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Consumer Picketing and the Court—The Questionable Yield of *Tree Fruits*

The actual effect upon the parties of some decisions by the Supreme Court may be of relative insignificance when compared with the impact of these decisions upon the judicial process itself. The following article discusses one recent decision of this nature, the Tree Fruits case, which dealt with the judicial interpretation of the amended "consumer picketing" provisions of the National Labor Relations Act. Professor Lewis characterizes the decision as one probably having no major impact upon labor-management relations, but criticizes the Court's decision making process. The author considers the general function of legislative history in the process of statutory construction and various rules of interpretation, along with the specific history of the provisions in question, which conceivably could explain the Court's decision. However, he concludes that the Court avoided significant factors in this case by a vague reference to the first amendment and rendered an opinion based on reasoning which was inadequate to support the result reached.

Thomas P. Lewis*

Many Supreme Court decisions are more interesting—and important—as specimens for the study of the judicial process than as resolutions of particular disputes. One such case, decided last term, is *NLRB v. Fruit & Vegetable Packers, Local 760 [Tree Fruits].*1 The issue was a narrow one—whether so-called "consumer picketing," limited to an appeal to the public concerning the products of an employer with whom the union has a primary dispute, is prohibited by section 8(b)(4)(ii)(B) of the National Labor Relations Act [NLRA], as amended. That section makes it an unfair labor practice for a labor organization "to

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threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person to . . . cease doing business with any other person . . . .” A proviso qualifying this section states that nothing in paragraph four “shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . .”

The factual context in which the issue was presented provided maximum sympathy for the union viewpoint that some form of consumer picketing should be permitted. Respondent, Local 760, represented employees of fruit packers and warehousemen doing business in Yakima, Washington, who were represented for collective bargaining purposes by the Tree Fruits Labor Relations Committee, Inc. During the negotiations for a new contract, Local 760 called a strike against the employers. Within a week the majority of the plants, with the assistance of nonstriking personnel and replacements, resumed full operation. After some three months of unsuccessful striking, the union decided to appeal to the public not to buy apples packed by non-union, strike-breaking workers. The plan was carried out by placing pickets at 46 Safeway stores in Seattle. The pickets wore placards and distributed handbills appealing to customers not to buy Washington State apples. The pickets appeared at and left the stores shortly after the beginning and before the end of the workday, restricted their activity to customer entrances, and were instructed not to interfere with the work of Safeway employees and not to request customers to refuse to patronize the stores. The union notified the store managers of their limited purpose to appeal to customers and promised corrective action immediately if any store employees stopped work or if deliveries to the stores were impeded. No work stoppages or refusals to deliver occurred.

The National Labor Relations Board received the case directly on the basis of stipulated facts and a complaint charging that the union’s conduct violated section 8(b)(4)(i) and (ii)(B). No evidence or stipulation concerning actual effects of the picketing on Safeway’s sales generally or on sales of Washington State

apples was produced. The Board dismissed the 8(b)(4)(i) charge, holding that any intention by the union to induce Safeway employees to engage in work stoppage was lacking. But the second charge was upheld, the Board holding that "by literal wording of the proviso [to section 8(b)(4)] as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited." The picketing "threaten[s], coerce[s], or restrain[s] persons within the meaning of Section 8(b)(4)(i)," the Board said, and since the "natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers" it is reasonable to infer that the union intended the forbidden object.

The Court of Appeals for the District of Columbia reversed the Board and remanded the case. Believing a substantial first amendment speech-regulation problem existed, that court found a more "plausible reading to be that § 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers. . . ." Since there was no evidence or finding that Safeway in fact felt any coercion or restraint (through substantial economic impact, for example), section 8(b)(4)(ii) was not applicable.

While rejecting the Court of Appeals' interpretation of the section, a majority of the Supreme Court, speaking through Mr. Justice Brennan, held that there was no violation of section 8(b)(4)(ii) on the facts. In reaching this result, the Court disagreed with most leading commentators who have discussed the question, strained the arguably "plain meaning" of the section coupled with its proviso, and overcame a legislative history which seemingly compelled a contrary conclusion. The only justification given for hurdling those substantial obstacles was shrouded in

the mists of a vague reference to the first amendment to the Constitution. Mr. Justice Brennan acknowledged the governing statutory language by quoting it in his opening sentence and stating the issue to be whether all secondary consumer picketing coerces or restrains the secondary employer within the meaning of section 8(b)(4)(ii); but from that point on, his analysis proceeds as if the statute were adequate only to present the legal question — as if it could have nothing to contribute towards answering it. This is accounted for by a rule of statutory construction announced by Mr. Justice Brennan at the beginning of his analysis. The rule and the reasons given for it are reflected in this language from the opinion:

Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. "In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing." . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," . . . that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.

The conclusion the Court reached on the basis of the above test was then stated prior to the description of the application:

We have examined the legislative history of the amendments to § 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway Stores.

What was Congress concerned with when it enacted 8(b)(4)(ii)(B) and the elaborate proviso? According to the Court, Congress meant to reach only that peaceful consumer picketing de-
signed to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer. Relating the problem to the conceptual terms of the statute, the Court held that publicity, whether by picketing or otherwise, which appeals to the consumer not to buy the product of the primary employer, does not "coerce or restrain" the secondary employer; whereas publicity appealing to consumers not to trade at all with a secondary employer who sells a product of the primary employer does coerce and restrain the secondary employer. The proviso saves this latter type of publicity, however, so long as it is not communicated through "picketing."

