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Unions and the Southern Courts: Part I--Boycotts in the Southern Courts

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UNIONS AND THE SOUTHERN COURTS:
PART I—BOYCOTTS IN THE SOUTHERN COURTS

SYLVESTER PETRO

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UNIONS AND THE SOUTHERN COURTS: PART I—BOYCOTTS IN THE SOUTHERN COURTS

SYLVESTER PETRO

It has been claimed that unions have not flourished in the South because of institutional barriers, including judicial antiusnionism. Professor Petro evaluates these charges in light of the common-law cases. In this first installment, Professor Petro surveys the southern common-law cases dealing with boycotts and contrasts them with comparable decisions of the northern courts. He concludes that there was virtually no difference in the substantive law applied to labor disputes in the South and in the North, and that the southern courts often followed the "liberal" pronion view of the New York courts.

In the next installment of this study Professor Petro examines the equity procedures and practices of the southern courts and the way in which they dealt with union and employer violence in labor disputes. Thereafter, in a final Article Professor Petro broadens the perspective to evaluate the southern cases in light of the common-law developments in the fields of conspiracy and tort that took place over five centuries or more in the United States and Great Britain.

This essay attempts to evaluate the beliefs that unions have not done as well as they should have in the South and that the reason for this supposedly poor performance has lain in "institutional barriers," presumably legal barriers among others. Similar beliefs expressed over the years about the perform-

† This is the first of three installments. Part II appears later in this volume. The final installment will appear as a separate article in volume 60.


1. By the "South" we mean the 11 confederate states. The literature on unions and the South is extremely large, and no attempt will be made here to cover it. For a guide to much of it, see the articles in ESSAYS IN SOUTHERN LABOR HISTORY (G. Fink & M. Reed eds. 1977), especially the article by Nolan & Jonas, Textile Unionism in the Piedmont, 1901-1932. The authors take the position that at least some of the organizational failures of unions in the South trace more to union ineptitude than to the "institutional barriers," id. at 48, that writers have referred to so often. One such writer is F. Ray Marshall who, in his LABOR IN THE SOUTH (1967), frequently, but always vaguely, referred to the "hostile environment." Id. at ix. See generally Marshall, Foreword, this symposium. One of the best books I have read about workers in the South after the Civil War is C. SPahr, AMERICA'S WORKING PEOPLE (1900). While strongly proworking-man and even pronion (not always the same thing), Spahr gives an even-handed account of labor, race, and union issues in the South. See, e.g., id. at 118-19. For a less even-handed account, see T. Tippett, WHEN SOUTHERN LABOR STIRS (1931), a book in which some semblance of fairness is achieved by reproducing in an appendix an address by Mr. Bernard Cone, president of the Proximity Cotton Mills, Greensboro, N.C., defending the labor policies and practices of the North Carolina textile firms and arguing powerfully against any need or use for unions. Id. at 297-333.
BOYCOTTS IN THE SOUTHERN COURTS

The boycott activities of unions and the legal system generally in the United States have been of great interest to me. Hence, when invited to participate in this symposium, I requested that I be allowed to evaluate the labor law decisions of the southern courts in light of what was going on in the northern courts contemporaneously in the pre-New Deal period of common-law ascendancy. The main (though not exclusive) focus was to be on the pre-New Deal period because since then, by the combined action of Congress and the United States Supreme Court, the state courts in both the North and the South have been excluded from any significant role in the law of labor relations. No amount of southern judicial prejudice since around 1940 could reasonably account for unions and other worker associations composing 41 percent of the nonagricultural labor force in New York and only 8.9 percent in South Carolina in 1978.

When I started putting together the research accumulated over many years on the common law of labor relations, I began to realize that despite the excellence of some of the writing at the turn of the century no one had examined accurately the role played by the conspiracy doctrine in either the business or labor cases, especially the latter. Moreover, no one seems to have shown satisfactorily how the eighteenth and nineteenth century judges in England and America were folding into the evolving tort theories the cognitions provided by the developing science of economics and by the moral-political conceptions of personal freedom and free competition stimulated by those economic cognitions. Judges had to learn, as they did in the nineteenth century, that personal freedom and free competition, which were gaining favor over the centuries on ethical and juridical grounds, were also extremely valuable social institutions that increased the wealth of nations. These concepts proved to be powerful stimulants to the development of legal doctrine restricting anticompetitive conduct, whether of organized business or of organized labor.

To explain these developments adequately as well as to project the southern labor cases against their background requires that this essay be published in three installments. This first one examines the southern cases dealing with the boycott activities of both business and labor combinations. The preoccupation in this installment is with substantive law only, and it ends with some provisional conclusions and a hypothesis about the career of unions in the South.

Other informative books are D. McCracken, Strike Injunctions in the New South (1931) and J. Rhyne, Some Southern Cotton Mill Workers and Their Villages (1930).

2. I have tested against the cases the crusade against "government by injunction." Petro, Injunctions and Labor Disputes: 1880-1932, 14 Wake Forest L. Rev. 341 (1978).

3. The role of the federal legislation and of the federal authorities is discussed in notes 14-15 & 38 infra.

4. I am indebted to Mr. Eugene Becker of the Division of Industrial Relations of the Bureau of Labor Statistics, U.S. Dept. of Labor, for the as yet unpublished data on the percentage of the nonagricultural labor force organized in unions and associations. These figures ultimately will be printed in U.S. Bureau of Labor Statistics, Directory of National Unions and Employee Associations.
The next installment will review what may be called the "procedural" aspects of the southern cases—the way in which the southern courts dealt with union violence, administered equitable remedies, and otherwise expressed themselves in the labor disputes that came before them. The third installment will be a discursive historical review and analysis of the evolution of conspiracy and tort doctrine in Anglo-American law. Final conclusions on the validity of the beliefs that unions have done worse than they should in the South and that "institutional antiunionism" was responsible will be postponed to the end of the second installment.

I. AN INTRODUCTION TO THE SOUTHERN LABOR CASES

A substantial preponderance of the labor disputes that reached the courts in the first third of this century involved violence in one form or another. This by itself accounts for a substantial base of similarity in the attitude of all judges, northern and southern, in labor disputes. The courts agreed that violence was unlawful, actionable, and often enjoincible. The differences among them were procedural, not substantive: the main point of departure was when or whether injunctive relief should be made available. Since it would be impossible to compare in the space available here the equity procedures of the southern and northern courts in the violence cases, we have decided to postpone treatment of these matters.

We concentrate here on the substantive law of labor disputes, and more particularly on the substantive law of peacefully but deliberately inflicted economic harm in three areas: (1) compulsory unionism agreements, (2) stranger picketing, and (3) other types of secondary boycotts.

It is certainly not easy to determine conclusively what the common law of each of the southern states was on these subjects. In some of the states there was no litigation; in others, the litigation was inadequate. In all, the state court adjudications were influenced, sometimes decisively, by federal statutes and by constitutional doctrines of the Supreme Court of the United States. Nevertheless, with the focus narrowed to these subjects, it is possible to reach a fairly satisfying conclusion on the question whether the southern courts dealt more harshly with organized labor than did the northern courts.

Because of time and space limitations, we have had to adopt a compressed form of exposition in order to cover all the southern cases decided prior to the New Deal legislation. Discursive treatment of the evolution of the relevant legal doctrines is postponed to the third installment of this essay. Generally, the opinions of the southern cases were in no way inferior to those

5. Part II appears later in this volume.
6. This installment will appear as a separate article in volume 60.
7. See Petro, supra note 2, at 341, 434-35, 468-71.
8. Id.
9. See note 5 supra.
10. See Petro, supra note 6.
of the northern cases. If there were some outstandingly good opinions in the northern cases, there were some equally good ones in the southern cases. The same is true for outstandingly poor ones, if any.

I found no reason to distinguish the southern opinions from the northern opinions in terms of bias or predilection. I have the impression that the South always has been more populist, more "anti-big-business," and less taken with the virtues of commerce and industry than the North has been. In the labor cases I occasionally found bases for this impression, but not often enough to ground a firm opinion one way or another.

I suppose that one might have concluded a priori that the southern judges, trained as they were in the same common-law traditions that formed the views of the northern judges, would have decided cases more or less as their northern brethren did, reflecting the same doubts and distinctions, moved by similar presumptions, and disciplined by the same principles and juridical ideals. This is exactly what the cases seem to indicate. In the South, as in the North, the decisions ranged from mildly to strongly favorable to unions and collective bargaining. The idea that the southern courts were especially antiunion is a myth.

II. PICKETING, SECONDARY STRIKES, AND THE CLOSED SHOP AS SECONDARY BOYCOTTS

The efforts of the National Labor Relations Board (NLRB) and of the United States Supreme Court in recent years to minimize the impact on unions of the secondary-boycott proscriptions of the Taft-Hartley Act have worked up such a farrago of nonsense and confusion, such a profusion of exculpatory doctrine and evasive exception, that some effort to reintroduce simplicity and intelligibility to the field is necessary. It is time to try to bring back to the law the clear vision and straightforward candor that Massachusetts Chief Judge Shaw claimed for it when he said that "[t]he law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume." We will attempt to look in this way at the type of conduct that constitutes "secondary action."

Under any consistent theory of legal relations, picketing, secondary strikes or strike threats, and compulsory unionism agreements all would be considered together as secondary boycotts or secondary-boycott inducements. This becomes apparent when the idea "secondary" is reduced to its

14. I do not know of any case or comment that views the secondary boycott in quite this comprehensive a fashion, although the early cases are full of judicial observations of such breadth. For example, in Harvey v. Chapman, 226 Mass. 191, 115 N.E. 304 (1917), the court considered union pressure on an employer to compel an employee to pay a union fine or be discharged as a species of secondary boycott and hence unlawful when no adequate justification existed. For one of the best analyses of secondary boycotts, see L. Wolman, The Boycott in American Trade
essentials. The basic pattern of the secondary boycott is D→T→P, or: DEFENDANT INDUCES A THIRD PARTY TO REFRAIN FROM DEALING WITH THE PLAINTIFF. Consider the following cases:

a. During a strike for higher wages a majority union sets up a picket line. We must assume that the picket line has a purpose, since all human action, especially institutionalized and expensive human action, has a purpose. The purpose of the picket line during a strike is sometimes said to be that of communicating to the world that there is a strike going on, in order to induce or encourage third parties to join with the strikers against the picketed party. This is true even if the main purpose of the picket line is to see to it that the strikers themselves do not defect by going back to work. Should this be the objective, or one of the objectives, of the picketing, the D→T→P pattern still applies. If the employer happens to be the plaintiff in such a case, it sues on a secondary-boycott theory because it considers the union defectors to be the parties whom the union is seeking to discourage from dealing with it.

b. Because the union represents none or few of the employees of a picketed employer, it is unable to produce an effective strike. Therefore, it sets up a picket line. This is normally called stranger picketing. No matter how the union describes the objective of its action, it nonetheless is designed to reach the twin ends for which unions exist: representation of employees and control of the labor market. Whether the picketing is peaceable or violent makes no difference. In either case, the objective is to induce or encourage third parties to quit dealing with the picketed employer in order to induce it to recognize the union and to confine its hiring to union members or to employees who will be required to become union members. When the plaintiff in such a case is the employer and the defendant is the stranger-picketing union, this is another D→T→P case.

