busch *Decision: A Study in the Technique of Judicial Nullification of an Anti-Injunction Act*, 7 INT'L JURIDICAL ASS'N MONTHLY BULL. 101, 110 (1939) [hereinafter *The* Busch *Decision*].

[110] *Id.*

[111] *Busch Jewelry Co.*, 5 N.Y.S.2d at 578.

[112] *The* Busch *Decision*, *supra* note 109, at 110 n.9 (citing FRANKFURTER & GREENE, *supra* note 13, at 90; Jerome R. Hellerstein, *Picketing Legislation and the Courts*, 10 N.C. L. REV. 158, 172 (1932)).

judge capitalized on racial animus to justify his decision. To show that the union engaged in violence, he described an alleged assault of a white woman on a picket line by African-American workers.[113] The judge suggested in a related proceeding that the pickets invited the possibility of a lynch mob in response—raising the specter of racist violence to justify repression of the workers' speech.[114] The Court of Appeals eventually affirmed the injunction in part, holding that the picketing could be enjoined despite the anti-injunction statute because of the trial judge's finding of violence.[115]

Other judicial carveouts from the anti-injunction statute developed through a narrowing of *Goldfinger*'s unity of interest test. Unions representing workers that manufactured neon signs frequently picketed at the stores where signs produced by non-union labor were hung.[116] These secondary pickets invited a substantial amount of litigation into whether the stores were in a unity of interest with the non-union sign manufacturers.[117]

From these cases emerged the "ultimate consumer" doctrine: There was no unity of interest between a manufacturer and a customer of a product who was not retailing that product themselves.[118] On the other hand, an ongoing relationship between manufacturer and customer could establish a unity of interest.[119] This doctrine was later applied to prevent picketing of even a primary employer's sup-

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[113] *Busch Jewelry Co.*, 5 N.Y.S.2d at 578–89.

[114] "This city has known no lynching since the days of the Civil War . . . but the action of the colored strikers in midtown New York and in the Harlem district were such that if committed elsewhere a lynching bee might well have resulted." *The* Busch *Decision*, *supra* note 109, at 110 n.10 (quoting Busch Jewelry Co. v. United Retail Emps. Union, 7 N.Y.S.2d 872, 873 (Sup. Ct. 1938)).

[115] *Busch Jewelry Co.*, 22 N.E.2d at 320.

[116] *See, e.g.*, Canepa v. Doe, 12 N.E.2d 790 (N.Y. 1938); Weil & Co. v. Doe, 5 N.Y.S.2d 559 (Sup. Ct. 1938); Scharf v. John Doe, 288 N.Y.S. 895 (1936); Silverglate v. Kirkman, 12 N.Y.S.2d 505 (Sup. Ct. 1939).

[117] *See supra* note 116 and accompanying text.

[118] *Canepa*, 12 N.E.2d 790 (no unity of interest); *Weil & Co.*, 5 N.Y.S.2d 559; *Scharf*, 288 N.Y.S. 895; *Silverglate*, 12 N.Y.S.2d 505. In *People v. Bellows*, another neon sign case, the court found that the defendants could be convicted for disorderly conduct, given that there was no unity of interest and that, therefore, the conduct was an illegal secondary boycott. 22 N.E.2d 238 (N.Y. 1939). One commentator described *Bellows* as "a decision quite universally condemned by thinking lawyers." Feinberg, *supra* note 54, at 389. Nonetheless, it was reaffirmed in later cases. *See, e.g.*, People v. Fleishman, 36 N.Y.S.2d 559, 563, 566 (Ct. Spec. Sess. 1942).

[119] *See* People v. Muller, 21 N.Y.S.2d 1003, 1005–06 (Ct. Spec. Sess. 1940), *aff'd*, 36 N.E.2d 206 (N.Y. 1941) (leasing a burglar alarm constituted an ongoing relationship between store and manufacturer sufficient to generate a unity of interest). The Court of Appeals also found, in the alternative, that such conduct was protected by the First Amendment as applied to the states. 36 N.E.2d at 207; *see also infra* Part II.

plier.[120] These cases were motivated by a fear that the unity of interest test could disrupt entire supply chains, elevating the interests of labor over all others. As one lower court put it:

> [A]lmost any situation does indirectly or ultimately affect labor, just as all members of a community are indirectly or ultimately, in some wise or degree, affected by a labor controversy, no matter how far removed that controversy is. . . . May a housewife be picketed for using non-union products? Is one to be pursued by pickets for wearing non-union garments?[121]

The perceived threat that permitting secondary activity could unleash unconstrained labor unrest throughout society made *Goldfinger*'s policy rationales irrelevant. *Goldfinger* had warned of the dangers to workers that the operation of non-union and union manufacturers in the same industry posed to their wages and working conditions.[122] Yet the courts did not appeal to this idea to liberalize common law principles or expand the reach of the anti-injunction statute. The Court of Appeals affirmed the injunction issued against the projectionist and his union in *Thompson v. Boekhout*[123] by reference to the common law rule that picketing of a business who refused to hire any workers at all was illegal, despite the fact that the projectionist's firing was to prevent any wage increases or unionization at the movie theater.[124] Courts continued to enjoin picketing under the *Thompson* doctrine, even if that gave the business an unfair advantage over union companies.[125]

The conservatism of the *Thompson* doctrine was notably apparent in *Wohl v. Bakery and Pastry Drivers Local 802*.[126] In *Wohl*, a union picketed two peddlers (i.e., independent contractors) who bought baked goods to resell to grocery stores.[127] The New York

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120 Feldman v. Weiner, 17 N.Y.S.2d 730 (Sup. Ct. 1940).

121 *Weil & Co.*, 5 N.Y.S.2d at 561; *see also Feldman*, 17 N.Y.S.2d at 734 ("[H]old[ing] otherwise . . . would require . . . that a union-shop manufacturer or a union-shop stationery supplies dealer who sold his products to many customers in different kinds of business, could be subjected to picketing because one of his vendees in an entirely different line of business was not itself unionized.").

122 *See supra* note 94.

123 7 N.E.2d 674 (N.Y. 1937).

124 *See supra* note 66 and accompanying text.

125 *See, e.g.*, Lyons v. Meyerson, 18 N.Y.S.2d 363, 365 (Sup. Ct. 1940) ("The fact that by doing all the work themselves these plaintiffs were and are enabled to have a commercial advantage over their competitors who do employ outside help in furtherance of their business cannot affect the decision of law herein involved."); *see also* Pitter v. Kaminsky, 7 N.Y.S.2d 10 (Sup. Ct. 1938); Luft v. Flove, 1 N.E.2d 369 (N.Y. 1936).

126 14 N.Y.S.2d 198 (N.Y. Sup. Ct. 1939), *aff'd*, 19 N.Y.S.2d 811 (N.Y. App. Div. 1940); *aff'd*, 31 N.E.2d 765 (N.Y. 1940), *rev'd on different grounds* 315 U.S. 769, 774 (1942); *see infra* Part II.