This disposition of the case raises three fundamental questions: 1) Was the Court justified in focusing its attention solely on the legislative history? 2) Was the Court justified in demanding a clearer expression of meaning than it found in the legislative materials? 3) What is the relevance, if any, of a finding of support or lack of support in the legislative materials for the interpretation selected by the Court? Each of the questions will be considered in the light of relevant general principles. The legislative history of section 8(b)(4)(ii) will then be set forth so that general conclusions can be tested against the concrete materials which were before the Court.

I. THE USE OF LEGISLATIVE HISTORY

The increasing role of legislative history in the Supreme Court's task of interpreting statutes, Mr. Justice Jackson's protests notwithstanding, is well known. Equally well established, however, is the fact that legislation, not legislative history, is passed by the Congress and approved or vetoed by the President. We know that legislation cannot be ignored because it lacks a helpful and explanatory history, and conversely, that legislative history not culminating in enacted legislation cannot be enforced as legislation in the conventional sense. These facts in no way detract from today's widespread agreement on the wisdom of using legislative history as an aid in interpreting legislation. It might be argued in a few instances that if plain statutory language seems to admit of but one solution, interpretation is ended; legislative

history can have no function. But words being the inexact symbols that they are, and the power being in a legislature to define even so-called “single-meaning” words, no means may be available for determining intelligently that certain language has or was intended to convey a plain meaning except study of extrinsic aids, including legislative history.11 Even an invariable rule of resort to legislative history, however, will not alter the fact that the purpose of the resort is to find out what relevant legislation means. As Mr. Justice Frankfurter has written, “spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it.”12

It follows from these observations that statutory interpretation should begin with consideration of the statutory language.13 The Court in Tree Fruits literally departed from this principle and seemed to provide an independent function for legislative history to which it is not entitled. It relied for its approach on NLRB v. Drivers Union [Curtis Bros.].14 In analyzing the Court’s methodology in light of the concrete problem before it, rather than against the foregoing abstractions, a comparison of Tree Fruits with Curtis Bros. will be useful.

In Curtis Bros. the Board had found,15 10 years after the enactment of the Taft-Hartley Act, that peaceful recognition picketing coerces or restraints employees in the exercise of their rights under section 7 of the NLRA16 in violation of section 8(b)(1) of the NLRA.17 The Supreme Court disagreed with this interpretation, and found that Congress did not intend to regulate peaceful picketing by the general language of 8(b)(1), which forbids a labor organization to “coerce or restrain” (but not to “interfere with”) an employee’s rights. The Court noted the linkage between the prohibition by the Board and the right to strike, protected by section 15 of the NLRA against restriction, “unless specifically provided for” in the Act” and read this as a caution “against an expansive reading” of the general language in 8(b)(1). The Court

13. Id. at 533; Hart & Sacks, op. cit. supra note 10, at 1285.
mentioned the sensitiveness of peaceful picketing as an area of regulation, pointed out the congressional approach of dealing with isolated evils (citing section 8(b)(4) "as illustrative of the congressional practice"), and concluded that it could uphold the Board only if the "congressional purpose . . . persuasively appears either from the structure or history of the statute." As the Court pointed out in this case, tension existed between two categories of employee rights protected from coercion or restraint by section 7—rights to organize, bargain collectively, and engage in concerted activities, and rights to refrain from these activities. General statutory language is not well suited to the task of relieving this tension. Just as the Court has had to avoid a literal interpretation of section 8(a)(1) and to consider legitimate employer interests to determine which of his activities interfere with section 7 rights, so the Court had to consider competing employee interests to determine the meaning of section 8(b)(1). The structure of the legislation created doubt. The Board recognized that organizational picketing was not condemned by the NLRA but perhaps failed to face up to the difficulty of distinguishing between it and recognition picketing. Tradition, a history of contrary legislative interpretation, and the very great importance attached to recognition picketing increased doubt. Finally, by the time the case reached its conclusion, Congress had isolated the evils it wanted to regulate by amending the NLRA to include section 8(b)(7), indicating in the legislative history that this was to be the exclusive accommodation of conflicting interests. Upholding the Board's ruling would create an additional source of regulation, possibly in conflict with 8(b)(7). In the face of these considerations, the demand for a persuasive legislative history indicating a congressional intention to forbid recognition picketing in 8(b)(1) is understandable.

The problem of statutory interpretation presented by *Tree Fruits* was fundamentally different from that presented by *Curtis Bros*. First, the statutory section contains specific language obviously addressed to the specific dispute in *Tree Fruits*. The proviso excepting publicity, other than picketing, from the general language of 8(b)(4)(ii) indicates the probability that all forms of consumer boycott publicity were thought to be included in the

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18. 362 U.S. at 281–84. (Emphasis added.)
23. See Cox, supra note 6, at 269–89.
meaning of the general language as a form of coercion or restraint. Interpreted most narrowly, the words definitely point to the inclusion of some picketing. But inclusion of less than all creates the problem of defining that picketing which is to be included. The statutory language provides no hint as to the means of differentiating between the permitted and prohibited. One possibility is the distinction made by the Court of Appeals in Tree Fruits. But this distinction turns the results on the success of the picketing, a criterion structurally out of joint with other parts of 8(b)(4). In addition difficult problems of proof would be created by such a distinction in cases of actual picketing and nearly impossible ones created in cases of "threats" which are also prohibited by 8(b)(4)(ii). Another possible criterion for distinction is the purpose of the picketing labor organization. Did it merely intend to reduce sales of a struck product to consumers, or was its purpose to force a cessation of business relations between the primary and secondary employers? The latter purpose is necessary to bring the conduct within the language of 8(b)(4)(ii)(B), but the reality of the distinction is highly questionable. It is noteworthy that neither the Court of Appeals nor the Supreme Court questioned the Board's finding of forbidden purpose in Tree Fruits.