c. The secondary nature of all picketing is even more obvious when it is carried on at construction sites or at other locations where several employers congregate. If a carpentry subcontractor happens to employ nonunion carpenters on a construction project that is otherwise largely organized, and if the Brotherhood of Carpenters then pickets the whole project in order to induce the employees of the other contractors to quit work so that maximum pressure will be exerted upon the general contractor to dismiss the nonunion carpentry subcontractor, the picketing is designed to produce secondary strikes. The plaintiff may be either the general contractor or the carpentry

subcontractor. In either event this is another D→T→P case. The result is the same if the picketing was carried on at a project entrance reserved for the employees of the nonunion carpentry subcontractor.\textsuperscript{15}

d. The same applies to the secondary strikes themselves. If in the foregoing fact situation the unions representing the employees of the other subcontractors on the project order them to strike their employers in order to induce the general contractor to dismiss the offending nonunion carpentry subcontractor, the case is again one of D→T→P. The defendants here are the unions that instruct their members to strike; the plaintiff may be either the carpentry subcontractor or the general contractor, in which event the other subcontractors are the third parties in the middle. Of course the other subcontractors themselves may choose to sue if the strikes against them are in violation of no-strike contracts, or if they can bring the case before a court that has adopted or will adopt the prima facie tort principle, since a strike in such a case is an unjustified infliction of harm.\textsuperscript{16} We ignore here the possibilities of suit under the National Labor Relations Act and its “secondary-boycott” proscriptions.

e. "Hot-cargo" arrangements are secondary-boycott commitments by employers. Usually, they differ in no juridically significant way from the cases already considered. In a hot-cargo arrangement the employer agrees in advance to refrain from doing business with any person whom the union representing its employees declares to be "unfair.” If the employer has “agreed” to such an arrangement only because of a strike or strike-threat by the union that represents its employees, the case is practically identical to situation d. above. If the employer, however, has agreed to the arrangement on its own motion, under no pressure at all from the union—an extremely unlikely case—it will be fallacious to consider this a D→T→P case because there is no entity to fill the “T” category. Since the employer has on its own motion agreed to refrain from dealing with “unfair” employers, the plaintiff (P) can scarcely say that the union (D) has induced a third party (T) to refrain from dealing. In short, if the employer has been the moving party in the hot-cargo arrangement, it must be called a primary rather than a secondary boycott, exactly, in law, the same as a simple strike for higher wages. In such a case, the boycotted person can hope to recover only in a court that finds self-governing conduct actionable, or in a court that adopts the prima facie tort principle, if the refusal to deal

\textsuperscript{15} See b. above. This analysis is not to be confused with the incoherent gyrations of the "primary-secondary dichotomy" of the NLRB and of Mr. Justice Brennan in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967), reviewed in Petro, Unions, Housing Costs, and the National Labor Policy, 32 LAW \& CONTEMP. PROB. 319, 335-48 (1967). For Justice Brennan’s latest exploits in the field of semantics, see his dissenting opinion in N.L.R.B. v. Retail Store Employees’ Union, 100 S. Ct. 2372 (1980) (Brennan, J., dissenting), in which he describes the picketing of the customers of a struck employer as a “primary product boycott,” as if by substituting “primary” for “secondary” one can change the reality of a D→T→P case to a D→P case.

\textsuperscript{16} Under the prima facie tort theory, one who intentionally harms another is legally liable unless he can establish a just cause for his conduct, meaning a socially serviceable reason or motive strong enough to overcome the presumption against him for the harm he has done. This theory is discussed in detail in the third installment of this essay. See Petro, supra note 6, at IV.
is a case of malice-in-fact.  

f. There is no juridically significant distinction between agreements requiring union membership as a condition of employment and the hot-cargo arrangements just considered. If the employer discharges an employee or refuses to hire him because of union pressure, the case is one of D→T→P, with the union being the defendant (D), the employer being the third party (T), and the employee being the plaintiff (P).  

Exactly the same is true if the employer's discharge of or refusal to hire P is pursuant to an "agreement" made under secondary-boycott or strike pressure from the union. Compulsory union contracts are nothing but hot-cargo contracts directly applied to employees to force them to join unions in order to get or keep a job. Of course the employer always could choose to sue rather than agree to discriminate in this way against employees and in favor of the union. At common law, the suit was likely to fail in a "lawful in itself" jurisdiction, but in a prima facie tort jurisdiction it was likely to succeed because the strike threat, designed to create an antisocial monopoly, would constitute unjustified harm. On the other hand, if the agreement to hire only through the union was voluntary and not motivated by an antisocial objective, it would have been nonactionable even in a prima facie tort jurisdiction, as it was in Massachusetts.

With these definitions and clarifications in mind, let us now consider what the southern courts were doing in the field of secondary boycotts. As indicated, we omit here consideration of all cases turning on violence, and our concern is mainly with the pure common law. Therefore, we only incidentally consider the right-to-work statutes and the cases thereunder, as well as the cases affected by the New Deal and other legislation.


18. Employees were plaintiffs in some of the earliest and most significant cases involving the closed shop. See, e.g., Berry v. Donovan, 188 Mass. 353, 74 N.E. 603, appeal dismissed, 199 U.S. 612 (1905); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); National Protective Ass'n of Steam Fitters v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902). Indeed, in two of the best known of the old criminal conspiracy cases, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842), and Commonwealth v. Pullis, 3 Doc. Hist. 60 (Phila. Mayor's Court 1806), the prosecuting witnesses were employees whose ouster the defendant unions were seeking. See Nelles, Commonwealth v. Hunt, 32 COLUM. L. REV. 1128, 1133 (1932). The old criminal conspiracy cases are discussed more fully in the third installment of this essay. See Petro, supra note 6.

19. See, e.g., Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917); National Protective Ass'n of Steam Fitters v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902). Under the "lawful in itself" tort theory, an act lawful in itself cannot become unlawful and actionable because of the actor's "bad" motives. This theory is discussed in detail in the third installment of this essay. See Petro, supra note 6, at III.


III. THE CLOSED SHOP IN THE SOUTHERN CASES

In determining whether the southern courts and the common-law principles that they adopted were "liberal" (i.e., prounion), rather than "conservative" (i.e., antiunion), it would be compatible with these criteria to conclude that the southern courts were liberal if they adopted the New York position on the closed shop, and that they were conservative if they adopted the Massachusetts position. The New York position held that the closed shop was a lawful labor objective regardless of the means used to induce the employer to agree to it.22 Strictly speaking, the New York courts should have held the closed shop itself valid even if the employer had agreed to it only after and as a result of a violent strike. Since no employer ever sought to justify violation of a closed shop agreement on the ground that it had been procured by violence, we do not know whether the New York courts would have been that consistent.23 This analysis, however, seems sound because the New York courts ultimately decided that the closed shop was not "in itself" unlawful.24

The Massachusetts view, on the other hand, regarded the closed shop as neither lawful nor unlawful "in itself." Applying the juristic principle that every form of human action is privileged or prohibited only when socially justified or unjustified, the Massachusetts court regarded the closed shop as privileged when it was a voluntary and disinterested response by employer and union alike to the relevant business exigencies, and unjustified if forced upon an employer by a union in order to monopolize a labor market and coerce above-market wages.25

Therefore, if we see the southern cases holding the closed shop lawful without a separate evaluation of the means by which it was obtained, we may regard them as liberal in the sense that being prounion may be regarded as being liberal; whereas if they were basing their determination of whether the closed shop was privileged upon the means, we may regard them as conservative and antiunion.

Analysis of all southern decisions found prior to the enactment of the right-to-work laws indicates that in all states but Virginia the closed shop was either explicitly or implicitly privileged.26 One might have inferred that this was the situation merely because the southern states thought it necessary to pass right-

22. Jacobs v. Cohen, 183 N.Y. 207, 76 N.E. 5 (1905); National Protective Ass'n of Steam Fitters v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902); but see Curran v. Galen, 152 N.Y. 33, 46 N.E. 297 (1897) (per curiam). See also Petro, supra note 6, at IV, B. Of course if the means were unlawful "in themselves," e.g., violent assaults, they would be regarded as actionable and enjoicable. But see Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931). But such a decision would say nothing about the closed shop as an objective.

23. See Schlesinger v. Quinto, 201 A.D. 487, 194 N.Y.S. 401 (1922), in which a New York court for the first time granted specific performance against an employer violation of a closed shop agreement. There is no sign in either the majority opinion or the dissent of a defense based on violent union procurement of the collective agreement.


25. See cases cited notes 18 & 20-21 supra.

26. The relevant decisions of the confederate states are as follows:
to-work laws in order to outlaw compulsory unionism. In any event, the cases

Alabama. Kinard Constr. Co. v. Building Trades Council, 258 Ala. 500, 64 So. 2d 400 (1953) (per curiam), rev'd per curiam on federal preemption ground, 346 U.S. 933 (1954) (stranger picketing for closed shop would have been privileged but for federal law against it); Klibanoff v. Triple Cities Retail Clerks' Union, 258 Ala. 479, 64 So. 2d 393 (1953) (closed shop contract lawful if made with majority union); Hotel & Restaurant Employees v. Greenwood, 249 Ala. 265, 30 So. 2d 696 (1947) (relying on Restatement (First) of Torts § 783 (1939) to hold that closed shop is lawful objective); Local 57, Bhd. of Painters v. Boyd, 245 Ala. 227, 16 So. 2d 705 (1944) (wrongful expulsion suit brought by member against union implicitly concedes legality of closed shop).

Arkansas. Harmon v. UMW, 166 Ark. 255, 266 S.W. 84 (1924) (legality of closed shop implicitly recognized in action for damages brought by employee for wrongfully procuring his discharge); Local 313, Hotel & Restaurant Employee's Int'l Alliance v. Stathakis, 135 Ark. 86, 205 S.W. 450 (1918) (coercive picketing for closed shop enjoined but seemingly implicit acceptance of legality of closed shop objective).

Florida. Harper v. Hoecherl, 153 Fla. 29, 14 So. 2d 179 (1943) (legality of closed shop implicitly recognized in decision upholding union privilege to expel members for violating union rule against spray-painting device); Retail Clerks Local 779 v. Lerner Shops, 140 Fla. 865, 193 So. 2d 529 (1960) (per curiam) (stranger picketing for closed shop enjoined solely on ground that employer was operating on nondiscriminatory open shop principle); Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907) (monopolistic secondary strikes for closed shop held privileged).


Louisiana. Baton Rouge Bldg. Trades Council v. T.L. James & Co., 201 La. 749, 796-801, 10 So. 2d 606, 622-23 (1942) (strike, picketing for closed shop held privileged even when total monopoly of relevant labor market avowedly sought and encouraged by local authorities; following New York decisions); Volquardsen v. Southern Amusement Co., 156 So. 678 (La. Ct. App. 1934) (legality of closed shop implicitly affirmed in wrongfull discharge case); Nyland v. United Bhd. of Carpenters Local 1960, 156 La. 604, 100 So. 733 (1924) (same as Volquardsen); Local 76, United Bhd. of Carpenter v. United Bhd. of Carpenters, 143 La. 901, 79 So. 532 (1918) (legality of closed shop implicitly affirmed in intra-union dispute); Monroe v. Colored Screwmen's Benevolent Ass'n, 135 La. 893, 66 So. 260 (1914) (legality of closed shop conceded in dismissal of action for wrongful expulsion); Schneider v. Local 60, United Ass'n of Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905) (same as Monroe; but see) Webb v. Drake, 52 La. Ann. 290, 26 So. 791 (Sup. Ct. 1899) (businessmen's boycott held actionable on prima facie tort principle in contrast to cases holding closed shop privileged).