127 14 N.Y.S.2d at 199.

courts enjoined the picketing under *Thompson*, holding that the peddlers could not be forced to hire union labor.[128] The opposing argument, articulated in the union's brief to the Supreme Court, appealed directly to the rationale motivating *Goldfinger*: Labor should be able to confront people in an "independent calling"[129] if that calling disrupts the ability of working people to achieve economic security. The rise of the "peddler system" in New York had coincided with the passage of Social Security and unemployment insurance, because of which bakeries laid off hundreds of union bakery drivers.[130] The emergent class of independent contractors disrupted unionized bakery drivers' livelihoods by offering cheaper services and working seven days a week, reducing the need for the bakeries to hire additional drivers.[131] The pickets at issue in *Wohl* were pressuring the peddlers, but actually occurred outside the bakeries which used the peddler system.[132] With this context, then, the protest appeared to be more like the kind of secondary picket which *Goldfinger*'s rationale, and the explicit text of the anti-injunction statute, putatively protected: a labor protest of other entities within the workers' same industry who threatened to depress wages.[133] The New York courts' treatment of this case illustrated how quickly the *Goldfinger* court's rationale became irrelevant.

By 1940, some legal commentators of the period declared New York's anti-injunction statute "judicially nullified."[134] One even noted that instead of liberalizing the law of picketing, New York's anti-injunction statute limited the right to picket beyond what had even been restrained by earlier law because judges presumptively enjoined picketing if no statutory labor dispute existed, presuming that it was

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128 *Id.*; *see also* Opera on Tour v. Weber, 34 N.E.2d 349, 353 (N.Y. 1941) ("So, too, in [*Wohl*] just unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week.").

129 *Wohl*, 31 N.E.2d at 765.

130 Brief for Petitioners at 5, Bakery & Pastry Drivers Loc. 802 v. Wohl, 315 U.S. 769 (1942) (No. 901), 1941 WL 52938. This factual account was cited by the Supreme Court. Bakery & Pastry Drivers Loc. 802 v. Wohl, 315 U.S. 769, 770–71 (1942).

131 Brief for Petitioners, *supra* note 130, at 4.

132 *Id.*

133 The New York courts similarly refused to recognize the importance of worker solidarity in ensuring union density and, thus, defending individual workers' wages and working conditions. *See, e.g.*, *Opera on Tour*, 34 N.E.2d 349 (finding no labor dispute when workers went out on a sympathy strike for theater musicians hired by the same employer who were being replaced by recorded music).

134 *See, e.g.*, Note, 13 N.Y.U. L.Q. REV. 92, 102 (1935) ("It appears, therefore, that the boycott remains as it was before in New York . . . .").

illegal.[135] Again and again, the courts prioritized employers' common law property rights over workers' newfound statutory immunity from judicial injunction. Nor was this nullification of the state anti-injunction statute unique to New York. By the 1940s, many states had formally excised secondary picketing from the scope of possibly protected worker protest. Some did it by statute.[136] Others underwent a similar process of judicial nullification in the courts as in New York, in which the state anti-injunction statute was repeatedly found to declare, rather than protect against, the common law prohibition of secondary boycotts.[137] As a result, one legal scholar wrote in 1940 that the courts' restrictions of picketing marked "[the] days when the tide of liberalism is receding."[138]

This is not to say that these statutes resulted in no material gains for workers; in the period after New York's statute went into effect, the number of injunctions filed did drop.[139] An examination of the judicial attitudes of this period nonetheless shows that even in a progressive jurisdiction, during a history-making period of progressive legislation, secondary picketing remained a source of consternation. The courts' fixation on the dangerous economic ripple effects of a secondary boycott was not, as discussed in Part II, limited to the states.

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135 Feinberg, *supra* note 54, at 386–87.

136 *See id.* at 389 n.20 (discussing statutory prohibitions against picketing in Wisconsin, Pennsylvania, and Michigan in 1940); *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, *supra* note 54, at 558. By 1947, California, Colorado, Wisconsin, and Hawaii prohibited the secondary boycott in general; Alabama, California, Kansas, South Carolina, Idaho, Minnesota, Oregon, and South Dakota prohibited specific kinds of secondary activity, like union workers' refusal to handle non-union goods. Isadore Gromfine, Note, *Labor's Use of Secondary Boycotts*, 15 GEO. WASH. L. REV. 326, 341–42 & nn.61–63 (1947).

137 Isadore Gromfine argued that the courts in Massachusetts, New Jersey, Indiana, Illinois, Colorado, Louisiana, Oregon, Pennsylvania, and Washington had all restricted the application of their anti-injunction statutes against secondary boycotts. Gromfine, *supra* note 136, at 342–43. For a discussion of how other states treated their anti-injunction statutes, see Note, *Constitutionality of State Statute Limiting Injunctions in Labor Disputes*, 46 YALE L.J. 1064 (1936); *Judicial Nullification of Anti-Injunction Acts*, *supra* note 27, at 12.

138 Feinberg, *supra* note 54, at 401.

139 "That all these regulations have had their influence is shown by the sharp decline that has already been noted in the number of injunctions issued in New York." Note, 13 N.Y.U. L.Q. REV. 92, 103 (1935) (citing *Judicial Nullification of Anti-Injunction Acts*, *supra* note 27, at 1).

II
Secondary Picketing Under the First Amendment at the Supreme Court

The New York courts' anxiety around drawing the acceptable boundaries of labor protest, even while attempting to expand the right to picket, was mirrored in the contemporaneous development of First Amendment protections for labor picketing at the Supreme Court. This expansion of the First Amendment came amidst a wave of Supreme Court decisions affirming the labor-friendly New Deal initiatives of the states and Roosevelt Administration in the late 1930s and its removal of the regulation of picketing from the purview of antitrust law.[140] During the same period, the Court turned away from the *Lochner* era's use of constitutional law to restrict states' ability to enact economic reforms when it issued its famous "switch in time" in 1937's *West Coast Hotel v. Parrish*, upholding state minimum wage legislation against a due process clause challenge.[141] The next year, the Court reaffirmed its newfound deference towards legislative regulations of the economy in *United States v. Carolene Products*, permitting Congress to restrict shipments of dairy substitute products in the interest of the public welfare.[142] The Court upheld the shipment scheme on the grounds that such economic regulations had a presumptively rational legislative purpose.[143] Footnote four of *Carolene Products*, however, described how this presumption of constitutionality receded if legislation violated the Bill of Rights, obstructed democratic processes, or instantiated "prejudice against discrete and insular minorities."[144] In this way, *Carolene Products* established a dual vision of the Constitution, prioritizing the protection of political rights through strict scrutiny review while leaving the oversight of economic regulations to deferential rational basis review.[145] This distinc-

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[140] Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938); New Negro All. v. Sanitary Grocery Co., 303 U.S. 552 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress's power to pass the National Labor Relations Act under the Commerce power); Senn v. Tile Layers Protective Union, Loc. No. 5, 301 U.S. 468, 478 (1937); *see supra* note 22 and accompanying text.