Finally, the Court drew the distinction between "do not buy the product" and "do not trade" appeals. This distinction clearly has merit which could appeal to a decision-maker for whom the problem is res integra. As the Court pointed out in its opinion, the distinction has secured some recognition in early state court decisions and labor law treatises. The question is, did Congress intend to create the distinction. Nothing in the statutory language points in that direction unless past interpretation of the words "coerce or restrain" provides direction. The Court referred

24. See text accompanying note 5 supra.
25. This point—as well as the point that the words "coerce or restrain" in §§ 8(a)(1) and 8(b)(1), as construed, do not require proof of actual effect—is developed with citation of many precedents in the Brief for Petitioner, pp. 10-13, NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964).
27. The distinction is stated as a possibility, but without any apparent enthusiasm for its validity, in Farmer, supra, note 6, at 341 n.73.
28. 377 U.S. at 63-64, citing, inter alia, Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937), and 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 129 (1940). The author of a 1938 article on the subject noted that case authority on the point outside of New York is extremely sparse. Hellerstein, Secondary Boycotts in Labor Disputes, 47 YALE L.J. 341, 349 (1938).
 Generally speaking, a “do not trade” appeal should have a more coercive effect on a secondary employer, but as Mr. Justice Harlan observed in his dissent, real effects will depend on the nature and number of products sold by the secondary employer. Apart from this distinction, degrees of coercive effect are not recognized in the statutory language. In an initial consideration of possible interpretations of the statute, the statutory structure should also be considered. The proviso which exempts publicity, other than picketing, is effective only so long as “such publicity does not have an effect of inducing” work refusals at the secondary employer’s establishment. The Court’s interpretation gives to the proviso the function merely of saving publicity other than picketing which makes a “do not trade” appeal. Since this publicity in turn is prohibited by the terms of the proviso if an effect is to induce work stoppages at the secondary site, the purpose attributed to Congress is to turn the application of the work-stoppage qualification on the type of message conveyed at the secondary site even though in all cases the message will be addressed solely to consumers. If Congress was at all concerned with the possibility that consumer boycotts might spread to employees, it is at least questionable whether its concern would be made to depend in live cases upon a factor so sterile and mechanical (in the context of proved work stoppages) as the content of the message to consumers.

29. The Court did argue that the express prohibition of picketing in § 8(b)(7) means that Congress makes its meaning clear when intending to bar picketing per se. Of course, picketing to effectuate a “do not trade” appeal is per se prohibited under the Court’s rule in just the same sense that picketing to effectuate a “do not buy the product” appeal would be under the Board’s rule.

30. But the Court in NLRB v. Servette, Inc., 377 U.S. 46 (1964), decided the same day as Tree Fruits, specifically ruled that a wholesaler of goods is a “producer” within the meaning of the publicity proviso to § 8(b)(4). Since the handbilling in question in the case appealed to customers to refrain from buying named products distributed by the wholesaler— hence was not “coercive” according to Tree Fruits—the coverage of the publicity proviso should not have been an issue.

31. If the occurrences of work stoppages alone were sufficient to convert a boycott of products at a secondary establishment into a § 8(b)(4)(i) type of boycott, the problem discussed in the text would disappear. The language of § 8(b)(4)(i), “to induce or encourage,” is closely similar to the language of the proviso, “have an effect of inducing,” but the Board has stressed in § 8(b)(4)(i) cases the necessity of finding conduct intended, calculated, or likely to result in work stoppages. Secondary picketing is not per se inducement or encouragement within the meaning of 8(b)(4)(i). See, e.g., Fruit & Vegetable Packers, Local 760, 192 N.L.R.B. 1172 (1961); Upholsterers, Twin City Local
Moreover, the very existence of this problem provided added dimension to the difference between the Court’s and the NLRB’s interpretations of the section. If the Court’s interpretation is correct, some accounting for the curious structure of the section might reasonably be searched for in the legislative history.

These are some of the questions that might have been asked prior to study of the legislative history. Without some analysis of the statutory language, it is difficult to understand how flat statements rationally may be made about the demands to be made of legislative history. Analysis of the language of the statute does not, it is true, demonstrate a single correct interpretation. The possibility that Congress used the words “coerce or restrain” in a special sense remains after analysis of the language. But the analysis does indicate that if a special meaning was intended, support for it should appear in the legislative history. It should, that is, unless a special rule of construction supplies the needed support.

II. THE EMPHASIS ON CLEAR MEANING

In addition to its use of legislative history as if it were the only source of meaning, the Court approached it with an artificial emphasis: The interpretation rendered by the Board would be upheld only if legislative history provided the clearest indication that this was Congress’ purpose. In choosing this emphasis, the Court applied a “policy of clear statement” for which it shared responsibility with Congress.