Mississippi. Mississippi Theatres Corp. v. Local 615, Int'l Alliance of Theatrical Stage Employees, 174 Miss. 439, 164 So. 887 (1936) (union suit upheld against employer for violation of collective agreement including closed shop clause).

North Carolina. McGinnis v. Raleigh Typographical Local 54, 182 N.C. 770, 108 S.E. 728 (1921) (per curiam) (legality of closed shop implicitly accepted); State v. Van Pelt, 136 N.C. 633, 49 S.E. 177 (1904) (blacklisting, secondary strike threats to force discharge of nonunionists held privileged on absolute rights grounds, following New York view and Allen v. Flood (see text accompanying notes 31-32 infra)).

South Carolina. Jarrett v. Southern Ry., 35 Lab. Cas. § 71779 (S.C. C.P. 1958) (right-to-work law not retroactive; tacit suggestion that closed shop was previously privileged); Sam's v. Bhd. of Ry. and Steamship Clerks Lodge 6193, 233 P.2d 263 (4th Cir. 1956) (per curiam) (dictum supporting Jarrett but court holds right-to-work law preempted).

Tennessee. Lyle v. Local 452, Amalgamated Meat Cutters, 174 Tenn. 222, 124 S.W.2d 701 (1939) (stranger picketing of self-employed butcher held enjoinalbe in absence of "labor dispute"); no position on closed shop expressed), overruled in Ira A. Watson Co. v. Wilson, 187 Tenn. 402,
show that in all southern states, except Virginia, the closed shop was explicitly and implicitly considered lawful in itself, as a corollary of the proposition that unionists had absolute rights to individually or collectively refuse to work with nonunionists.

Indeed, if the situations in North Carolina and Texas are suggestive of general judicial attitudes in the South, one may conclude that the South was more "liberal" than New York. During a time when New York was still wavering on the legality of the closed shop,27 and when Connecticut,28 New Jersey,29 and Pennsylvania30 were holding that other-governing boycotts designed to compel the discharge of nonunionists were actionable or even indictable as criminal conspiracies, North Carolina, in State v. Van Pelt,31 held, on pure "lawful in itself" grounds reminiscent of Allen v. Flood,32 that a comprehensive boycott designed to impose the closed shop was not aimed at an unlawful objective and hence was not indictable. Moreover, long before the

215 S.W.2d 801 (1948) (U.S. Supreme Court had meanwhile held peaceful picketing lawful under fourteenth amendment regardless of whether "labor dispute" existed); Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W.2d 501 (1939) (use of union's labor monopoly by business combination to punish competitive employer held actionable and enjoinable, but legality of closed shop tacitly accepted); Powers v. Journeymen Bricklayers' Local 3, 130 Tenn. 643, 172 S.W. 284 (1914) (tacit acceptance of legality of closed shop in successful action by employer against union for failing to inform him that it had reduced its wage scales); Marshall v. City of Nashville, 109 Tenn. 495, 71 S.W. 815 (1903) (city ordinance requiring union label on all city purchases held unconstitutional).


28 Virginia. Crump v. Commonwealth, 84 Va. 927, 6 S.E. 620 (1888) (boycott to compel discharge of nonunionists held criminal conspiracy). See Table 1.

27 Jacobs v. Cohen, 183 N.Y. 207, 76 N.E. 5 (1905), which had upheld the closed shop, avoided any suggestion that it was overruling Curran v. Galen, 152 N.Y. 33, 46 N.E. 297 (1897), which had held a union shop agreement invalid. Cf. David Mach. Co. v. Robinson, 41 Misc. 329, 84 N.Y.S. 837 (1903) (closed shop held unlawful strike objective).

28 State v. Glidden, 55 Conn. 46, 8 A. 890 (1887).


31 136 N.C. 633, 49 S.E. 177 (1904).

32 [1898] A.C. 1. This decision is considered at length in the third installment of this essay. See Petro supra note 6, at III.
New York courts were to reach the same result, Texas held that a collective agreement providing for a closed shop was fully enforceable.33

This apparent paradox can be cleared up if one gives the term “liberal” its real contemporary meaning—that is, reactionary. The coercively imposed closed shop implies regimentation of industry and restraints of trade and of labor market competition along the lines of the medieval gild system—restrictions on the free movement of labor and on free competition among workers. The paradox thus lies in the confiscation of the term “liberalism” by reactionaries. George Orwell wrote about such things.

Because restrictionism resembles slavery in some ways, the southern states would be familiar with it. For example, South Carolina in early days had a statute forbidding the landing of free negroes in its territory and providing for their enslavement immediately upon landing. In Elkison v. Delisseline,34 Mr. Justice Johnson of the Supreme Court of the United States held on circuit that the statute was incompatible with the Commerce Clause. Therefore, he granted the plaintiff a writ de homine replegiando (replevin of an individual) although he recognized that the writ might not be effective against a recalcitrant South Carolina sheriff.

It does not seem outlandish to conclude that a society that tolerated the barriers to free labor competition implicit in slavery would find nothing repugnant in the closed shop. Of course the closed shop is not identical with slavery.35 Indeed, when the closed shop is purely voluntary and contractual, that is, obtained by genuine, legal consideration, it is sharply distinguishable; it is then much the same as any other exclusive requirements contract. But when coercively imposed, the closed shop does share features with slavery: it closes off the labor market to both employers and employees and eliminates free competition, which is the opposite of slavery. Therefore, it is not really surprising that the closed shop was approved by southern courts, in contrast to so many northern courts. Nor is it surprising that the only southern state that frowned upon the closed shop was Virginia.36 Virginia was on the border in more ways than one.

At any rate, our review of the southern cases thus far establishes one point fairly solidly. If unions failed to flourish in the South before right-to-work

34. 8 F. Cas. 493 (C.C.D.S.C. 1823).
35. For an investigation of the relationships between collective bargaining under the exclusive representation principle and the badges and incidents of slavery that the thirteenth amendment was designed to extirpate, see Vieira, Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of “Exclusive Representation” in Public-Sector Employment, 12 Wake Forest L. Rev. 515, 672-95, 761-84 (1976).
### TABLE 1

**LEGAL STATUS OF THE CLOSED SHOP AT COMMON LAW IN THE SOUTHERN STATES***

<table>
<thead>
<tr>
<th>STATE</th>
<th>LAWFUL (L)/UNLAWFUL (U)</th>
<th>EXPLICITLY (E)/IMPLICITLY (I)</th>
<th>MEANS RELEVANT TO LEGALITY? YES (Y), NO (N)</th>
<th>COMMENT*</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALA.</td>
<td>L</td>
<td>E, I</td>
<td>N</td>
<td>Some are expulsion cases.</td>
</tr>
<tr>
<td>ARK.</td>
<td>L</td>
<td>I</td>
<td>N</td>
<td>Like Alabama.</td>
</tr>
<tr>
<td>FLA.</td>
<td>L</td>
<td>E</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>GA.</td>
<td>L</td>
<td>I</td>
<td>NOT CLEAR</td>
<td>Yellow-dog contract also lawful. Legality of closed shop taken for granted.</td>
</tr>
<tr>
<td>LA.</td>
<td>L</td>
<td>E, I</td>
<td>N</td>
<td>La. apparently a strong pro-union state for a long time. Public officials encourage it.</td>
</tr>
<tr>
<td>MISS.</td>
<td>L</td>
<td>E</td>
<td>N</td>
<td>Closed shop contract enforced.</td>
</tr>
<tr>
<td>N.C.</td>
<td>L</td>
<td>E</td>
<td>N</td>
<td>Discussed in text.</td>
</tr>
<tr>
<td>S.C.</td>
<td>L</td>
<td>I</td>
<td>NOT CLEAR</td>
<td>Conclusion based on cases holding right-to-work law not retroactive.</td>
</tr>
<tr>
<td>TENN.</td>
<td>L, U</td>
<td>E, I</td>
<td>Y</td>
<td>Stranger picketing and secondary boycotts for closed shop held wrongful, but <em>Powers</em> case implies legality of closed shop.</td>
</tr>
<tr>
<td>TEX.</td>
<td>L</td>
<td>E, I</td>
<td>Y</td>
<td>Numerous cases imply legality, but stranger picketing and secondary boycotts for closed shop held wrongful.</td>
</tr>
<tr>
<td>VA.</td>
<td>U</td>
<td>I</td>
<td>Y</td>
<td>Important <em>Crump</em> case actually holds boycott to oust nonunionists a criminal conspiracy.</td>
</tr>
</tbody>
</table>

* All the cases relevant to the legality of the closed shop from the confederate states prior to enactment of right-to-work laws are collected and briefed in note 26.
laws were passed, it was not because they were denied the closed shop. Table I, which summarizes the case law, shows that the closed shop was more widely privileged in the South than it was in the North.37

IV. PICKETING: BY EMPLOYEES AND BY STRANGERS

Although picketing of any variety normally operates and is intended to operate as a secondary-boycott inducement, the southern courts, like most of the other courts of the Nation, placed picketing by the employees of the picketed employer, when located at the scene of the labor dispute, in the same category as the strike: lawful "primary action" if peaceable and designed for the economic betterment of the striking or picketing employees. Strikes are purely self-governing activities, while picketing is designed to influence relationships among others; but this made no difference to the southern courts or to most northern courts. In the South, as in the North, however, some of the courts distinguished between picketing by employees and picketing by strangers.38 Whereas peaceful "primary" picketing by employees was almost uni-

37. See note 26 and accompanying text supra. The northern views on the closed shop are discussed at length in the third installment of this essay. See Petro, supra note 6, at IV & V.

38. The legal status of stranger picketing for recognition easily ranks among the most important issues in labor law, for whether the bargaining status of unions is the voluntary choice of employees often turns upon it. If stranger picketing is privileged, whether as a matter of express law or because of constitutional or administrative barriers to control by courts and legislatures, unions in many cases will achieve bargaining status contrary to the will of the employees involved. This is possible because, as is normally true of the person in the middle in secondary boycotts, the economic harm done to the employer by the picketing often will induce it to accept the union as bargaining agent even though, given a choice, the employees might prefer to go either unrepresented or represented by some other union.

An adequate account of the law relating to stranger picketing is not possible here. But if the southern cases are to be appraised with any confidence, some account of the history of the law of stranger picketing is necessary. The United States Supreme Court first established a narrowly qualified privilege for stranger picketing in American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921). Later it held stranger picketing privileged as a form of free speech in a case brought by employees who objected to being represented by the picketing union. AFL v. Swing, 312 U.S. 321 (1941). Still later, the Court took the position that stranger picketing over the objection of employees was not entitled to constitutional protection as freedom of speech. Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Building Serv. Employees v. Gazzam, 339 U.S. 532 (1950). But the Court also held that while a union could not claim free speech rights to force itself upon unwilling employees by stranger picketing, state courts, nevertheless, could not enjoin such picketing because it had been preempted by the NLRA. Garner v. Teamsters Local 776, 346 U.S. 485 (1953). The Court reaffirmed this position in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), but a year later, in NLRB v. Teamsters Local 639, 362 U.S. 274 (1960), it held that nothing in the NLRA prohibited stranger picketing, so that the NLRB also was without authority to prevent it. The following year, in Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961), the Court held that both a union and an employer violated the NLRA—the union when it asked for and the employer when it granted recognition without establishing that the union was the free choice of a majority of the employees in the appropriate bargaining unit. Thus, although by the Supreme Court's own decisions stranger picketing was neither prohibited by the NLRA nor compatible with its policy of free employee choice, neither the NLRB nor state courts could restrain it, and the federal courts could not enjoin it because of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976). Clearly the Court was intent upon establishing a privilege for the coercive attainment of bargaining status by unions that employees did not want. Meanwhile, in 1959, Congress again tried to restrict stranger picketing by adding § 8(b)(7) to the Taft-Hartley Act, which made stranger picketing for recognition an unfair labor practice. Landrum-Griffin
versally held privileged,29 picketing by persons not employed in the picketed establishment—stranger picketing—was considered by some of the southern courts to be unjustified, especially when the employer was getting along well with its employees, paying them above union scale, and not discriminating against union members. These courts could see no social justification for the harm done by the stranger picketing.