[141] 300 U.S. 379 (1937). The "switch in time that saved nine" refers to the shift of Justice Roberts's vote to the pro-New Deal Roosevelt appointees in *Parrish* as what saved the Court from President Roosevelt's so-called "court-packing plan." Burt Solomon, FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy 162 (2009).

[142] 304 U.S. 144 (1938).

[143] *Id.* at 152.

[144] *Id.* at 152 n.4.

[145] *See generally* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L.

tion between the economic and the political soon haunted the Supreme Court's First Amendment labor speech jurisprudence.

The liberalization of the Supreme Court's attitudes towards labor was initially reflected in its First Amendment doctrine. In 1940, the Court decided *Thornhill v. Alabama*, which invalidated an Alabama statute prohibiting picketing as a violation of free speech rights.[146] From a solely federal perspective, picketing—even secondary picketing—now appeared to be immune from federal regulation, a historic victory after over half a century of federal labor injunctions.[147] Yet, as we will see, a core principle of New Deal Supreme Court jurisprudence—deference to legislative regulation of the economy—informed the development of picketing rights, ultimately preventing the Court from offering workers full protection of their speech under the First Amendment. By 1941, only a year after *Thornhill*, the Court had already highlighted its reluctance to second-guess states' restrictions on secondary activity in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*;[148] by 1942, the Court explicitly allowed states to prohibit secondary picketing in *Carpenters & Joiners Union v. Ritter's Cafe*.[149] At issue in each of these cases was whether the First Amendment unequivocally protected speech concerning working conditions or whether states, in the interest of commercial stability, could circumscribe labor speech to protect against the "danger of breach of the peace or serious invasion of rights of property or privacy."[150] In both cases, the Court deferred to states' regulations over labor picketing, implicitly refusing to recognize labor speech as speech within the core of First Amendment protections.

A. The Protection of Labor Speech Under the First Amendment

In the period immediately following the passage of Norris-LaGuardia, the Court considered several cases that indicated its willingness to view picketing as protected speech. In *Senn v. Tile Layers Protective Union, Local No. 5*, the Court upheld Wisconsin's anti-injunction statute, finding that it had not deprived the petitioner of his right to work under the Fourteenth Amendment, but had only authorized certain forms of speech—picketing—to persuade him to unionize

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REV. 713 (1985); Barry Cushman, Carolene Products *and Constitutional Structure*, SUP. CT. REV. 321 (2012).

146 310 U.S. 88 (1940).

147 *See supra* notes 10–18.

148 312 U.S. 287 (1941).

149 315 U.S. 722 (1942).

150 *Thornhill*, 310 U.S. at 106.

his shop.[151] The Court also declared that the First Amendment protected the publicization of a labor dispute.[152] In *Hague v. CIO*, a case involving a Jersey City ordinance prohibiting public meetings of labor unionists, the Court first recognized the "public forum doctrine," with some of the most memorable rhetoric on the place of free assembly in a democratic polity ever produced by the Court:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated to the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[153]

Parallel to the Court's turn away from the prioritization of property interests over states' interest in economic regulation in *Carolene Products*, this passage reflects the Court's rejection of the prioritization of property rights over citizens' rights to public assembly and discussion.[154] Notably, however, the Court did not characterize the petitioners' speech as "labor" speech; rather, the Court limited their decision to the "narrow question" of whether the First Amendment protected speech concerning the National Labor Relations Act, characterizing the speech at issue as a debate about "national legislation, the constitutionality of which this court has sustained."[155]

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[151] 301 U.S. 468, 478 (1937). The Wisconsin anti-injunction statute excluded secondary boycotts from its protections. *Id.* at 479. Further, the *Senn* Court contrasted the appellants' peaceful picketing with the allegedly libelous and threatening pickets in *Truax v. Corrigan*, even though both statutes at issue in these cases only addressed the issue of a court's jurisdiction over a labor dispute. *Id.* at 479–80 (citing Truax v. Corrigan, 257 U.S. 312 (1921)). This reference to *Truax* suggested that the Court already saw only peaceful picketing as within the auspices of the First Amendment. *See infra* note 163 and accompanying text.

[152] 301 U.S. at 478 ("Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.").

[153] 307 U.S. 496, 515–16 (1939).

[154] *See also* Schneider v. New Jersey, 308 U.S. 147 (1939) (holding that municipal interests in the prevention of littering did not outweigh petitioners' First Amendment right to distribute pamphlets in public places); *cf.* Osmond K. Fraenkel, *One Hundred and Fifty Years of the Bill of Rights*, 23 MINN. L. REV. 719, 720 (1939) ("That property rights transcend personal rights may too frequently have been the view of judges graduated into their calling from careers of advocacy for powerful business interests.").

[155] *Hague*, 307 U.S. at 512.

This new balance struck between property and speech rights was reflected in the Court's next First Amendment case that touched on the rights of labor protestors, *Thornhill v. Alabama*.[156] In *Thornhill*, the petitioner, Bryan Thornhill, was indicted under an Alabama statute that forbade "picketing and loitering" without "just cause or legal excuse."[157] Thornhill had picketed in front of the entrance to Brown Wood Preserving Company in order to publicize an ongoing strike.[158] During the course of this picket, Thornhill told a non-union member, hired to work at the plant during the strike, to return home, which he did. Thornhill was arrested.[159]

The Court found the Alabama statute under which Thornhill was convicted unconstitutionally overbroad under the First Amendment. The majority opinion justified the decision in sweeping language, relying on two principles. First, unlike in *Hague*, the Court explicitly identified labor speech as concerning matters of public concern[160] because it addressed issues affecting entire communities, for "the practices in a single factory may have economic repercussions upon a whole region . . . ."[161] As a result, the Alabama statute was akin to government censorship.[162] Second, the majority argued that the Alabama statute restricted speech while failing to show that such speech categorically posed a "clear and present danger" to the

156 310 U.S. 88 (1940).

157 *Id.* at 91–92.

158 Brief for the Petitioner, *Thornhill*, 310 U.S. 88 (No. 514), 1939 WL 48828, at *14; *Thornhill*, 310 U.S. at 94. The Court may have been influenced by the fact that the entire town in which Thornhill and his union operated was the private property of the Brown Wood Preserving Company. Brief for the Petitioner, *supra* at *4. The Court later explicitly demonstrated their willingness to strike the balance between property and personal rights differently when company towns were at issue. Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."). *Marsh*'s principle of a private party's weakened property rights in the face of strong claims to First Amendment rights was eventually left in question by the Supreme Court's overruling of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 318–19 (1968) in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (an implicit overruling) and in *Hudgens v. NLRB*, 424 U.S. 507 (1976) (an explicit overruling). *But see* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (upholding, over a property-rights objection by the owners, an application of *state* law that restricted private-shopping-center owners from curtailing expressive activities within the shopping center).

159 *Thornhill*, 310 U.S. at 94–95.

160 *Id.* at 97.

161 *Id.* at 103.