61, 132 N.L.R.B. 40 (1961), rev’d on other grounds, 381 F.2d 561 (8th Cir. 1964) (citing Tree Fruits). The contrary authority of Burr v. NLRB, 391 F.2d 612 (5th Cir. 1968), has been diminished by the Supreme Court’s disposition of Tree Fruits. See also United Wholesale & Warehouse Employees Local 261 v. NLRB, 282 F.2d 824 (D.C. Cir. 1960). One can only speculate as to the effect, if any, which Tree Fruits will have on the Board where work stoppages actually occur, even though the union activity is restricted purely to consumer appeals at consumer entrances. It could be said in one sense that work stoppages having occurred, they were “likely” to occur, but it might be difficult to find that the union sought the stoppages, or that they were the natural and probable result of the picketing.

32. See Hart & Sacks, op. cit. supra note 10, at 1235.

33. The Court’s statement of the policy is quoted in text accompanying note 8 supra. Hart & Sacks, op. cit. supra note 10, at 1240, states the same policy: “Judicial opinions on the interpretation of statutes are replete with references to presumptions, or suggestions of the existence of presumptions, amounting to what are here called policies of clear statement. In effect, these presumptions all say to the legislature, ‘If you mean this, you must say so plainly.’”
This policy of clear statement applied is probably a composite of several well-established policies, the most nearly analogous one being the practice of construing legislation to avoid constitutional questions. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." The key words are "serious doubt" and "fairly possible." Is it enough that the words of a statute will bear more than one interpretation, one of which will raise a serious question of constitutional law and one of which will avoid the question? The rule has been stated in terms almost this extreme. This application of the rule would represent an inflexible conclusion that the purposes unmistakably sought by Congress are always of less importance than the avoidance of constitutional issues, and would lead in many cases to absurd results. The next most extreme statement of the rule takes this form: "We should not attribute to Congress such a purpose or intent unless it used language so mandatory and unmistakable that it left no alternative . . . ." This statement leaves room for the accommodation of legislative purpose if clearly enough stated. Set off against these statements of the rule are the more frequent statements which would invoke it where legislation is "reasonably susceptible" to the innocent interpretation, or where the legislation is "equally susceptible" to two interpretations.

Then there is the rule of construction of opposite thrust which

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35. "The Court makes a drastic break with the past in disregard of the settled principle of constitutional adjudication not to pass on a constitutional issue—and here a grave one involving basic civil liberties—if a construction that does no violence to the English language permits its avoidance." Shapiro v. United States, 335 U.S. 1, 36 (1948) (Frankfurter, J., dissenting). Mr. Justice Frankfurter did not apply the rule in this literally extreme form.

36. For example, consider the possible results if the rule in this form had been applied to the issues presented in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and Katzenbach v. McClung, 85 Sup. Ct. 377 (1964).

37. Shapiro v. United States, 335 U.S. 1, 71 (1948) (Jackson, J., dissenting).

emphasizes legislative purpose as the most important value:

For, in construing statutory immunities in such circumstances, we must heed the equally well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. The canon of avoidance of constitutional doubts must, like the "plain meaning" rule, give way where its application would produce a futile result, or an unreasonable result "plainly at variance with the policy of the legislation as a whole." Each of these statements is capable of valid applications.

While it would create absurd results if the evident purposes of Congress were ignored blindly in the name of self-restraint, it would create equally absurd results if the apparent purposes of Congress were inexorably found in its legislation even though these purposes would lead to the destruction of entire legislative enactments as unconstitutional. The nature and gravity of the constitutional issue must be accounted for in the formulation of the canon. If it is reasonably evident that one interpretation will render a statute unconstitutional on its face or as applied, this may be a powerful argument for a narrower interpretation.

Knowledge of a constitutional issue may be used as a reason for attributing certain meanings to Congress in the use of language. Beyond this usage, as the border between the constitutional and unconstitutional is approached, there legitimately may be less concern with giving effect to the expressed will of the legislature, for that branch might prefer in the circumstances to have some legislation on the subject rather than none at all. In these cases, of course, the more the Constitution determines the meaning of legislation, the less possible it becomes to avoid the constitutional issue.

At the opposite extreme is the case in which the congressional purpose is clear, the constitutional issue is of doubtful validity at best, and the alternative interpretation is one which would seriously undermine the legislative purpose. Use of the canon in these circumstances is merely a disguise for a result reached on

40. See, e.g., United States v. CIO, 335 U.S. 106 (1948); Ruddy v. Rossi, 249 U.S. 104, 110-11 (1918) (Holmes, J., dissenting); The Abby Dodge, 228 U.S. 166 (1912).
41. See, e.g., Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
42. The obscenity cases illustrate the extreme application of this general statement.
the basis of other considerations. Whether a given case falls at one extreme or the other or somewhere between the extremes can be determined only by considering the legislation, its legislative history, and the nature of the constitutional issue potentially involved. Application of the canon in any event cannot justify reliance upon an examination of legislative history alone.