Assessing the common-law status of picketing in the southern courts is complicated in some instances by the lack of decisions, and in others by the intervention of such extraneous influences as state statutes, the federal labor relations legislation, and the Supreme Court's constitutional inventions under the free speech and preemption doctrines.40 Evaluating the cases as best we can under the circumstances, they line up as indicated in Table 2. State-by-state, the picketing decisions follow:

Alabama. As the state of origin of the celebrated Thornhill case,41 Alabama occupies a special place in the history of the law of picketing. From an


For an analysis of the role of the NLRB in establishing a privileged statute for stranger picketing, notwithstanding congressional efforts to restrict it, see S. Petro, supra note 14, at 1-34, 51-70.


For a federal court injunction against stranger picketing during the period of "government by injunction," see Waitresses' Local 249 v. Benish Restaurant Co., 6 F.2d 568 (8th Cir. 1925).

In light of the foregoing authorities, the relatively few instances in which southern courts enjoined stranger picketing suggest that, on the whole, the southern courts should be ranked among the more "liberal" (i.e., prounion) courts of the country.

39. Judge McPherson's oft-quoted comment that the concept "peaceful picketing" was as much a contradiction in terms as "chaste vulgarity" or "lawful lynching," Atchison, T. & S.F. Ry. v. Gee, 139 F. 582, 584 (C.C.S.D. Iowa 1905), may have been sound enough, but it certainly did not represent general judicial opinion either at that time or since then. See generally Petro, supra note 2, at 455-63 (data on injunctions against peaceful primary picketing).

40. See note 38 supra.

early date, Alabama had a statute explicitly applying the prima facie tort theory\(^\text{42}\) to picketing. It declared that all picketing was unlawful unless supported by a "just cause."\(^\text{43}\) Under this statute all picketing, including peaceful picketing in connection with a lawful strike, was held unlawful and enjoinalble.\(^\text{44}\) In *Thornhill v. Alabama* the United States Supreme Court put an end to this by declaring, in effect, that because of the first and fourteenth amendments, the prima facie tort theory had to succumb to the absolute rights theory, at least for peaceful picketing accompanying a lawful strike.\(^\text{45}\)

Applying *Thornhill*, the Alabama Supreme Court later held that even picketing for the closed shop was privileged,\(^\text{46}\) unless the picketing union did not represent a majority of the employees of the picketed employer.\(^\text{47}\) This might have suggested that stranger picketing was unlawful "in itself"\(^\text{48}\) in Alabama. In the *Kinard* case,\(^\text{49}\) however, the Alabama Supreme Court found that under Alabama common law stranger picketing was privileged, but it was held unlawful because it violated section 8(b)(1)(A) of the NLRA. The U.S. Supreme Court, however, made short shrift of this loyal effort by the Alabama court, curtly reversing it per curiam.\(^\text{50}\)

The rather tangled history of picketing in Alabama reduces to this. As a

\(^{42}\) See note 16 supra.

\(^{43}\) ALA. CODE § 3488 (1923) (repealed).


\(^{45}\) 310 U.S. at 105. The reader no doubt will observe in this course of reasoning a suggestion of how the Bill of Rights might impair freedom rather than promote it. By naming certain freedoms, or aspects of freedom, as "rights," the Bill of Rights gave the Supreme Court the opportunity to grant such freedoms as it favored, e.g., freedom of the press, a status far above that of equal aspects of freedom such as the right of private property, especially the property right in reputation. New York Times v. Sullivan, 376 U.S. 254 (1964), is a good example of this kind of juristic anomaly, of which the U.S. Reports are full. The prima facie tort theory would compel courts to harmonize intersecting, overlapping, and conflicting exercises of freedom. See note 16 supra. The Supreme Court's method, sometimes called "balancing," really involves chopping off the immunities of some persons and adding them as special privileges to the rights of others. This is what the Supreme Court did in the *New York Times* case; it is also what the Court did when it held that the right of employees to self-organization should be "balanced" against the property rights of employers by compelling the latter to permit unions to use company premises when it otherwise would be costly or difficult for them to organize employees. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). This reasoning is a recipe for confiscation, and not for the promotion of freedom. The technique is attacked sharply in Vieira, *Rights and the United States Constitution: The Declension from Natural Law to Legal Positivism*, 13 GA. L. REV. 1447, 1480-1500 (1979). But Vieira fails to recognize that the enumeration of certain rights in the first ten amendments might have been the origin of the problem, despite the effort made in the ninth amendment to stimulate something like the prima facie tort theory by providing that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

\(^{46}\) Shiland v. Retail Clerks Local 1657, 259 Ala. 277, 66 So. 2d 146 (1953); Hotel & Restaurant Employees v. Greenwood, 249 Ala. 265, 30 So. 2d 696 (1947), cert. denied, 332 U.S. 847 (1948), contempt proceedings dismissed sub nom. Ex parte Hacker, 250 Ala. 64, 33 So.2d 324 (1947).

\(^{47}\) Klibanoff v. Tri-Cities Retail Clerks' Local 1678, 258 Ala. 749, 64 So. 2d 393 (1953).

\(^{48}\) See note 19 supra.


\(^{50}\) 346 U.S. 933 (1954) (per curiam).
matter of Alabama common law, peaceful picketing, whether by strangers or by employees during a strike, was privileged. The Alabama statute prohibiting all picketing was held invalid on free speech grounds in Thornhill, and a court decision prohibiting stranger picketing as a violation of the NLRA was reversed on preemption grounds in Kinard.

Arkansas. The legal status of picketing at common law in Arkansas is obscure because no decision was reported until after the free speech doctrine of Thornhill was announced by the Supreme Court. In the only relevant Arkansas picketing case found, the court held that peaceful picketing for recognition was privileged free speech, even though the employees of the picketed employer had shown that they were not interested in having the union represent them.51

Florida. In the Retail Clerks case,52 the only Florida decision uncomplicated by the free speech and preemption doctrines, the Florida Supreme Court held that stranger picketing for recognition and for the closed shop was enjoinable as unjustified harm when the employer ran a nondiscriminatory open shop, its employees seemed satisfied with their lot, and it in no way discouraged its employees from joining the union.53 After Thornhill, however, the Florida court held stranger picketing to be privileged,54 unless enmeshed in violence,55 or unless aimed at the closed shop in violation of the state right-to-work law.56 Eventually the United States Supreme Court held that under the preemption doctrine the Florida court could not enjoin stranger picketing for the closed shop,57 or picketing of a railroad terminal during a strike against one of the railroads having a proprietary interest in the terminal.58

Not much can be said with confidence about the status of picketing in Florida at common law. The Retail Clerks case disapproved of stranger picketing by a union that the employees, given a free choice, had rejected. But since the Florida court earlier had held that secondary action by a union avowedly aiming at a monopoly was privileged,59 its qualified opposition to stranger picketing does not seem to indicate any notable antiunion stance.

Georgia. This state, as a matter of common law, held picketing privi-

52. Retail Clerks Local 779 v. Lerner Shops, 140 Fla. 865, 193 So. 2d 529 (1940).
53. Id. at 866, 193 So. 2d at 530.
54. Hotel & Rest. Employees Local 156 v. Cothron, 59 So. 2d 366 (Fla. 1952); Johnson v. White Swan Laundry, 41 So. 2d 874 (Fla. 1949); Whitehead v. Miami Laundry, 160 Fla. 667, 36 So. 2d 382 (1948).
56. Plumbers & Pipe Fitters' Local 519 v. Robertson, 44 So. 2d 899 (Fla. 1950).
59. But see Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907).
leged, whether by employees or strangers, unless it was violent, intimidatory, or enmeshed in coercion. The free speech doctrine hence produced no change in the substantive law of picketing in Georgia, only a decision explicitly holding stranger picketing privileged whether "primary" or "secondary." Later, when induced by the employee-free choice principle of the NLRA to hold stranger picketing for recognition unlawful and enjoinable, the Georgia court found its jurisdiction preempted by the Supreme Court of the United States.

**Louisiana.** It is not possible to determine what the Louisiana common law would have been on picketing, since the *Johnson* case, the first reported decision, came in 1940, the same year the free speech doctrine was established in *Thornhill*. Nevertheless, the *Johnson* case reflected the New York position. In a dispute with a dairy, a Teamsters local picketed the retailers who purchased from the dairy. This picketing was held to be "primary," in the sense established by the New York court in *Goldfinger v. Feintuch,* and hence privileged. Besides, said the court, the Louisiana anti-injunction law prohibited injunctive relief against peaceful picketing.

Some years later, the Louisiana Supreme Court cast doubt on the *Johnson* decision by observing that the court there had not recognized that the equity jurisdiction of the Louisiana courts was granted by the Louisiana Constitution and could not be abridged by statute. Stranger picketing in a rival union dispute, therefore, was held enjoinable as an unjustified infliction of harm.

Three years later, in 1955, a similar decision was reversed by the Supreme Court of the United States on preemption grounds. A year later, the Supreme Court again reversed a Louisiana antipicketing decision on preemption grounds.

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60. Robinson v. Bryant, 181 Ga. 722, 184 S.E. 298 (1936); McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S.E. 226 (1921); Burgess v. Ga. F. & A. Ry. Co., 148 Ga. 415, 96 S.E. 864 (1918) (Pickets were former employees who had been replaced during a strike, and although there was much violence an injunction against all picketing was vacated.).


62. Ellis v. Parks, 212 Ga. 540, 93 S.E.2d 708 (1956); but see Parks v. Atlanta Printing Pressmen Local 8, 150 F. Supp. 246 (N.D. Ga. 1956), rev'd, 243 F.2d 284 (5th Cir.), cert. denied, 354 U.S. 937 (1957) (dismissing an action against the same union because there was no violation of the NLRA). The federal court decision appears to have been handed down before the state decision, but perhaps it had not been brought to the attention of the Georgia court.


66. 195 So. at 796.


68. 58 So. 2d at 302.


If the Johnson case is considered as Louisiana's only purely common-law decision on picketing, one must conclude that Louisiana too, at least before the era of the NLRA and the free speech doctrine, saw nothing wrong in picketing. Indeed, the Louisiana court later ruled against stranger picketing only because of the obvious conflict between such picketing and the basic policy of the NLRA, pursuant to which the bargaining status of unions was to depend upon the choices of employees and not upon the coercive potential of picketing.\(^7\)

**Mississippi.** The earliest picketing decision found in Mississippi, enjoining secondary picketing aimed at the closed shop in violation of the state right-to-work law, was reversed on preemption grounds by the United States Supreme Court.\(^7\) A few years later, having learned its lesson, the Mississippi Supreme Court vacated an injunction against construction site picketing allegedly designed to induce the general contractor on the project to hire only union labor, in violation of the right-to-work law.\(^7\) The court held that if the injunction was based on the alleged violation of the right-to-work law, it was preempted. If it was issued because the picketing induced the unionized employees of the plaintiff, the plumbing subcontractor, to leave their work in violation of a collective agreement, the agreement should have been pleaded or the pleadings amended to conform with the proof. The plaintiff had done neither.