162 *Id.* at 97 (citing Near v. Minnesota, 283 U.S. 697 (1931)); JOHN MILTON, AREOPAGITICA: FOR THE LIBERTY OF UNLICENC'D PRINTING (1644), https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.html.

public.[163] In so doing, the Court applied the same logic of economic interdependence that had captured the attention of the New York courts to stress the importance of labor speech in public places.[164] For the first time ever, the Court cited footnote four of *Carolene Products*, categorizing picketing as speech within the core of First Amendment protections.[165]

Commentators of the time and today laud *Thornhill* for establishing a "right to peaceful picketing" under the First Amendment.[166] But there were already suggestions of *Thornhill*'s possible limitations. The majority opinion's dicta identifying labor picketing as core First Amendment speech seems over-inclusive in light of its more restrained overbreadth holding.[167] Likewise, the Court's invocation of the clear and present danger test—with the hanging threat that picketing that posed a "danger of breach of the peace or serious invasion of rights of property or privacy" would not be protected—opened the door for exceptions to the Court's seemingly broad rule.[168] After all, the complex dependencies within a modern economy that justified the Court's discussion of labor picketing as touching "matters of public concern" could just as easily make picketing so disruptive to commerce that it could be characterized as a "serious invasion of rights of

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163 *Thornhill*, 310 U.S. at 104–05. The clear and present danger test, first elaborated on in *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes, J.), eventually evolved from a speech-restrictive to speech-protective standard. *Compare* Abrams v. United States, 250 U.S. 616 (1919) (upholding the conviction of distributors of pamphlets advocating for strikes at armaments factories under the clear and present danger test during World War I), *and* Dennis v. United States, 341 U.S. 494 (1951), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (creating the modern clear and present danger test in limiting unprotected speech to imminent lawless action).

164 *See supra* Part I; *Thornhill*, 310 U.S. at 105–06 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

165 *Thornhill*, 310 U.S. at 95; Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & the First Amendment: An Analysis of the Preferred Position of Speech After the* Carolene Products *Decision*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1019, 1034 (2003).

166 *See, e.g.*, Fisk, *supra* note 29, at 2067 n.55; Weinrib, *supra* note 24, at 527; Hayes, *It's Now Persuasion*, *supra* note 29, at 567.

167 The fact that this dicta is in stark tension with the dicta of later Supreme Court cases demonstrates how this statement, made in the context of an overbreadth holding, overcommitted to the idea of labor speech as within the "core" of First Amendment protections. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council (*DeBartolo II*), 485 U.S. 568, 576 (1988) ("That a labor union is a leafletter and that a labor dispute was involved does not foreclose this analysis. We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection."); *see also* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2644–47 (2011) (discussing whether union speech can be considered commercial speech).

168 *Thornhill*, 310 U.S. at 106.

property or privacy."[169] It was these exceptions which, as with the development of New York's picketing doctrines,[170] ultimately curtailed the Court's recognition of peaceful secondary picketing under the First Amendment.

B. The Limitations of Thornhill

Over the course of four cases in the two terms after *Thornhill*, the Court quickly revealed that decision's limits. Subsequent cases repeatedly demonstrated that states had the power to determine the boundaries of legitimate labor protest, indicating that *Thornhill*'s discussion of labor speech as within the core of First Amendment protections did not necessarily extend to all forms of labor protest. Despite contentions by modern-day academics that these cases illustrated the Court's understanding of labor speech as implicating matters of public concern,[171] in fact the Court repeatedly refused to protect secondary picketing—which, like primary picketing, involves publicization of issues that implicate the wider community—under the First Amendment.

In 1941, the Court issued two decisions on the question of picketing under the First Amendment: *AFL v. Swing*, which protected peaceful picketing against a business by non-employees under the First Amendment,[172] and *Milk Wagon Drivers Union, Inc. v. Meadowmoor Dairies*, which found picketing unprotected if undertaken against a "background of violence."[173] Both *Swing* and *Meadowmoor* were Illinois cases involving pickets by individuals not themselves employed by the picketed entity. In both decisions, the Illinois Supreme Court interpreted Illinois's anti-injunction statute to cover only disputes between employers and employees.[174] In *Meadowmoor*, whose lower court rulings predated *Thornhill*, the Illinois court explicitly dismissed the appellants' First Amendment claims, finding that they could not outweigh the dairies' right to be free from tortious interference with their business.[175]

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169 *Id.* at 104, 106.

170 *See supra* Part I.

171 *See* Fisk, *supra* note 29, at 2076–79; Fisk & Rutter, *supra* note 29, at 280; Theo A. Lesczynski, Note, *Redefining Workplace Speech After* Janus, 113 Nw. U. L. Rev. 885, 902–04 (2019).

172 312 U.S. 321 (1941).

173 312 U.S. 287, 294 (1941).

174 Swing v. AFL, 22 N.E.2d 857, 858 (Ill. 1939), *rev'd*, 312 U.S. 321 (1941); Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union, 21 N.E.2d 308, 312–15 (Ill. 1939), *aff'd*, 312 U.S. 287.

175 *Meadowmoor*, 21 N.E.2d at 317.

Justice Felix Frankfurter, the coauthor of *The Labor Injunction*,[176] saw a clear example of the peaceful exercise of free speech in *Swing*: In that case, union members picketed outside of a beauty parlor to convince the proprietor to allow the employees to unionize.[177] Justice Frankfurter, writing for the Court, found the picketing had been peaceful and unaccompanied by any violence or threat of imminent danger.[178] Appealing once again to a logic of economic interdependence, the Court held that the State could not regulate worker speech by "drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."[179] The interdependence of workers in the "same industry,"[180] as in *Goldfinger*, justified the Court's protection of pickets conducted by those not directly employed by the picketed entity, since the union members' interests could be affected by the beauty parlor's refusal to allow its employees to unionize.

Despite the union's triumph in the case, *Swing* may not have been the unequivocal victory for labor speech that it seemed to be. Although the facts in *Swing* involved a recognitional picket, which is in some instances currently prohibited,[181] the Court instead addressed a more general issue: Could a state enjoin peaceful picketing, even if there was no direct employer-employee relationship?[182] Given the level of generality at which the Court framed the decision's central question, one can understand why the majority found the *Thornhill* principle easily applicable, for the state injunction appeared to involve a similarly overbroad and chilling restriction of speech.[183] As Joseph Tanenhaus, a contemporaneous labor law scholar noted, the Court's emphasis on overbreadth meant the disappearance of the speech-protective clear and present danger requirement of the *Thornhill*

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176 FRANKFURTER & GREENE, *supra* note 13.

177 *Swing*, 312 U.S. at 323.

178 *See id.* at 325 (1941) (quoting Thornhill v. Alabama, 310 U.S. 88, 105 (1940)) (describing the picketing at issue as an act of peaceful persuasion).

179 *Id.* at 326 ("The interdependence of economic interest of all engaged in the same industry has become a commonplace.").

180 *Id.*

181 See NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7), which prohibits unions from picketing in order to compel employees to "recognize or bargain with a labor organization as the representative of his employees, or forc[e] or requir[e] the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees."