In *Tree Fruits*, the Court did not precisely invoke the canon that legislation should be interpreted so as to avoid a constitutional question. Nowhere in the majority opinion is it claimed that the NLRB's interpretation raises a serious constitutional question; rather, the claim is made that a "broad ban" against peaceful picketing might violate the Constitution, without any conclusion that 8(b)(4)(ii) in any of its possible meanings constitutes a "broad ban" in the sense used. Bans on peaceful picketing as broad or broader, and surely more severe in their effects, have been upheld by the Court in recent cases.44

No further hint is given as to the Constitution's role in the case. The impression is easily gained that the Constitution contributed to the defeat of one possible interpretation of the statute, and that the interpretation adopted somehow accounts for any constitutional doubts, but these ideas never receive clear expression.

The important point may be one mentioned by the Court that an appeal concerning only the primary employer's product partakes of a primary dispute even though it occurs at the site of the secondary employer's business. A Congress believing this factor to be important in weighing competing interests might distinguish between "product" and "do not trade" picketing. It might also distinguish between picketing and other publicity, for it is apparent that an important value of a "do not buy the product" picket line, as distinguished from mere publicity, is the potential power the picket line has as a symbol to turn customers.

43. In an opinion in which he invoked the canon, Mr. Justice Holmes asserted that its use to bolster a conclusion reached on other grounds was the more common usage. Ruddy v. Rossi, 248 U.S. 104, 110–11 (1918).

away from any trade with the picketed establishment. A picket line limited to the purpose of advising persons who are implicitly invited to cross it not to buy a particular product within the picketed establishment is a concept embodying internal inconsistency. This fact hardly means that Congress would not choose to preserve a traditional means of communication, but does suggest that a choice to condemn it in this very limited context, even though considered by many to be unnecessarily harsh, is not irrational and arbitrary. Also the suggestion is possible that a Congress mindful of the Constitution might have chosen precisely the rule which the Board found clearly stated in section 8(b)(4)(ii)(B), i.e., a rule which protects lines of information concerning a labor dispute and involved products, but which attempts to excise the one element that may have an extra-informational effect.

Another basis for the policy of clear statement, closely related to the one derived from a desire to avoid constitutional issues, is one derived from the value of protecting important interests from lightly undertaken legislative destruction. Mr. Chief Justice Marshall provided an early announcement of this policy:

To interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. . . .

An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.

The interest regarded as important enough to support a policy of clear statement may or may not be of constitutional proportions. The interest in picketing generally, and in the specific goals for which it is a means, is surely a highly important one. Apart from the constitutional protection it might receive, the right to engage in peaceful picketing should not be subjected to regulation by inference from loosely drawn legislation. This idea probably explains the Court’s insistence on clear expression by

45. The words of the proviso will bear an even narrower interpretation combining both of the mentioned distinctions. NLRB General Counsel contended that only publicity urging a product boycott is permitted by the proviso. The NLRB rejected this interpretation and held that “do not trade” publicity is permitted. Local 662, Radio & Television Eng’rs, 133 N.L.R.B. 1698 (1961). The legislative history recounted in the text accompanying notes 49–77 infra reflects substantial support for the Board’s position.


Congress more adequately than the interest in avoiding a constitutional issue. However, reliance upon legislative history alone as the source of clarity or ambiguity is not thus explained. And, unlike a constitutional issue, an important interest can serve only as the predicate for a demand for clarity; it cannot doctrinally limit the power of Congress and in this way inject its own meaning into legislation. Thus the legislative meaning, if expressed with sufficient clarity, should dominate in the process of interpretation. In judging the clarity of expression in section 8(b)(4)(ii), its legislative history must be considered.

III. LEGISLATIVE HISTORY RELEVANT TO TREE FRUITS

The Labor-Management Reporting and Disclosure Act was a compromise between the Kennedy-Ervin bill, adopted by the Senate, and the Landrum-Griffin bill adopted by the House, in the 86th Congress. The Kennedy-Ervin bill contained no amendments to the NLRA secondary boycott provisions, but Landrum-Griffin, and the Administration bill introduced in the Senate by Senator Goldwater, contained amendments designed to close certain "loopholes" in section 8(b)(4) of the NLRA. One of these loopholes was the failure of section 8(b)(4) to reach direct pressures exerted against a secondary employer with an object of forcing him to cease doing business with the primary employer. The language of section 8(b)(4)(ii) was designed to close this loophole and was contained in the portions of Landrum-Griffin and the Administration bill amending the NLRA.

Specific types of "coercion" of secondary employers were not initially explained in any detail by the sponsors of the legislation. Emphasis was placed on the object for which coercion was practiced — cessation of business between employers — rather than on means. But in early criticism of a Goldwater amendment to the Kennedy-Ervin bill similar to section 8(b)(4)(ii), Senator Humphrey said he feared that appeals to consumers through handbills or picketing to stop buying a primary employer's produ-

52. It is clear that prohibiting the consumer boycott was an object of those who sought to close "loopholes." Senators Goldwater and Dirksen criticized the omission of any provision aimed at the problem in S. 1555 when it was favorably reported from committee. S. Rpt. No. 187, 86th Cong., 1st Sess. 79 (1959) (minority views).
uct or to stop patronizing the secondary employer would be outlawed. Congressman Griffin initially explained this portion of his bill simply as prohibiting a union official's going to B and threatening "him with labor trouble or other consequences, unless he stops dealing with company A..." He became more specific under questioning from Congressman Brown:

Mr. BROWN of Ohio. Mr. Chairman, I should like to propound a question either to Mr. GRIFFIN or to Mr. LANDRUM, the authors of one of the bills, relative to secondary boycotts...