Without reported decisions, one cannot tell what the common-law position on picketing was in Mississippi. Because there were unions in the state and because unions tend to strike and picket unless restrained by courts, the absence of any decision suggests that picketing was privileged in Mississippi, at least when peaceful.

**North Carolina.** Picketing decisions were scarce also in North Carolina. The 1921 decision in the McGinnis case shows,\(^7\) however, that peaceful picketing accompanying a strike was privileged. In McGinnis the North Carolina Supreme Court vacated a temporary injunction against intimidatory picketing because conflicting affidavits were not strong enough proof to support the order. The only other relevant decision came after enactment of the state right-to-work law and held that secondary construction site picketing aimed at the closed shop was enjoinable and not preempted.\(^7\)

\(^7\)1. See note 38 supra.


\(^7\)5. Jones Constr. Co. v. Electrical Workers Local 755, 246 N.C. 481, 98 S.E.2d 852 (1957). For other North Carolina cases that grew out of picketing for the closed shop but did not deal with the legality of the picketing, see Poole & Kent Corp. v. C.E. Thurston & Sons, Inc., 286 N.C. 121,
A reasonable conclusion to draw from the slender authority available is that peaceful picketing by employees was privileged at common law in North Carolina. It may be inferred from *State v. Van Pelt*[^76] that in the absence of a statute peaceable secondary and stranger picketing would be privileged as well.

**South Carolina.** No picketing decisions prior to 1960 have been found in South Carolina, but the 1960 decision in *Piedmont Shirt Co. v. Clothing Workers*[^77] is interesting. The defendant union picketed the plaintiff's customers nationwide after it failed to induce the plaintiff's employees to join or to get the NLRB to force on the employer recognition of the union. This has become a common device of unions, especially in the South, that are unable to acquire representative status legitimately. The South Carolina Supreme Court observed that this secondary stranger picketing undoubtedly would have been considered tortious at common law (presumably on the prima facie tort theory since obviously there could be no just cause supporting a union's attempt to force itself on unwilling employees). The court, however, dissolved a temporary restraining order against the picketing on preemption grounds.[^78]

**Tennessee.** The Tennessee courts distinguished between picketing by employees, picketing by strangers, and picketing aimed at securing the closed shop in violation of the state right-to-work law. When employee picketing itself was peaceable, the Tennessee Supreme Court ruled that it could not be enjoined even though *accompanied* by violence.[^79] On the other hand, stranger picketing designed to compel self-employed butchers[^80] or barbers[^81] respectively, to join the picketing union and to observe cartel rules was held unlawful and enjoinable. Similarly, the Tennessee courts enjoined stranger picketing for the union shop as a violation of the state right-to-work law.[^82] Even though the United States Supreme Court vacated such a decision per curiam, presumably on preemption grounds,[^83] the Tennessee Supreme Court found it hard to believe that it could not enjoin conduct that Congress expressly reserved to the authority of the states in section 14(b) of the Taft-Hart-

[^76]: 136 N.C. 633, 49 S.E. 177 (1904) (secondary strike threats to force discharge of nonunionists held privileged on absolute-rights grounds). See text accompanying note 377 *supra*.


[^78]: Id. at 17, 115 S.E.2d at 500.

[^79]: Rowe Transfer & Storage Co. v. Teamsters Local 621, 186 Tenn. 265, 271-72, 209 S.W.2d 35, 37 (1948) (distinguishing between violence enmeshed in picketing and "disassociated acts of violence").


Finally, in a 1979 decision, a Tennessee appellate court held that stranger picketing that trespassed on a shopping center was enjoinable notwithstanding the preemption doctrine.85

Texas. The Texas courts' approach to picketing was similar to that of the Tennessee courts. While holding peaceful picketing by or on behalf of employees privileged,86 the Texas courts consistently ruled against stranger picketing, unless charges of such picketing were not adequately proved.87 As early as 1918, in the Webb case,88 a Texas appellate court affirmed an injunction against stranger picketing for recognition when the employer got along well with its employees and apparently paid them satisfactory wages. This position was maintained over the years, especially when the picketing union had been rejected by the employees in secret-ballot elections,89 until the United States Supreme Court made it clear in the preemption cases that it did not wish to have the national labor policy against such union coercion enforced.90 The Texas Supreme Court then abandoned its stand against stranger picketing, even when obviously designed to force employees to accept union representation that they did not desire.91

It would be incorrect to infer from the relatively strong stand taken by the Texas courts against stranger picketing that they were hard on picketing and on unions generally. On the contrary, the Texas Supreme Court demonstrated considerable solicitude for the right to picket when the picketing was done by employees. Indeed, in Operating Engineers v. Cox,92 it held unconstitutional a

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88. Webb v. Cooks' Local 748, 205 S.W. 465, 466 (Tex Civ. App. 1918) (said to be the first picketing case to reach a Texas appellate court).
89. See Dallas Gen. Drivers' Local 745 v. Oak Cliff Baking Co., 203 S.W.2d 586 (Tex. Civ. App. 1947) (union had been rejected 14-6 in one election and unanimously in another, and employer had no objection to the employees belonging to the union). See also Machinists Local 1488 v. Federated Ass'n of Accessory Workers, 133 Tex. 624, 130 S.W.2d 282 (1939) (vacating injunction as moot on motion of successful plaintiff in another case of rival unions and picketing by a union that represented so small a number of employees that the NLRB denied an election petition); Texas Motion Picture and Vitaphone Operators Local 56, 880 v. Galveston Motion Picture Operators Local 305, 132 S.W.2d 299 (Tex. Civ. App. 1939) (stranger picketing by union of black workers for jobs held by white members of another local); Culinary Workers' Local 331 v. Fuller, 105 S.W.2d 295, 295 (Tex. Civ. App. 1937) (union seeking recognition apparently represented none of the employees, who were being paid above scale).
91. Ex parte Twedell, 158 Tex. 214, 309 S.W.2d 834 (1958) (reversing a contempt conviction for violation of an injunction against picketing by a union that admittedly represented none of the employees of the picketed employer and that declared that it would not accept recognition by the employer, even if offered, until the employees "voluntarily" chose the union as its representative; id. at 216-17, 309 S.W.2d at 836-37).
92. 148 Tex. 42, 219 S.W.2d 787 (1949).
statute that identified minority picketing with secondary boycotts in a way that would make it unlawful and enjoinable.

**Virginia.** The course of the picketing decisions in Virginia ran a little differently. An early case established that the Virginia courts should not enjoin peaceful organizing, strikes, or picketing by employees.\(^9\) Moreover, possibly under the influence of the free speech doctrine, the Virginia Supreme Court in 1950 held unconstitutional a Virginia statute prohibiting all picketing by nonemployees.\(^9\) But a similar statute, worded more narrowly, was upheld a few years later.\(^9\) Meanwhile, the court had held that peaceful stranger picketing was privileged.\(^9\) But later it held that stranger picketing designed to achieve a closed or union shop in violation of the state right-to-work law was enjoinable, a decision affirmed by the United States Supreme Court.\(^9\) Still later, the Virginia courts learned that what they were allowed to do under the free speech doctrine they were prevented from doing under the preemption doctrine.\(^9\)

**Conclusion.** Charges of judicial antiunionism as the reason for the lack of unionization in the South are unpersuasive in light of the attitude of the courts toward picketing. Even in Alabama peaceable “primary” picketing was privileged except when a statute forbade it. Elsewhere it was fully privileged. Stranger picketing was prohibited in Florida, Tennessee, Texas, and probably in Louisiana, but permitted in Alabama (at common law), Georgia, Virginia, and probably in North Carolina. Reference to Table 2 will show that there is no apparent correlation between the legality of stranger picketing and the extent of union organization. In North Carolina, the least organized state, stranger picketing was probably lawful. In Tennessee, one of the most extensively organized states, it was unlawful. These figures seem to prove that unions do best when denied one of their most coercive organizing devices.

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93. Waddey Co. v. Richmond Typographical Union Local 90, 105 Va. 188, 53 S.E. 273 (1906).
95. Dougherty v. Commonwealth, 199 Va. 515, 100 S.E.2d 754 (1957). Although the pickets were not employees of the picketed employer, they were officers of the union whose members were lawfully striking at the time. The Virginia Supreme Court thought that in such a case its jurisdiction was not preempted, but one may doubt whether the decision would pass muster with the U.S. Supreme Court that decided San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). See note 38 supra.
96. Painters Local 1018 v. Rountree Corp., 194 Va. 148, 72 S.E.2d 402 (1952) (vacating a temporary injunction for failure of proof that the picketing was aimed at a violation of the right-to-work law).
TABLE 2

<table>
<thead>
<tr>
<th>STATE</th>
<th>PICKETING BY EMPLOYEES</th>
<th>PICKETING BY STRANGERS</th>
<th>PERCENTAGE OF NONAGRICULTURAL LABOR FORCE ORGANIZED BY UNIONS</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>1964</td>
<td>1970</td>
<td>1978</td>
</tr>
<tr>
<td>All States</td>
<td>29.5</td>
<td>30.8</td>
<td>26.9</td>
</tr>
<tr>
<td>Ala.</td>
<td>Lawful</td>
<td>Lawful</td>
<td>18.7</td>
</tr>
<tr>
<td>Ark</td>
<td>No common-law decisions</td>
<td>No common-law decisions</td>
<td>17.0</td>
</tr>
<tr>
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<tr>
<td>Va.</td>
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<td>15.8</td>
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* In accordance with present practice, the term "primary" is used here in a locational, not a legal-relational, sense. Picketing is primary in this sense when restricted to the premises of the employer with whom the union's original dispute occurred. The untoward consequences of this confusion of legal and spatial categories become apparent when numerous employers share common physical premises. For some sense of the consequent legal breakdown into such absurdities as the "common situs" and "roving situs" doctrines—both granting unions special privileges to evade the federal law against secondary boycotts—see the cases and other references in notes 14-15 supra.

** Source: Figures for 1964 are from U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, DIRECTORY OF NAT'L UNIONS AND EMPLOYEE AS. 64 (1967). The other figures are from unpublished data supplied by Mr. Eugene Becker of the Division of Industrial Relations of the Bureau of Labor Statistics.

V. CONVENTIONAL SECONDARY BOYCOTTS INDUCED BY UNIONS

We have seen that under any consistent theory of legal relations, most types of concerted union activity should be called either secondary boycotts or secondary boycott inducements.99 Only a strike called by a union against an employer to express dissatisfaction with the terms and conditions of employment offered by the employer to the strikers themselves with no deliberate intent to injure third parties, is primary action in this plain and rigorous sense. If employees strike an employer, not exclusively over terms and conditions of mutual and reciprocal interest, but over relations between the employer and other persons, whether employers, employees, or consumers, then the strike becomes secondary.