182 *Swing*, 312 U.S. at 323.

183 *See id.* at 326 ("The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.").

exception.[184] The likely explanation for that omission can be found in *Meadowmoor*, the other picketing case decided that same day.

Meadowmoor involved pickets by unionized dairy truck drivers outside stores that purchased milk from non-union truck drivers—that is, a secondary boycott, for the union drivers had a dispute with the drivers, not the stores.[185] The Illinois Supreme Court's decision was explicitly influenced by events that had occurred earlier that year, when, in response to pressure by milk dealers to cut prices, dairy farmers and union milk drivers went on strike.[186] The union members' participation was motivated by the emergence of the "vendor system," in which independent dairies hired non-union independent contractors, rather than union drivers, to deliver milk.[187] Milk dealers independent of the farmers' association continued to deliver milk during the strike by relying on non-union drivers.[188] Throughout January, farmers and union members inflicted property damage, including several bombings of stores that sold independent dealers' milk and the puncturing or dumping of milk trucks into the Chicago River.[189] The current action involved only a peaceful picket that had begun in September, seven months after the January events.[190] Meadowmoor Dairies—which had a plant that was bombed in the January events—nonetheless brought an action to enjoin the picket.[191] The Illinois Supreme Court, in light of the January riots, issued an

184 *See* Joseph Tanenhaus, *Picketing-Free Speech: The Growth of the New Law of Picketing from 1940 to 1952*, 38 CORNELL L.Q. 1, 14 (1952) (explaining how the Supreme Court in *Swing* retreated from its holding in *Thornhill*).

185 Milk Wagon Drivers Union, Loc. 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 291 (1941).

186 *Id.* at 314.

187 *See* Milk Wagon Drivers' Union, Loc. No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 95 (1940) ("With the spread of this new competitive system, ... [m]any of the union drivers lost their jobs and were dependent upon their union's relief funds and upon public relief agencies for their support."). A report of the time noted that because participants in the vendor system were not subject to federal and state social insurance laws, the system enabled employers to minimize their costs at the expense of union drivers. *See* U.S. DEP'T OF LABOR, BUREAU OF LAB. STAT., BULL. NO. 715, LABOR ASPECTS OF THE CHICAGO MILK INDUSTRY 2 (1942).

188 *See Meadowmoor*, 312 U.S. at 314 (Black, J., dissenting).

189 *See id.* at 314–15 (Black, J., dissenting); *Milk in Chicago*, FORTUNE, Nov. 1, 1939, at 126 ("Along the country roads armies of irate farmers marched to and fro, dumping milk trucks, stopping trains, and puncturing milk tanks."). Unrest in the milk industry, which constituted five percent of the national income in 1939, was not limited to Illinois. *See, e.g.*, Lowell K. Dyson, *The Milk Strike of 1939 and the Destruction of the Dairy Farmers Union*, 51 N.Y. HIST. 523 (1970) (detailing the financial and political impact of the milk industry strike of 1939 in New York).

190 *See Meadowmoor*, 312 U.S. at 313 (Black, J., dissenting) (detailing the record of events).

191 *Id.* at 313–15, 315 n.16 (Black, J., dissenting).

injunction barring not just violent but also peaceful picket activities, finding that they posed a threat amounting to a tortious invasion of the shopkeepers' right to a "free and open market."[192] The Court also appeared to assume, without definitively deciding, that the pickets were secondary boycotts.[193]

Justice Frankfurter again penned *Meadowmoor*. Yet here, unlike in *Swing*, the Court found that the injunction against picketing was not contrary to the First Amendment.[194] Justice Frankfurter emphasized that "the Bill of Rights was the child of the Enlightenment,"[195] protecting speech on the basis that speech can avert violence by appealing to reason.[196] "But," the Court wrote, "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."[197] The Court purported to rely on *Thornhill*'s exception for pickets that "might occasion such imminent and aggravated danger . . . as to justify" restriction, yet it seemed to ignore the requirement of "imminen[ce]."[198] Over an extended dissent, in which Justice Black appealed to the Court's right in constitutional cases to engage in de novo review of the underlying record to recognize that the violence in question occurred months prior,[199] the majority refused to substitute its own judgment for the lower court's, deferring to its finding that "the momentum of fear generated by past violence . . . survive[d]" and infused even the "wholly peaceful" present picketing.[200] Like *Swing*, *Meadowmoor* thus ignored *Thornhill*'s clear and present danger test, and, unlike *Swing*, *Meadowmoor* demonstrated the consequences that the test's absence could yield.

Further, the *Meadowmoor* Court implicitly expanded *Thornhill*'s exception for speech that poses a "serious invasion of rights of property or privacy."[201] Like the New York courts' treatment of their state anti-injunction statute,[202] the Supreme Court's deference to the

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[192] *Id.* at 292; Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union, No. 753, 21 N.E.2d 308, 311 (Ill. 1939), *aff'd*, 312 U.S. 287.

[193] *See Meadowmoor*, 21 N.E.2d at 312, 315 (arguing that if the Illinois anti-injunction statute applied, it would have to be "broad enough to apply to the different kinds of interference enumerated above *and* to secondary boycotts" but ultimately not deciding if the pickets were definitively secondary (emphasis added)).

[194] *Meadowmoor*, 312 U.S. at 296.

[195] *Id.* at 293.

[196] *Id.*

[197] *Id.*

[198] *Id.* at 297 (quoting Thornhill v. Alabama, 310 U.S. 88, 105 (1940)).

[199] *Id.* at 307–09 (Black, J., dissenting).

[200] *Id.* at 294.

[201] *Thornhill*, 310 U.S. at 106.

[202] *See supra* Section I.A.

Illinois decision effectively allowed the common law of torts to carve out exceptions from the First Amendment. While Justice Black's dissent argued that peaceful labor speech always merits protection,[203] the majority clearly held that it would not recognize such a categorical principle.[204] In *Meadowmoor*, the Court was attuned to what it believed to be the deleterious effects of allowing workers to engage in secondary activity, echoing the judicial tendency to see a specter of violence in otherwise peaceful labor speech.[205]

The next year, the Court decided two more picketing cases, *Bakery & Pastry Drivers Local 802 v. Wohl*[206] and *Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe*,[207] and further circumscribed *Thornhill*'s scope. Just as *Swing* and *Meadowmoor* dropped *Thornhill*'s clear and present danger test, thereby expanding its exceptions for danger of breach of the peace and serious invasion of property or privacy rights, *Wohl* and *Ritter's Cafe* deferred to how states "dr[ew] the circle of economic competition" within which labor picketing could permissibly occur.[208] As a result, by the end of 1942, the Court had opened the door for states to use their powers of economic regulation to curtail labor picketing's economic effects.