My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

Mr. BROWN of Ohio. That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. GRIFFIN. Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN of Ohio. But the Griffin-Landrum bill would?

Mr. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer — then such a boycott could be stopped.

Mr. BROWN of Ohio. Not to sell the goods of some concern that is on strike. Would that same rule apply to the picketing at the customer entrances, for instance of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?


54. Id. at 15583, 2 Leg. Hist. 1568.
Mr. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing—

Mr. BROWN of Ohio. Advertising.

Mr. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.55

Congressmen Udall and Thompson were very specific in the meaning they attached to the Landrum-Griffin amendment in a formal analysis which they inserted in the record:

The bill provides that a union may not restrain an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts, and newspaper advertisements, thereby interfering with freedom of speech.

Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sold Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

The Landrum bill forbids this elementary freedom to appeal to the general public for assistance in winning fair labor standards. The union apparently could be enjoined upon the ground that it was coercing or restraining the retailer with object of inducing him not to deal with the brewery; indeed, as I understand it, one of the acknowledged purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute.

This is a basic infringement upon freedom of expression.56

The same illustration and objections were registered in an analysis of Landrum-Griffin prepared by the late Senator Kennedy and Congressman Thompson, both conferees.57

The history of the proviso to section 8(b)(4) begins with a resolution introduced in the Senate by Senator Kennedy seeking instructions for the Senate conferees in their attempt to resolve differences between the Landrum-Griffin and Kennedy-Ervin bills. According to the proposed resolution, section 8(b)(4)(ii) would remain, but a proviso worded as follows would be added:

Provided, That nothing contained in this subsection (b) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor...
One of the ambiguities of this proviso is whether "publicity" included picketing. The analysis submitted with the resolution merely explained that "there is to be no prohibition on truthful appeals to consumers not to patronize an establishment, or not to buy goods, because the manufacturer is involved in a labor dispute." One point is clear: All publicity, whether an appeal not to patronize or an appeal not to buy goods, was subject to the limitation that it must not affect pick-ups and deliveries. An earlier exchange between Senators Kennedy and Dirksen concerning the resolution sheds some light, but its meaning is not perfectly clear:

Mr. DIRKSEN. . . . We got into a tizzy in the illustration used about a mattress plant located, let us say, in Raleigh, N.C., which has a very good customer in St. Louis, Mo. They have a labor dispute in Raleigh, and the pickets show up at the customer's plant in St. Louis. We spend a day discussing what shall appear on the signs. Can they put something in the newspapers? Can they go on the radio?

Mr. KENNEDY. We agreed to that. It is not a part of our resolution.

Mr. DIRKSEN. It is a question of customer picketing.

Mr. KENNEDY. That is right. In that case, we have receded on the question of consumer picketing of a secondary employer.

Now we are going quite far in limiting the right of unions, the traditional right to carry on picketing. And I will say to the Senator that on the point which he raises we have already agreed to the House position.

This colloquy, coupled with the analysis of the resolution, seems to mean that publicity, other than picketing, directed at the primary employer's product or appealing to consumers not to trade with a secondary employer who sells products of the primary employer would be permitted. This same question must have troubled the conferees for the proviso which emerged from conference cleared up the doubt by expressly providing for "publicity, other than picketing," but making no distinction between the narrow "product" and the broad "do not trade" appeal.  

60. Id. at 17328, 2 Leg. Hist. 1378.
61. Though not a formal part of the legislative history, the summary of the proviso's history by Solicitor General, then Professor, Cox, who argued the principal case before the Supreme Court, and who, while a professor of law, participated in the conference as an adviser (see the remarks of Senator Morse, 105 Cong. Rec. 17867 (1959), 2 Leg. Hist. 1411) provides insight and
The analysis of this final conference provision, which was enacted into law, is the most enlightening. Congressman Griffin reported to the House that the conference had started with the House bill which “prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute,” and the Senate bill which contained no provision at all for consumer picketing and had compromised by leaving the House provision intact “with clarification that other forms of publicity are not prohibited . . . .” Senator Kennedy reported to the Senate in the following words:

Secondly, the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.

We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.

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

Continuing his report the following day, he said:

[T]he Senate conferees insisted that the report secure the following rights: . . .

(e) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike

interesting sidelight. Professor Cox pointed out the possibility that some of the backers of Landrum-Griffin may not have realized the words of § 8(b)(4)(ii) were broad enough to include consumer boycotts, but President Eisenhower, in a television appearance, had described activity which should be proscribed and his example had to be read as a description of inducing employees through picketing, or causing a consumer boycott through picketing:

The sponsors of the Landrum-Griffin bill stood immovably upon the second alternative. The Senate conferees, therefore, sought to narrow the restriction to the exact illustration used by the President. This is the reason for the proviso which permits unfair lists, radio broadcasts, newspaper advertising, sound trucks and every other form of publicity except picketing, for the purpose of inducing consumers to boycott an unfair product or a distributor who does business with an unfair producer.