99. See Part II supra.
If in connection with a primary strike the strikers set up a picket line or any other device intended to affect relations between the employer and third parties, that picket line or other device, though localized at the strike scene, is, nevertheless, secondary in the sense of legal relations though it may be "primary" in the geographical sense. Designed to affect relations between the employer and others, it is no different from any other "secondary boycott," regardless of its location.

These matters of definition, which today remain in an even less satisfactory state than seventy or eighty years ago, figured largely in the pre-New Deal common-law labor cases, both North and South, with which we are concerned. The cases will demonstrate that even some strikes against employers over the economic terms applicable to the strikers themselves might become secondary boycotts, depending upon how the strikes were brought about. Therefore, the secondary boycott may actually be a far more dominant means of union self-advancement than anyone has hitherto thought.

Disturbed by this insight, unions and their sympathizers have expended considerable effort in an attempt to prove that almost none of the union devices of coercive self-aggrandizement are "secondary boycotts." In one of their more disturbing arguments, they take the position that no action designed to prevent third parties from mitigating the disruptive effects of the union's direct action against the "primary" employer should be called "secondary". For example, if a union struck an employer for higher wages, and the employer sent to another firm some of the work that the strike was halting, under this theory the union would be engaging in privileged "primary" action if it struck, picketed, or otherwise boycotted the second employer.

The necessary implication of this argument is that the test of whether conduct is "secondary" should have nothing to do with the way in which relational pressures are brought to bear on union-management disputes. The test becomes instead whether or not the union's pressures on third parties help it to completely shut down the operations of the so-called "primary" employer—a dubious position that amounts to elevating union interests above all other interests and the rights of union leaders over all other rights, whether of consumers, of investors, or of competing workers. The premise is that monopolistic union controls, not competitive markets, should determine labor costs. Thus, if a union calls an unsuccessful strike against an employer, and the employer is able to carry on production, under this theory unions are privileged to "follow the product" and picket at all distribution points, no matter how much they embarrass operations there, provided the picketing is confined to the offending

101. Lesnick, supra note 100, at 1420-30.
102. Id.
This study is not designed to provide a complete account of the current law of "secondary boycotts." The success of the "primary-secondary" dichotomy excogitated by unionists and academic writers has proliferated the law to such complexity that nothing less than a multi-volume work would suffice to that end. Our object here is to show what the southern courts did with secondary boycotts until the time when the Supreme Court ordered them out of the labor law field and when, with some slight murmurs of indignation, they quietly accepted the eviction. Although the comparison is especially difficult in this complicated field of law, we also try to evaluate the southern decisions in the light of the leading northern approaches to the secondary boycott. However, we will first examine the inner workings of secondary boycotts, for without a grasp of these workings it is impossible to appreciate just how coercive secondary boycotts are and why courts and legislatures have persistently tended to find them tortious and prohibit them. We then deal with the main forensic devices for transforming actionable secondary boycotts into privileged "primary" action: the "common situs" picketing of the construction unions; the "roving situs" picketing and "hot-cargo contracts" of the Teamsters Union; and finally the "allowable area of economic conflict" and "unity of interest" doctrines.

A. The Basic Mechanism: Coercion

Nothing was more common in the old decisions against secondary boycotts than the tendency of the courts to refer to them as "coercive." Scarcely a ruling against them failed to mention their "coercive" nature. In most cases the courts probably were thinking of the coercion addressed to "T," the middle party in the pattern D→T→P. Typically, the defendant union would threaten to strike, picket, or boycott T unless he quit dealing with P, the person or firm with whom the union was ultimately disputing. Very little attention, however, was paid, at least in the opinions, to the devices used by the union to bring pressure to bear on T.

Consider the rather remarkable fact that a single picket at a construction project containing hundreds of employees, engaged by perhaps a dozen separate subcontractors, could and often did bring all construction to a halt. In observing this phenomenon one must not fall victim to the fallacy that workers, even union workers, are automatons who lay down their tools and leave the premises whenever they see a picket sign or receive orders from the walking delegate. On the contrary, wage workers are as independent and as varied as any other group. Something more than a mere request to quit work, when

103. See section V. D., infra.
they have no grievance against their employer, is necessary to induce them to
leave their job and sustain the accompanying loss of pay. This "something
else" that makes secondary boycotts even more secondary and more coercive
than they usually are thought to be is the power exercised by union officials,
sometimes authorized by union bylaws, to fine or expel, and thus to keep out
of the relevant trade permanently, any member who refuses to walk out when
directed to do so in a secondary-boycott situation.

Judges from an early date were aware that secondary strikes and strike-
threats were even more secondary and more coercive than they seemed to be
on their face. In the celebrated case of Temperton v. Russell, the English
Judge Lopes rejected the idea that secondary strikes should be held privileged
as manifestations of the personal freedom of the secondary strikers. Contrary
to the unions' contentions, he said, the workers themselves were compelled to
strike in order to escape the unions' reprisals:

It was contended that the damage to the plaintiff must be con-
sidered as having arisen from the spontaneous action of the individ-
ual workmen themselves. I cannot think that that view is
maintainable. We know something of the action of trade unions and
their officials. So far from the injury to the plaintiff arising from the

105. A great many cases could be cited illustrating the difficulties unions sometimes have in
getting their members to quit working in the absence of disputes involving the immediate interests
of those workers. Union members are not always anxious to lose pay merely to advance the
monopolistic or cartel objectives of their leaders and of the business combinations whose aims
they share. See, e.g., Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496, 98 So. 569
(1923), appeal dismissed per curiam, 265 U.S. 576 (1924) (member expelled for refusing to partici-
pate in wartime strike); Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353
(1905) (union members frustrated union-employer cartel by refusing to strike an employer who
preferred to compete); Yankee Network, Inc. v. Gibbs, 295 Mass. 561, 3 N.E. 2d 228 (1936) (union
members suspended and expelled for refusing for refusing to engage in a secondary work stoppage); Cotton
members expelled for allegedly working under scale).

106. Typically, union bylaws "require that the members . . . give prompt and implicit obedi-
ence to the demands of the walking delegates." National Protective Ass'n v. Cumming, 53 A.D.
227, 229, 65 N.Y.S. 946, 947 (1900), aff'd, 170 N.Y. 315, 63 N.E. 369 (1902). See also Saulsbury v.
Coopers' Int'l Union, 147 Ky. 170, 172 143 S.W. 1018 (1912); Willcutt & Sons v. Bricklayers'
southern cases describing or containing instances of the operation of such bylaws, see Montgom-
ery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 So. 2d 112 (1951),
cert. dismissed as improvidently granted, 344 U.S. 178 (1952); Local 57, Bhd. of Painters, v. Boyd,
245 Ala. 227, 16 So. 2d 705 (1944); Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496,
98 So. 569 (1923) appeal dismissed, 265 U.S. 576 (1924); Love v. Brotherhood of Locomotive Engi-
near, 139 Ark. 375, 215 S.W. 602 (1919); Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So.
590 (1907); Nyland v. Brotherhood of Carpenters & Joiners Local 1960, 156 La. 604, 100 So. 733
(1924); Monroe v. Colored Screwmen's Local 1, 135 La. 893, 66 So. 260 (1914); Schneider v. Local
60, Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905); Lundine v. McKinney, 183 S.W.2d 265
(Tex. Civ. App. 1944); Longshoremen's Ass'n Local 329 v. Williams, 102 S.W.2d 1072 (Tex. Civ.
App. 1937); McCantz v. Brotherhood of Painters, 13 S.W.2d 902 (Tex. Civ. App. 1929); Cotton
in an article some years ago to show that the way unions conduct their internal affairs has a
considerable impact on the public interest. See Petro, External Significance of Internal Union Af-
fairs, 4 N.Y.U. ANN. CONF. ON LABOR 339 (1951).

men acting of their own accord, I think it is clear that, if it had not been for the fear of the trade unions and of the consequences of breaking the compacts which they had entered into as members of the union, there would have been no question of the men withdrawing from their employ. I think it was shewn that Russell acted in what he did as the delegate, and under the instructions of the joint committee of the three trade unions. . . . 108

Furthermore, it was equally unconvincing to assert that there was no coercion in secondary strikes because the members had voluntarily joined the union and, therefore, had voluntarily bound themselves to strike when ordered to do so. For in an indeterminate but certainly large number of cases, workers had found themselves forced to join the union if they wished to continue working. 109

In a typical resolution of this issue, courts would enjoin unions from ordering their members to engage in secondary strikes, but would preserve the right of the members to cease working upon their own volition. 110 Even in New York, with its general pro-union stance and its tendency to believe that there was nothing coercive in union fines or expulsions to implement secondary boycotts, 111 injunctions in some instances prohibited unions from ordering their members to participate in secondary strikes. 112 The Massachusetts court, after the Martel 113 and Willcutt 114 cases, often would order unions guilty of secondary boycotting to refrain from threatening members with fine or expulsion in order to compel them to engage in secondary-strike activity. 115 Maryland and New Jersey, while recognizing the right to discipline members for breaking union rules and the inability of a court to compel an individual to work, also did not hesitate to hold secondary-strike orders unlawful and en-

108. Id. at 731. See also id. at 726-27 (comments of Lord Esher, M.R.).

109. Forced unionism traces back to the earliest days. See note 18 supra. I have contended elsewhere, with extensive documentation, that during the period of so-called “government by injunction” most of the labor disputes involved efforts by unions to force themselves upon unwilling employees. See Petro, supra note 2, at 341, 390-428.

110. E.g., Alabama State Fed’n of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944), cert. dismissed, 325 U.S. 450 (1945), (statute prohibiting single workers from refusing to handle goods held unconstitutional, but statute prohibiting secondary strikes constitutional); Henderson v. Coleman, 150 Fla. 185, 7 So. 2d 117 (1942) (individual decisions to refuse to load trucks despite injunction against secondary strike held privileged, but if defendant union had ordered employees to strike in violation of decree contempt would be found).


joinable. The southern decisions were indistinguishable from the northern decisions on these issues. They too never commanded an individual employee to work. In the southern cases that we shall be covering, the court orders against secondary strikes or strike threats were uniformly addressed to the union officials.

B. Construction Industry Boycotts: "Common Situs"

Although it is but one of many industries in which numerous distinct employment units are found at a single site, the construction industry must rank among the most notable in any account of secondary boycotts. The building trade unions have been in the forefront of the cartel-prone unions and among the first to pursue technologically restrictionist policies and to aim at taking wages out of competition. Much earlier than other unions, they brought secondary-boycott techniques of eliminating the competition of nonunion employers and employees to a high state of effectiveness.

Most construction projects contain a large number of independent contractors. If all are organized by A.F.L.-affiliated unions, the only "labor" trouble likely to occur will involve jurisdictional disputes between the unions. But if one or more of the subcontractors happens to be nonunion, there is likely to be more serious trouble. Usually a picket line, or maybe a single picket, announces that the electrical work, the carpentry, or the masonry, as the case may be, is being performed by an "unfair" subcontractor. The likely result is that the tradesmen in the affiliated unions will quit working, so that the owner or the general contractor on the project will be under pressure to dispense with the services of the nonunion subcontractor. Quite obviously,

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117. Others include railroad and airline terminals, seaports, office buildings, industrial parks, and shopping centers. All have produced numerous cases that have been complicated unnecessarily by the idea that since the "primary" employer is there, the union should have picketing privileges—an argument that would disappear if all picketing were appraised for what it is, that is an inducement to secondary boycotts.