Wohl marked the apex of the Supreme Court's protection of picketing under the First Amendment. As discussed in Part I, the New York courts had enjoined the picketing outside bakeries that sold bread to independent peddlers, finding that no labor dispute existed under the anti-injunction statute.[209] By contrast, the Supreme Court in *Wohl*, as in *Swing*, held that the First Amendment could protect labor speech even in the absence of a statutory labor dispute so long as the speakers and audience were within one circle of economic competition.[210] The New York Court of Appeals had recognized that the ped-

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[203] *See Meadowmoor*, 312 U.S. at 301 (Black, J., dissenting) (contending that the guarantees of the First Amendment are the "foundation upon which our government structure rests").

[204] It is worth noting that threats have always posed an exception to First Amendment protection. Today, however, the standard of what constitutes a "threat" for these purposes is narrow. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003) (deciphering states' power to prohibit true threats).

[205] *See supra* Part I; *see, e.g.*, Busch Jewelry Co. v. United Retail Emps. Union, Loc. 830, 22 N.E.2d 320, 321–22 (N.Y. 1939) (emphasizing the importance of unions avoiding violence during picketing).

[206] 315 U.S. 769 (1942).

[207] Carpenters & Joiners Union, Loc. No. 213 v. Ritter's Cafe, 315 U.S. 722 (1942).

[208] *Id.* at 736 (Reed, J., dissenting).

[209] *See supra* notes 126–38 and accompanying text. This principle was first established in Thompson v. Boekhout, 7 N.E.2d 674 (N.Y. 1937).

[210] *Compare* AFL v. Swing, 312 U.S. 321, 326 (1941) (noting the workers' right to free communication), *with Wohl*, 315 U.S. at 774 ("[O]ne need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a

dlers and bakeries had an ongoing commercial relationship.[211] The Supreme Court agreed, emphasizing that this relationship impacted union workers' ability to maintain their wages and working conditions[212] and presented the only possibility that the workers had to petition the public for support.[213] In *Swing* and *Wohl*, then, the Court recognized that so long as peaceful public picketing was directed towards parties within their "circle of economic interdependence," the workers could picket those parties. Justice Douglas's concurrence criticized this holding for appearing to "prohibit picketing when it is effective but . . . not prohibit it when it is ineffective."[214]

The Supreme Court's deference to states' determinations of where to draw this "circle of economic competition" was clarified in *Ritter's Cafe*.[215] Applying a state anti-trust law, a Texas court enjoined a construction union's secondary picket in front of a restaurant owned by the same person who owned a construction site whose general contractor refused to hire union labor—a paradigmatic secondary boycott.[216] Illustrating his commitment to federalism over an affirmative right to picket, Justice Frankfurter penned the majority opinion, upholding states' right to balance the interests of employers and labor.[217] Here, *Thornhill*'s dicta about picketing's role in the public sphere disappeared, replaced with a balancing between two parties' economic interests. Peaceful picketing or publicization of a labor dispute alone, the Court held, could not be prohibited.[218] Yet states retained the right "to *localize* industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants."[219]

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grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.").

211 *See* Wohl v. Bakery & Pastry Drivers Loc. 802, 31 N.E.2d 765, 765 (N.Y. 1940) ("They . . . had no relation with such manufacturing bakers except as they bought goods from them for distribution and sale."), *rev'd on other grounds*, 315 U.S. 769 (1942). Despite this finding, however, the Court of Appeals refused to recognize a supplier-customer relationship as sufficient to constitute a statutory "labor dispute." *Id.*

212 *Wohl*, 315 U.S. at 771 (characterizing the peddler system as posing "aggressive inroads . . . upon the employment and living standards of [the union's] members").

213 *Id.* at 775.

214 *Id.* (Douglas, J., concurring).

215 Carpenters & Joiners Union, Loc. No. 213 v. Ritter's Cafe, 315 U.S. 722, 736 (1942).

216 *Id.* at 724.

217 *Id.*

218 *Id.* at 725 (first citing Thornhill v. Alabama, 310 U.S. 88 (1940), then citing AFL v. Swing, 312 U.S. 321 (1941)).

219 *Id.* at 726–27 (emphasis added).

The *Ritter's Cafe* opinion shifted *Thornhill*'s focus from the interest that all workers had in particular labor disputes to something akin to *Goldfinger*'s unity of interest test.[220] *Wohl* involved a union "following the subject-matter of their dispute" by picketing the bakeries who sold goods delivered by non-union peddlers.[221] Rather than taking note of the impact that the peddler system had on other *workers*, the Court emphasized the economic interdependence between the peddlers and the *bakeries*.[222] Likewise, in *Ritter's Cafe*, Texas had shielded a business from picketing that "*industrially* has no connection with the dispute."[223] As a final justification, the Court deferred to the fact that Texas's regulation of secondary picketing represented "the prevailing, and probably the unanimous, policy of the states."[224] States' widespread distaste for the secondary boycott in favor of economic rights—and the Court's desire to defer—now qualified the absolute right to picket from *Thornhill*.

Meadowmoor and *Ritter's Cafe*, both of which involved secondary boycotts, led to a sharp narrowing of *Thornhill*'s holding. Although *Wohl* involved a form of secondary picketing, the Court, while balancing the right to picket against others' property rights, had emphasized that it involved economically interdependent employers and "slight, if any, repercussions" on third parties.[225] In *Meadowmoor* and *Ritter's Cafe*, by contrast, the highly disruptive nature of secondary boycotts was on full display. As in the New York courts,[226] the potential disaster that secondary activity posed to the wider economy haunted the Supreme Court's analysis of these secondary boycott cases. Following the logic of *Carolene Products*, the Court deferred to states' calculus of how to regulate picketing.

In 1949, two years after the passage of Taft-Hartley, Justice Black—the free speech absolutist[227]—wrote the majority opinion in *Giboney v. Empire Storage & Ice Co.*, which held that state antitrust law could trump workers' right to picket.[228] Justice Black noted that even *Thornhill* had recognized that "it was within the province of

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220 *See id.* at 727 ("This line drawn by Texas in this case is not the line drawn by New York in the *Wohl* case.").

221 *Id.* at 727.

222 *See supra* notes 210–14 and accompanying text.

223 *Ritter's Cafe*, 315 U.S. at 727 (emphasis added).

224 *Id.* at 728.

225 Bakery & Pastry Drivers Loc. 802 v. Wohl, 315 U.S. 769, 775 (1942).

226 *See supra* Part I.

227 *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting) (rejecting "the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms").

228 336 U.S. 490 (1949).

states 'to set the limits of permissible contest open to industrial combatants.'"[229] A series of cases following *Giboney* culminated in *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*, which found that "the broad pronouncements, but not the specific holding, of *Thornhill* had to yield" to states' need to regulate the economic effects of picketing.[230] The Court explicitly applied rational basis review to the State's injunction.[231] *Thornhill*'s two exceptions to its right to picket, for breaches of the peace and intrusion of property and privacy rights, had swallowed its rule. As with the trajectory of the states' anti-injunction statutes,[232] the promise of the First Amendment for the labor movement fell flat in the face of employers' assertions of property rights against the use of secondary tactics.