63. Id. at 17720, 2 Leg. Hist. 1388–89.
was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.64

Senator Morse offered an illustration of the meaning of section 8(b)(4)(ii)(B) in the course of explaining the many reasons why he could not sign the conference report:

This bill does not stop with threats and with illegalizing the hot cargo agreement. It also makes it illegal for a union to “coerce, or restrain.” This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, “Do not buy X shoes.” This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer. . . . We take a long and backward step when we legalize consumer picketing. It is not enough to say that the union can make its appeal by newspaper advertisements and leaflet distribution. Advertisements are expensive, and both may be ineffective to quickly and dramatically catch the public’s eye.65

Two references to legislative history are made by the Court but not included in the foregoing report. Senator McClellan offered an amendment to section 8(b)(4) forbidding “economic or other coercion” against any person for a proscribed object. The Court said he “mentioned consumer picketing but only such as was ‘pressure in the form of dissuading customers from dealing with secondary employers.’”66 It is not at all clear from the context that Senator McClellan meant to regulate only appeals to consumers to cut off all trade with the secondary employer. He followed the remarks quoted by the Court with a reference to employers who may have built their entire business around the product of a single manufacturer. He preceded the quoted words with the following explanation of his amendment:

The amendment covers the direct coercion of secondary employers to cause them to cease dealing with or doing business with the primary

64. Id. at 17898–99, 2 LEG. HIST. 143l–32.
65. Id. at 17882–83, 2 LEG. HIST. 1426–27. Mr. Justice Harlan noted the irony in the fact that Senator Morse used the New York case, Goldfinger v. Feintuch, in the course of explaining the type of activity struck down by § 8(b)(4)(ii), 377 U.S. at 86 n.3, while the majority of the Court cited the same case, see note 28 supra, as a state precedent recognizing the distinction announced by the Court.
66. 377 U.S. at 60.
employer. In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union could not use picketing to try to compel me to cease handling the products... 67

The second reference was to Senator Goldwater, a conferee. The Court quoted him as explaining that the House bill closed up every loophole, "including the use of a secondary consumer picket line, an example of which the President gave on his nationwide TV program..." 68 The Court then quoted Senator Goldwater's own definition of a consumer boycott and described it as "even more clearly narrow in scope: 'A secondary consumer, or customer, boycott involves the refusal of consumers or customers to buy the products or services of one employer in order to force him to stop doing business with another employer.'" 69

This language supports the Court's conclusion only if it is assumed the speaker intended to provide a literally complete and exclusive definition of the types of publicity reached by the general language of the provisions in question.

The substance of the Court's opinion consists of interpretation of the legislative history. Some emphasis is placed on the fact that initially the legislators sponsoring section 8(b)(4)(ii) did not spell out the consumer boycott, or at least its precise nature, as an object of regulation. Senator Morse's remarks were discounted because opponents of legislation tend to overstate its reach in an effort to defeat it. This factor would play down the analysis of Congressman Udall and Thompson also. But neither observation is persuasive in the context of the entire legislative history. It is possible that consumer boycotts were not at the forefront of the legislators' thoughts when the legislation was first drafted. But subsequent statements of opponents brought the issue to the forefront, and there is every indication that the sponsors accepted the interpretation of the opposition. Indeed, the opposition apparently was quite sincere because a legislative compromise — the insertion of the proviso — grew out of common assumptions as to the meaning of the section if not qualified by the proviso.

The Court interpreted Congressman Griffin's remarks about consumer picketing as being made "only in the context of its abuse when directed against shutting off the patronage of a secondary employer." 70 How or why the Court drew this conclusion...
is not clear. The only indication of the mental process involved is a quotation of Congressman Griffin in which the Court supplied italics: "[O]f course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer—then such a boycott could be stopped." Did the Court interpret the italicized words to mean "coerce the consumer not to do business with the retailer"? Neither the Court nor the Court of Appeals questioned the Board's finding in the instant case that Local 760's object was to pressure the retailer (Safeway) not to do business with the manufacturer (packers and warehousmen).

Finally, Senator Kennedy's words were to be accounted for. The Court concluded that his explanation "does not compel the conclusion that the Conference Agreement contemplated prohibiting any consumer picketing at a secondary site beyond that which urges the public, in Senator Kennedy's words, to 'refrain from trading with a retailer who sells such goods.'" A more complete text of Senator Kennedy's words had just been quoted by the Court: "He said that the proviso preserved 'the right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by non-union labor and to refrain from trading with a retailer who sells such goods . . . .'" Mr. Justice Harlan accused the majority of "simply grasping at straws" by adding emphasis to the word "and," and he suggested that the word lends itself equally well to a disjunctive meaning. It is interesting to note in this connection that Senator Kennedy did use the literal disjunctive conjunction at another point when describing secondary consumer publicity.

Even more at war with the Court's reliance upon such slender threads as these is the fact that never in the debates or reports relied upon was the distinction the Court found, brought home to the legislators. The legislators who provided definitions of consumer boycotts were not alerted to the task of differentiating categories of consumer boycotts; rather, they spoke very generally with the apparent purpose of isolating the secondary nature of the activity and the consumer audience as the primary defini-

71. Id. at 68.
72. Id. at 70.
73. Ibid. A fuller quotation of Senator Kennedy's remarks appears in text accompanying notes 60, 63, 64 supra.
74. See text accompanying note 59 supra.
75. The remarks of Professor Cox, quoted in note 61 supra, are especially telling in this respect.
tional criteria. For the Court to seize upon this general, unfocused language is especially curious when it is remembered that close scrutiny of legislative history here was peculiarly the child of the Court's opening assumption: "'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.'"