118. For a case recounting the socially destructive monopolistic tendencies of the construction trade unions in San Francisco, see Industrial Ass'n v. United States, 268 U.S. 64, 72-75 (1925). The description of the efforts of the building trades unions there would fit any large city in the United States.

119. See National Protective Ass'n v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902) (involving the building trades), discussed in Petro, supra note 6, at IVB. See also Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997 (1908) (featuring a comprehensive summary of the restrictive practices of the building trades' unions and a successful complaint against a broad attack on non-union building products).

120. For a typical contemporary example, see NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951), indicating how the Taft-Hartley Act dealt with construction industry boycotts. Much has happened in this field of law since the Denver case, so it gives no more than an indication.

Picketing construction projects is not the only means by which the building trades achieve coercive monopolies. They also, along with the Teamsters, make considerable use of "hot-cargo" contracts, which provide that the contracting employer will not use proscribed materials or deal with nonunion contractors. For a leading case, see National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967), reviewed in Petro, supra note 15, at 335-48.
in spite of the "geographical primariness" of this picketing, it is an inducement to secondary strikes and to secondary boycotts—secondary strikes by the members of the affiliated trades and consequent boycotts of the offending subcontractor by the owner of the project and the general contractor, not because of any dissatisfaction with its work, but because its employees do not belong, do not choose to belong, or are not permitted to belong to the aggressor union.

During the common-law period relevant to our discussion, the courts across the nation generally split between the "liberal" New York approach, which held construction industry boycotts privileged;\(^\text{121}\) and the "conservative" Massachusetts approach, which usually held them actionable and enjoinable because they were contrary to the public good, which is served by competitive industry and harmed by the kind of monopolies that the building trades unions have always aimed to establish.\(^\text{122}\) Here again we are in for a surprise when we observe what the southern states did with secondary construction site boycotts. Not all of the southern states have reported decisions on these boycotts, but of those that do, most found them privileged. Thus:

**Alabama.** Strictly speaking, Alabama had no common-law decision on the legality of construction site boycotts. But in a case in which it declared that it could see nothing wrong in refusals to work on nonunion products, the Alabama Supreme Court struck down a statute prohibiting strikes against nonunion products.\(^\text{123}\) In the only other case worth noting, the Alabama court enjoined a construction industry boycott, but only because the court thought that it violated the Taft-Hartley Act and not because it violated Alabama law.\(^\text{124}\)

**Arkansas.** There was only one relevant case in Arkansas, but in it the Arkansas Supreme Court forcefully held privileged a typical construction industry secondary strike and boycott against nonunion subcontractors and products.\(^\text{125}\) Apparently, from an early date, Arkansas authorities took sides with unions against employers.\(^\text{126}\)

**Florida.** At least in the beginning, Florida too found secondary strikes on

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\(^{121}\) E.g., Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917).


\(^{123}\) Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944), cert. dismissed, 325 U.S. 450 (1945).


\(^{125}\) Meier v. Speer, 96 Ark. 618, 132 S.W. 988 (1910).

\(^{126}\) Cf. State v. Kansas & Texas Coal Co., 96 F. 353 (W.D. Ark. 1899), rev'd on other grounds, 183 U.S. 185 (1901) (dissolving an Arkansas state-court injunction granted to Arkansas officials against an employer, prohibiting it from transporting striker replacements across state line).
construction projects privileged on absolute-rights grounds. Later, however, it held that construction-site picketing for the closed shop violated right-to-work provisions of the Florida statutes and Constitution.

Georgia. There were no common-law decisions in Georgia on construction industry strikes and boycotts. A Georgia injunction against picketing for the closed shop in violation of the state right-to-work law was reversed on preemption grounds by the United States Supreme Court.

Mississippi. In the only relevant Mississippi case, construction-site picketing, designed to compel a general contractor to sign with the unions, induced the employees of the unionized plumbing subcontractor, the plaintiff, to go on strike in violation of a no-strike agreement. Plaintiff charged the unions with violation of the state right-to-work law. Dismissing the action, the Mississippi Supreme Court held that the United States Supreme Court was not permitting the states to enforce their right-to-work laws in any effective way. Moreover, relief could not be based on the picketing-induced violation of the plumbers' no-strike contract because neither the contract nor the breach had been pleaded.

North Carolina and South Carolina. State v. Van Pelt, which we have encountered previously, is the only common-law case in North Carolina on construction industry boycotts. In Van Pelt threats to refuse to work on construction jobs that used the offending employer's lumber products were held privileged against criminal conspiracy charges. Subsequent North Carolina decisions involving the construction industry arose out of the state right-to-work laws, as did the only relevant South Carolina decision.

Tennessee. We have dealt elsewhere with the Tennessee construction industry decisions involving the state right-to-work law. In the only case of note a mason's union, acting as enforcer for a cartel of mason contractors, refused to supply labor to the plaintiff because the cartel mistakenly believed that the plaintiff had violated its bidding restrictions. As the court put it,

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127. Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907).
128. Local 519, Plumbers & Pipefitters' v. Robertson, 44 So. 2d 899 (Fla. 1950).
131. 136 N.C. 633, 49 S.E. 177 (1904).
132. See text accompanying note 31 supra.
135. See notes 82-84 and accompanying text supra.
"the only offense of which complainants were guilty... was that of obtaining the low bid on tile and brick work in Nashville." The court affirmed an award of compensatory and punitive damages.

**Texas.** The *Cain* case was the only clear common-law decision on construction industry boycotts in Texas, although there were many cases construing statutes. In *Cain* a single picket at a large shopping center construction site brought all work to a halt. The object seemed to be to induce the plaintiff-general contractor to break its contract with a nonunion subcontractor. The court could not hold the picketing a violation of the state statute prohibiting secondary boycotts because it earlier had held that statute unconstitutional; nor could it hold the picketing a violation of the state right-to-work law because that statute had not been pleaded. But it could and did hold that the picketing was a deliberate infliction of harm without justification and, therefore, actionable and enjoindable at common law. Objections based on preemption grounds were rejected because the NLRB had refused to prosecute despite the clear violation of the NLRA that was involved and the devastating effect of the boycott. Furthermore, after a thorough review of the cases, the Texas Supreme Court ruled that the right of free speech did not apply to picketing designed to induce a secondary boycott.

**Virginia.** There were no "common-situs" or construction industry boycott cases in Virginia until well after the Taft-Hartley Act and the state right-to-work law were passed. In one case the United States Supreme Court upheld over free speech objections Virginia's authority to enjoin construction-site picketing in violation of its right-to-work law. In another, the Supreme Court upheld over preemption contentions Virginia's authority to prevent the

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137. *Id.* at 678, 125 S.W.2d at 506.
138. *Cain, Brogden & Cain, Inc. v. Teamsters Local 47, 155 Tex. 304, 285 S.W.2d 942 (1956).* *Cf.* Carpenters Local 2484 v. Rust, 433 S.W.2d 683 (Tex. 1968), (a dubious decision vacating an injunction against construction-site picketing inducing breach of contract because there was a failure of proof. In dissent Judge Griffin pointed out that plaintiff offered no proof because defendant's pleading and proof established the point in question, *id.* at 687 (Griffin, J., dissenting)).
139. *See,* e.g., *Ex parte Dilley, Zea and Cooper, 160 Tex. 522, 334 S.W.2d 425 (1960) (construction site picketing held a violation of the Texas antitrust law, but contempt judgment against defendant vacated on preemption grounds)*; Texas State Fed'n of Labor v. Brown & Root, Inc., 246 S.W.2d 938 (Tex. Civ. App. 1952) (combination of 56 unions, a number of trade councils, and city officials to force unionization on an employer and employees who wanted no part of the construction trades unions; fragmentary relief granted against violation of Texas right-to-work law and other statutes); Construction & Gen. Labor Local 688 v. Stephenson, 148 Tex. 434, 225 S.W.2d 958 (1950) (picketing to compel a house-moving firm to accept the closed shop held a violation of the state right-to-work law but not of the Texas secondary boycott statute declared unconstitutional because it prohibited picketing by minority or stranger unions).
140. *Construction & Gen. Labor Union Local 688 v. Stephenson, 148 Tex. 434, 225 S.W.2d 958 (1950).*
141. The court pointed out that on the one hand the plaintiff had no dispute with his own employees, and on the other he had no control over the labor policies of the offending subcontractor. 155 Tex. at 310-11, 285 S.W.2d at 946-47.
142. *Id.* at 312, 285 S.W.2d at 947.
143. *Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953).*
United Mine Workers from using outrageous violence to supplant members of A.F.L. unions on a construction project. Justice Douglas dissented in part on the ground that "this conduct is the stuff out of which labor-management strife has been made, ever since trade unionism began its growth." The same reasoning generally applied would establish prescriptive rights in law-breaking.

**TABLE 3**


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** Since Virginia held secondary boycotts generally to be criminal conspiracies in Crump v. Commonwealth, 84 Va. 927, 6 S.E. 620 (1888), it may be assumed that construction site secondary boycotts would be considered unlawful.

**C. Trucking Industry Boycotts: "Roving Situs," "Hot-Cargo," and Preemption**

Just as the work of contractors in the construction industry causes them to move from place to place, so too does the work of trucking companies. They have home terminals, just as contractors have offices; but a union picketing a home terminal, just as one picketing a contractor's office, is not likely to create the secondary boycott pressures that unions seek to bring about in order to

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145. Id. at 670 (Douglas, J., dissenting in part).
force themselves upon unwilling employers and employees. After all, the employees at the home terminal already know of the dispute and may have rejected the union. Hence, in the trucking industry, as in the construction industry, the unions send their pickets to the places where they can invoke maximum coercive pressures on third parties. The construction unions achieve the coercive maximum at construction sites. The trucking unions, and mainly the Teamsters Union, achieve it by picketing at shipping customers' terminals and at loading docks where trucking companies make pickups and deliveries.

Again as unions do in the construction industry, the Teamsters Union avails itself of the anticipatory type of secondary boycott known as the "hot-cargo" contract. Trucking companies organized by the Teamsters "agree" in advance—usually under threat of strike—to refuse to interline freight with trucking companies that resist the Teamsters. Since no trucking company whose employees wish to have representation can effectively refuse to recognize the Teamsters (the NLRB will force it to recognize and bargain), hot-cargo contracts compel trucking companies to participate with the Teamsters in the illegal activity of coercing employers to recognize the union despite the unwillingness of the employees themselves.146 No hot-cargo agreement provides for boycotting only those firms that have flouted the wishes of their employees to be represented by the Teamsters. Rather, it provides for boycotting any firm no matter who resists the union, the employer, or the employees.

As previously mentioned,147 the Supreme Court of the United States held that the NLRB was without authority to prevent the Teamsters from forcing itself upon unwilling employers and employees in this way.148 It also held that under the preemption doctrine the state courts had no authority under state statutes or the common law to prevent this travesty of the national policy of free employee choice.149 Thus, although the Teamsters' monopolistic boycotting techniques violated the common law, state statutes, and the NLRA in several ways, decisions of the United States Supreme Court insured that this most powerful and arrogant of all unions would have nothing standing in the way of its intention to control "everything on wheels," least of all the choices of individual employees or the wishes of consumers for cheap motor transport. This is why there are relatively few cases to report in this section. The state courts were compelled to act warily in view of the Supreme Court's exculpation.