III
Continuities in the Treatment of Secondary Boycotts and Thoughts for Reform

This Note has shown that judges at both the state and federal levels remained preoccupied with the threat that secondary picketing appeared to pose to public order and employers' property rights throughout the interwar period. Again and again, judges nullified progressive state laws or deradicalized progressive directions towards which federal constitutional law tended. For progressives, then, the question remains: How can one fundamentally alter the law governing labor's use of the secondary boycott?

A. Continuity Before and After Taft-Hartley

In 1947, labor unions famously denounced the Taft-Hartley amendments as a "slave-labor" act in the wake of its passage.[233] Past scholars, including some employer advocates, argued that Taft-Hartley was generally continuous with preexisting practice.[234] As Senator Robert Taft, the Republican Senate sponsor of the Act, said shortly after its enactment: "The real basic theory of the Taft-Hartley Act . . . is the same as the theory of the [prior] Wagner Act."[235] Although

[229] *Id.* at 499.

[230] *See* 354 U.S. 284, 289 (1957).

[231] *Id.* at 295; Fisk, *supra* note 29, at 2068 ("In the restrictive period from 1943 to 1957, the Court portrayed picketing as an economic tactic that states could restrict to avoid inconvenience to business or consumers.").

[232] *See supra* Part I.

[233] Dray, *supra* note 6, at 498. For a discussion of this rhetoric, see Lichtenstein, *supra* note 23, at 766–67.

[234] Lichtenstein, *supra* note 23, at 763–64.

[235] Tomlins, *supra* note 24, at 279 (quoting Robert A. Taft, Address at the Columbia University Club, Luncheon Forum (Oct. 8, 1948), in *Taft Papers*, 1273–383).

most of today's progressive legal academics have sought to emphasize how Taft-Hartley codified employer revanchism,[236] some labor academics on the Left, including Christopher Tomlins, have disagreed with that view.[237] According to Tomlins's account, President Truman's lukewarm fight against the Republican Congress's passage of Taft-Hartley, the Act's legislative history, and the rise of strikes and union membership in the post-enactment period of the 1950s all suggested that Taft-Hartley was chiefly to be a revision—not replacement—of prior labor law.[238] Yet even Tomlins argues that Taft-Hartley's secondary boycott prohibition was an "innovation[ ]."[239] While the secondary boycott prohibition did overrule the New Deal defederalization of the labor injunction, returning federal court jurisdiction to employers seeking to enjoin pickets,[240] as this Note has shown, the substantive law rarely viewed secondary activity favorably in the intervening period, suggesting that the secondary boycott provisions were not as drastic a shift as they may seem.

One may be tempted to think, looking only at the federal law, that the New Deal period ushered in a revolutionary legalization of the secondary boycott.[241] But secondary activity remained subject to judicial suspicion. Many states continued to apply the common law of

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[236] *See, e.g.*, Lichtenstein, *supra* note 23, at 765 (noting "labor and the left were forced into an increasingly defensive posture" after 1947, the year of Taft-Hartley).

[237] *See, e.g.*, *id.* at 764 (explaining New Left scholars' opinion on Taft-Hartley's significance); MELVYN DUBOFSKY, THE STATE & LABOR IN MODERN AMERICA 206 (1994) (describing the Taft-Hartley Act as a "continuation of New Deal labor policy in a slightly diluted form"); TOMLINS, *supra* note 24, at 251 (noting many of the Act's noteworthy changes were already adopted by the NLRB); Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065.

[238] *See* TOMLINS, *supra* note 24, at 237–314 (documenting the adoption of the Taft-Hartley Act); *see also* DUBOFSKY, *supra* note 237, at 201, 204–05 (discussing the incidence of strikes before and after Taft-Hartley and Truman's "Machiavellian statecraft" of balancing a desire to appease labor with a desire to, among other things, restrain secondary boycotts).

[239] TOMLINS, *supra* note 24, at 296, 299–300.

[240] The 1959 Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519, 29 U.S.C. § 401, further continued this process, closing loopholes in Taft-Hartley's secondary boycott prohibition. Today, under the NLRA, secondary boycotts under section 8(b)(4) are subject to mandatory injunctions sought by the NLRB's General Counsel in federal district court and any party injured by secondary activity may sue to enforce section 8(b)(4) for money damages. *See* NLRA § 10(j), 29 U.S.C. § 160(j) (authorizing the NLRB to petition the district courts for injunctive relief); 29 U.S.C. § 187 (authorizing those injured by secondary activity to pursue monetary damages in the district courts).

[241] For an overstated example of this, see Lawrence Alfred De Lucia, The Secondary Boycott and the Federal Law 106 (Feb. 8, 1967) (unpublished Ph.D. dissertation, University of Arizona) (on file with University Libraries, University of Arizona) ("With the exceptions noted, all secondary strikes were nonrestrainable as well as legal by the end of 1941.").

picketing after the passage of their anti-injunction statutes and after the Supreme Court decisions in *Thornhill* and *Swing*;[242] some amended their statutes to prohibit secondary boycotts specifically.[243] And as we have seen, secondary picketing remained a contested practice in the Supreme Court's First Amendment jurisprudence, prompting the erosion of *Thornhill* within two years of its decision. Without a substantive recognition that an industrial economy necessarily involves complex, interdependent supply chains, secondary picketing continued to appear threatening or coercive to "neutral" third parties under the preexisting legal framework throughout this period.

The continuity between the New Deal and post-New Deal periods is further illustrated by the similarity between the New Deal courts' treatment of secondary picketing and the legal doctrines that emerged to interpret the reach of section 8(b)(4)'s secondary boycott prohibition after Taft-Hartley. The logic of the unity of interest test permeates the law of secondary boycotts today. The unity of interest test allowed workers to "follow" a product to a secondary employer's location in order to persuade customers not to buy that particular product.[244] Under the NLRA, a business that is an "ally," franchisor, or parent company of an employer may also be picketed.[245] In 1964, the Supreme Court likewise interpreted the NLRA's secondary boycott prohibition to allow picketers to target a primary employer's product even at a "secondary site."[246] But the anxiety that New York

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[242] Fisk, *supra* note 29, at 2065 (citing Barbara Nachtrieb Armstrong, *Where Are We Going with Picketing? Intra-Union Coercion Is Not Free Speech*, 36 CALIF. L. REV. 1, 34–35 (1948)); Thornhill v. Alabama, 310 U.S. 88 (1940); AFL v. Swing, 312 U.S. 321 (1941).

[243] *See supra* notes 136–38 and accompanying text.

[244] *See supra* Part I (discussing *Goldfinger*). This doctrine was adopted in several states after *Goldfinger*. *See supra* note 101.

[245] *See* NLRB v. Bus. Mach. & Off. Appliance Mechs. Conf. Bd., 228 F.2d 553, 557–58 (2d Cir. 1955) (ally doctrine); Douds v. Metro. Fed'n of Architects, 75 F. Supp. 672, 676 (S.D.N.Y. 1948) (same). Franchisors or parent companies may only be picketed if they wield sufficient control over the employees' wages and working conditions. *See* Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018) (joint employer doctrine); NLRB v. Rockwood Energy & Min. Corp., 942 F.2d 169 (3d Cir. 1991) (single employer doctrine). *But see* Am. Fed'n of Television & Radio Artists v. NLRB, 462 F.2d 887 (D.C. Cir. 1972) (finding that unincorporated divisions of the same company are separate entities for secondary boycott purposes).