The heart of the matter, then, is that Congress had isolated what it considered to be an unwarranted practice. If the question of interpretation had been simply whether Congress did or did not outlaw secondary consumer picketing, an easier case might have been presented. But the question, rather, was what types of consumer picketing did Congress regulate if it regulated less than all. The Court could not find that Congress had not spoken to the issue, but was forced to find how Congress had defined the issue. In this kind of case legislative history cannot be scrutinized with the single negative demand for compelling evidence that Congress had a given intention. Since the outcome of the inquiry will be the attribution to Congress of some affirmative meaning, the search should be undertaken with the object of determining that meaning. If one goes to the legislative history to find affirmative support for the interpretation announced by the Court in Tree Fruits, he will find only a few shreds. This very absence of support is additional evidence pointing towards the validity of the competing interpretation.

For these reasons, neither of the policies of clear statement previously discussed seems equal to the task of relieving the strain placed upon 8(b)(4)(ii) and its legislative history. To the extent they played a part in the case, it was in their not unfamiliar role of diverting attention from the actors with leading parts.

IV. THE SECOND-LOOK DOCTRINE

One other rule of construction might be offered to explain the result. Professors Bickel and Wellington have suggested a type of case in which the Court ought to "flout" the legislative will even though it is unmistakable. The instances when this will be justified will of course be rare and grow out of a failure of

76. 377 U.S. at 62-63.
77. In this respect, the problem of interpretation differed from the kind posed in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), and Kent v. Dulles, 357 U.S. 116 (1958), where a conclusion that Congress had not regulated to the extent contended ended the matter.
Congress adequately to consider serious "institutional" problems or invasions of interests occasionally embedded in its legislation. In carefully defined circumstances where this failure occurs, the suggestion is that the Court should adopt an interpretation which will avoid or postpone the effects of the legislation which are perceived to be troublesome (taking care not to "do anything that is inconsistent with the English language"). The interpretation may emasculate the legislation in its intended applications (this may be the object of the interpretation) since the reason for ignoring the stated legislative purpose is to stimulate the Congress to take a second look at the legislation in light of the problem disclosed by the Court.

Although it is very doubtful that the authors of this doctrine would apply it to a case such as Tree Fruits, the Court may have been pursuing a similar idea. If the Court felt that Congress had regulated a phase of peaceful picketing without adequate consideration, it might see an emasculating interpretation of the regulation as a suitable remedy. This would explain the emphasis on legislative history, for only in that history would the extent and quality of congressional consideration of the problem be reflected.

Bearing in mind that the suggestion calls for the "flouting" of clearly expressed legislative purpose, the difficulty with the doctrine, if it has any validity, is in determining when to apply it. Apparently it is to be applied when a majority of the justices reasonably conclude that the problem which disturbs them is sufficiently serious to warrant their refusal to permit the intact survival of the legislation. Reasonable men, adhering to the doctrine, presumably could reach opposite conclusions. If this is the test, it makes it difficult for one who disagrees with a specific

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79. As the title to their article suggests, the authors recommend the application of their rule of construction in connection with Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Believing that § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185 (1958), assigns the wrong task to the wrong institution without due legislative consideration of the probable serious consequences, they would approve of "any form of dismissal for lack of jurisdiction which does no violence to the statutory language" as a suitable disposition of the Lincoln Mills litigation. Bickel & Wellington, supra note 78, at 35; see id. at 26-35.

80. The authors distinguish questions of economic policy and accommodations struck between competing interests from "institutional" issues and serious invasions of personal liberties in discussing types of legislation subject to their rule. Id. at 26. Tree Fruits arguably can be classified as either type, however.

81. Ibid.
application of the doctrine to assert anything more than his disagreement. But most of the objections which might be raised to the validity of the doctrine in the abstract are probably resolved by a qualification placed on the doctrine by the authors. They insist that the Court should be candid in applying the doctrine. Such a requirement would surely provide a safeguard against frequent usage of the technique, if it could survive at all. The trouble is, while candor is not too much to ask, it is probably too much to expect. Application of the doctrine disguised as "interpretation" creates problems more serious, perhaps, than those the Court might remand to Congress. For if the Court "speaks in terms of congressional purpose when it is actually motivated by other constitutional considerations, the Court can only earn the disrespect of the legal profession and the public." This observation retains its validity if the "other considerations" are nonconstitutional in nature.

If the Court did apply the second-look doctrine or its equivalent in Tree Fruits, it was not candid about it. And if candor were somehow an enforceable condition precedent to the doctrine's application, the prediction that the doctrine would not be applied to this piece of labor legislation can be made with some assurance. Even in the opinion as written, the Court came perilously close to a reversal of roles with Congress through the demand by a general rule that Congress legislate practically on a case by case basis. Another guideline laid down by the Court for those who seek to interpret labor legislation may have been more appropriate in Tree Fruits. In an earlier case dealing with a problem the reverse of that in Tree Fruits, the Court said:

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.


CONCLUSION

The reasoning of the opinion in Tree Fruits appears to be inadequate to support the result reached. The result reached by the Court will probably not have a substantial impact on labor-management relations, but this makes the Court’s opinion all the more difficult to understand since the same could be said of the result reached by the Board. One is at a loss, therefore, to explain even the values that might respectably be suggested as tending to offset the debilitating effects of the opinion on the judicial process. In these terms, no victor emerged in the litigation, for the loss to all is considerably greater than the temporary gain for a few.