[246] NLRB v. Fruit & Vegetable Packers, Loc. 760 (*Tree Fruits*), 377 U.S. 58, 63, 71–72 (1964). The Court conceded that a "diminution in [the secondary employer's] purchases . . . might . . . cause[ ] respondents' picketing to fall literally within the statutory prohibition." *Id.* at 71. But, applying the rule of *Holy Trinity*, it held that "a thing may be within the letter of the statute and yet not within . . . its spirit," *id.* at 72 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892), and that such picketing was not targeted by Congress (and thereby not within the statute) because "[w]hen consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is

courts evidently felt in restricting secondary activity[247] also manifested at the Supreme Court, which later narrowed this interpretation to ensure that customers heavily dependent upon a struck retailer's wares could not be picketed if it would threaten their existence altogether.[248]

B. Takeaways for Current Legislative Proposals: The PRO Act

Today, the labor movement is rallying behind legislation to overturn the NLRA's secondary boycott prohibition. The PRO Act would remove section 8(b)(4) from the NLRA altogether.[249] While the Act may remove a burden from unions and open up possibilities for worker solidarity, an analysis of the legal principles that undergirded the system predating the secondary boycott prohibition presents food for thought for policymakers.

The PRO Act currently only amends the NLRA's secondary boycott prohibition by "striking paragraph [8(b)](4)" of the NLRA.[250] But would removing the federal prohibition of secondary boycotts, without more, defederalize the law of secondary boycotts again, thereby leaving it to the states to regulate such activity? Preemption of state laws under the NLRA is generally robust. State courts are preempted from regulating conduct that the NLRA arguably covers, even if the NLRB does not exercise its authority,[251] unless the conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[252] Under this rule, the Supreme Court permits state courts to

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closely confined to the primary dispute." *Id.* The Court noted two alternative theories to support targeted as opposed to generalized picketing of a secondary employer: the unity of interest theory and the notion that primary boycotts include any "picketing restricted to the primary employer's product." *Id.* at 64 n.7.

247 *See supra* Part I.

248 NLRB v. Retail Store Emps. Union, Loc. 1001 (*Safeco*), 447 U.S. 607 (1980).

249 Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020).

250 *Id.* § 4(c)(2)(A).

251 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 238 (1959) ("[T]he refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be preempted from regulating."); Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Rels. Comm'n, 427 U.S. 132 (1976); *see also* Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n, 382 U.S. 181 (1965) (holding that states may enjoin picketing by a supervisor's union, even though supervisors are outside the jurisdiction of the NLRA); Helmsley-Spear, Inc. v. Fishman, 900 N.E.2d 934 (N.Y. 2008) (holding that employer's tort claim of private nuisance against loud union picket was not preempted).

252 *Garmon*, 359 U.S. at 244.

regulate labor union protests through the application of tort law.[253] The Court has even found that a state may regulate activity arguably protected by federal labor law if the conduct clearly violates state law.[254] Given courts' decades-old propensity to see secondary activity as inherently coercive or accompanied by violence[255] and the PRO Act's silence on its preemptive effect in this respect, there is a real question whether courts would interpret the PRO Act's secondary boycott provision to protect all secondary activity from state regulation.

The PRO Act currently manifests no explicit congressional intent with regard to state regulation of boycotts. Its minimalist intervention could just as easily be interpreted as intending to defederalize the law of secondary boycotts as intending to legalize the secondary boycott nationwide. Part I illustrated the dangers of the former interpretation: even progressive jurisdictions in the 1930s were reluctant to legalize secondary boycotts after the law's defederalization and remained preoccupied with the threat that secondary activity appeared to pose to public order and employers' property rights. Further, if state courts enacted legislation to prohibit secondary activity in reaction to the PRO Act, labor advocates would likely lack any recourse in the courts under the First Amendment. As Part II described, despite *Thornhill*, the Supreme Court concluded years before Taft-Hartley that labor speech is not within the core of First Amendment protections and states are free to regulate picketing to curtail its economic effects.[256]

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253 *See, e.g.*, United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663–64 (1954) (finding no collision between the NLRA and state tort law where the NLRA does not provide a remedy for damages caused by tortious conduct); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957) (holding that the state court could enjoin acts of intimidation and coercion by protestors); Int'l Union, UAW v. Russell, 356 U.S. 634 (1958) (citing *Laburnun*, 347 U.S. 656, to uphold the state court's jurisdiction over tort action); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 55 (1966) (upholding a state tort action for libel arising from a union-organizing campaign); Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977) (finding that a state tort action for intentional infliction of emotional distress was not preempted by the NLRA).

254 *See* Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180 (1978) (finding that a state law injunction for picketing that continually, under state law, trespassed on employer property under state law was not preempted by federal labor law).

255 *See generally* NLRB v. Retail Store Emps. Union, Loc. 1001 (*Safeco*), 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (characterizing the picketing at issue as "call[ing] for an automatic response to a signal, rather than a reasoned response to an idea"); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 45 (1999); Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 BUFF. L. REV. 1 (1989); Edgar A. Jones, Jr., *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023 (1953) (reviewing common law jurisprudence on picketing).

256 Int'l Brotherhood of Teamsters, Loc. 695 v. Vogt, Inc. 354 U.S. 284, 289 (1957).

An effective repeal of the secondary boycott prohibition, then, would need to affirmatively legalize the secondary boycott nationwide, explicitly preempting any states' attempts to the contrary.

Conclusion

In the end, it is not clear that the 1947 Taft-Hartley amendments to the National Labor Relations Act dramatically altered the law's treatment of the secondary boycott. Without an analysis of supply chain interdependencies, courts struggled to articulate a clear reason to prefer the indirect economic demands of one company's workers over the property rights of another business. Labor law reform should always be mindful of the high value that American law places on private property and employers' prerogatives.[257] Secondary picketing holds the potential that, in their attempt to vindicate their own economic rights, workers would target anyone implicated in a modern industrial economy, no matter how far removed. One 1938 court decision questioned whether all modern consumers are complicit: "Is one to be pursued for wearing non-union garments?"[258] Turning away from this history and elevating workers' speech rights over employers' property interests requires a firm, explicit congressional declaration of a new public policy, one which encourages the flourishing of worker speech throughout our modern, interconnected economy.

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257 *See* White, *supra* note 237, at 1072 ("[T]he history of strikes shows . . . an encounter with the unyielding outer boundaries of what labor protest and labor rights can be in liberal society.").

258 Weil & Co. v. Doe, 5 N.Y.S.2d 559, 561 (Sup. Ct. 1938) ("May a housewife be picketed for using non-union products? Is one to be pursued by pickets for wearing non-union garments?").