146. A summary of the relevant law under the NLRA, as interpreted by the U.S. Supreme Court, is found in note 38 supra. See Ladies' Garment Workers Union v. NLRB, 366 U.S. 731 (1961) (both union and employer violated NLRA when union was recognized without establishing that it was choice of majority of employees).
147. See note 38 supra.
148. NLRB v. Local 639, Int'l Bhd. of Teamsters, 362 U.S. 274 (1960); note 38 supra. The 1959 amendments of the NLRA made stranger picketing for recognition an unfair labor practice, see 29 U.S.C. § 158 (b) (7) (1976), thus cancelling the effect of this case.
tory doctrines. There is no point in attempting to line up the cases. They are too few and too various to produce any kind of a meaningful pattern.

**Georgia.** Impelled by the United States Supreme Court's protection of picketing under the free speech doctrine, the Georgia Supreme Court held in 1942 that Teamster picketing was privileged whether confined to the primary employer's premises or extended to other sites.\(^{150}\)

**Mississippi.** This state had no "roving-situs" Teamster cases, but there was a comparable one involving building trades unions.\(^{151}\) An employer and his employees joined together as plaintiffs when construction unions picketed a plant where they were at work and endangered their jobs. The unions picketed at gates used by all the plant's regular employees, rather than the one used by the plaintiffs, in order to bring about maximum disruption against the party in the middle ("T") and thus maximum pressure against the plaintiffs. This was not a case of unions defending exploited employees against an abusive employer. Rather, the lower court found that the plaintiff-employer operated on nondiscriminatory open shop principles, that some of its employees were union members, that relations among them were excellent, that the employees no more wanted union representation than the employer did, and that the picketing unions were plainly out to achieve a hiring monopoly in violation of the state right-to-work law.\(^{152}\) The Mississippi Supreme Court, upholding an injunction against the picketing, acted consistently with section 14(b) of the Taft-Hartley Act, which explicitly provided that state right-to-work laws were not preempted. In a performance that must be called extraordinary for even the Warren Court, the Supreme Court reversed the Mississippi decision, finding that it was based on the mistaken belief that the case was not governed by the NLRA because of inadequate interstate commerce.\(^{153}\) This ground of decision is found nowhere in the opinion of the Mississippi Supreme Court.\(^{154}\)

**Tennessee.** Like other state courts, the Tennessee Supreme Court learned that the United States Supreme Court was not going to tolerate any obstruction by the states of the aspirations of the unions for a monopoly of the labor supply in their respective "jurisdictions." With the state courts preempted from enjoining secondary "roving" picketing, regardless of its coercive effect, the Tennessee Supreme Court thought it proper to permit the victim of a

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152. Id. at 472, 153 So. 2d at 701.
154. The Court was afraid to hold that picketing for the closed shop was preempted because § 14(b) quite clearly intended the precise opposite. Hence it grabbed for this alternate ground of disposition.
Teamsters picket line to enjoin common carriers from refusing to cross the picket line (not the union for establishing it).\textsuperscript{155} After all, it is the legal duty of common carriers to serve all customers without distinction. Why should there be discrimination merely because a customer was being picketed? Within a year the Supreme Court set the Tennessee court straight, holding that the legal duties of common carriers provide no ground for avoiding the impact of the preemption doctrine.\textsuperscript{156}

Texas. The same story was repeated in Texas. Before the Supreme Court created the labor law preemption doctrine, the Texas courts had been consistently enjoining hot-cargo operations and roving picketing of a clearly secondary variety,\textsuperscript{157} although it was holding picketing primary, and hence privileged, when it moved slightly away from a struck plant to the point where a railroad entered the plant,\textsuperscript{158} or when in a dispute with a trucker the union picketed its main customer.\textsuperscript{159}

Once the Supreme Court showed in its \textit{Garner}\textsuperscript{160} decision that Teamster picketing was immune to state controls, even when plainly designed to defeat the national labor policy of free employee choice, the Texas Supreme Court followed suit and added some flourishes of its own. In the \textit{Whitfield} case,\textsuperscript{161}

\begin{itemize}
  \item \textsuperscript{156} Kerrigan Iron Works, Inc. v. Cook Truck Lines, Inc., 41 Tenn. App., 296 S.W.2d 379 (1956), rev'd sub. nom. Teamsters Local 327 v. Kerrigan Iron Works, Inc., 353 U.S. 968 (1957). In National Car Loading Corp. v. Arkansas Motor Freight Lines, Inc., 201 Tenn. 259, 298 S.W.2d 720 (1957), the Tennessee court tried to cope with the Teamsters by denying it intervention rights in these cases, but \textit{Kerrigan} also ended that possibility.
  \item \textsuperscript{157} Dallas Gen. Drivers v. Waimix, Inc., 156 Tex. 408, 295 S.W.2d 873 (1956) (roving-situs picketing of transit-mix trucks at construction site held a secondary boycott actionable at common law, especially since plaintiff had five plants that the union could have picketed [but obviously without the coercive effect of the construction site picketing]); North East Texas Motor Lines, Inc. v. Dickson, 148 Tex. 35, 219 S.W.2d 795 (1949) (roving-situs picketing and hot-cargo operations enjoined; also "primary" picketing of plaintiff's terminal when it appeared that the Teamsters had confronted the plaintiff with a "sign it or else" "negotiating" stance); General Drivers Local 745 v. Dallas County Constr. Employers' Ass'n, 246 S.W.2d 677 (Tex. Civ. App. 1951) (roving-situs picketing of transit-mix trucks held enjoinderable on suit by customer of the transit-mix company, but perhaps privileged "primary" action had suit been brought by the transit-mix company itself); Turner v. Zames, 206 S.W.2d 144 (Tex. Civ. App. 1947), overruled in \textit{Ex parte} Henry, 147 Tex. 315, 215 S.W.2d 588 (1948) (Teamsters backed up majority strike against plaintiff with roving picketing and inducements of other truckers to boycott plaintiff; all secondary activities held wrongful and enjoinderable notwithstanding picketing-free-speech doctrine).
  \item \textsuperscript{158} \textit{Ex parte} Henry, 147 Tex. 315, 215 S.W.2d 588 (1948). \textit{See also} Alamo Motor Lines, Inc. v. Teamsters Local 657, 229 S.W.2d 112 (Tex. Civ. App. 1950) (strike and picketing of plaintiff held "primary"; therefore injunction denied against both union and other firms that refused to interline freight with plaintiff).
  \item \textsuperscript{160} Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (stranger picketing by Teamsters for recognition as exclusive bargaining representative of employees who had rejected it, held not subject to jurisdiction of state courts). \textit{See note 38 supra}.
  \item \textsuperscript{161} Truck Drivers Local 941 v. Whitfield Transp., Inc., 154 Tex. 91, 273 S.W.2d 857 (1954). Three years earlier, in Best Motor Lines v. Teamsters Local 745, 150 Tex. 95, 237 S.W.2d 589 (1951), the Texas Supreme Court held that the Teamsters' hot-cargo arrangements were enjoin-
the Teamsters had been defeated 37-6 in an election conducted by the NLRB. Nevertheless, it "informed" the trucking companies interlining freight with plaintiff Whitfield that he was "unfair." The trucking companies immediately refused to interline freight with Whitfield.\textsuperscript{162} Thereupon Whitfield sued the trucking companies, claiming that they were engaged with the union and among themselves in a conspiracy to injure. The Teamsters, which had not been named as a defendant, intervened, and when judgment went for the plaintiff, the union appealed. Evidently willing to interline freight with the plaintiff under court order, the trucking companies did not appeal.

On appeal, the Texas Supreme Court was not content to reverse simply on preemption grounds, even though the similar \textit{Garner} case already had been handed down. Apparently failing to notice that the plaintiff had sued the trucking companies in conspiracy, and not the Teamsters, a majority of the Texas Supreme Court held that the Teamsters had not forced the defendants to boycott the plaintiff; it had only informed them of its dispute with Whitfield. Their decision to boycott Whitfield was, therefore, "voluntary," and Whitfield had no cause of action against the defendants.\textsuperscript{163} The court then held that the injunction against the employer-defendants should be vacated, despite their failure to appeal.\textsuperscript{164}

In a trenchant dissent, Judge Smith brought out all the weaknesses, irrelevancies, non sequiturs, and other absurdities of the majority opinion. He pointed out that there was no dispute between the plaintiff and its employees, who definitively had rejected the union in a secret-ballot election; that indeed the union never claimed a majority; that there was an obvious violation of the Texas antitrust and secondary boycott statutes; and that never before had the Texas court vacated an injunction against defendants who failed to appeal.\textsuperscript{165} In a field of law that may correctly lay claim to its full share of travesties, surely the \textit{Whitfield} case deserves a prominent place.\textsuperscript{166}

\textbf{Conclusion}. The Supreme Court's preemption and free speech doctrines, especially as they appear in these secondary boycott cases, emphasize that from about 1940 onward, when the picketing-free-speech doctrine was excogitated in \textit{Thornhill}, there was little to choose between the southern and the northern courts in the labor law field. Certainly on the law concerning union aggression, the courts in the North and South were equally subject to the Supreme Court's determination to place union action in a specially privileged status. To conceive that southern courts were hotbeds of seething rebellion

\begin{footnotes}
\begin{enumerate}
\item[162.] 154 Tex. at 94, 273 S.W.2d at 858.
\item[163.] \textit{Id.} at 101, 273 S.W.2d at 863.
\item[164.] \textit{Id.} at 102, 273 S.W.2d at 863.
\item[165.] \textit{Id.} at 102-09, 273 S.W.2d at 863-70 (Smith, J., dissenting).
\item[166.] For approval of the \textit{Whitfield} decision, see Jeffers, \textit{supra} note 26.
\end{enumerate}
\end{footnotes}
against the Supreme Court's cancellation of traditional state authority over union action would be inaccurate. There was no such rebellion. On the whole, the southern courts accepted the free speech and the preemption doctrines at least as readily as the northern courts did. The Whitfield case is a good example. We have seen others, and we shall see more.

D. The Allowable Area of Economic Conflict

The term "allowable area of economic conflict" achieved prominence as the title of the first chapter of the influential book by Felix Frankfurter and Nathan Greene entitled The Labor Injunction.\(^1\)\(^6\)\(^7\)\(^8\)\(^9\)\(^10\) Shortly after the book was published it was cited by the New York Court of Appeals in Stillwell Theatre, Inc. v. Kaplan,\(^16\)\(^8\) the first case using the term. The object of the term, along with such other terms as "unity of interest," "allies," and "struck work," was to suggest the extent to which unions might, in a dispute with one person or firm, impose pressures on others.\(^16\)\(^9\) Just how far a court allowed unions to extend their harmful pressures was called the "allowable area."\(^17\)\(^0\)

Those who thought that doing deliberate harm to anyone should be actionable in the absence of just cause were inclined to limit the size of the allowable area considerably, especially when the union extending its harmful pressures sought to impose itself on unwilling employers and employees.\(^17\)\(^1\) A union actually representing the free choice of employees in any firm did not need to harm other parties. The right to strike, a devastating weapon, would bring any employer to heel unless it was exercised when there was great unemployment creating a willing labor pool to replace the strikers. If a union called a strike at such a time it should not be able to compound its error by harming third parties.

On the other hand, if the union was in no position to call a strike because the employees did not want its representation, why should it be allowed to harm third parties in order to force itself where it was not wanted? Thus, hard

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169. The idea that the New York Court of Appeals might place limits on the extent to which a union or group of unions might force themselves upon unwilling employers and employees first appeared in Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919), a case in which the Teamsters' reacted to a refusal by the plaintiff's employees to join by getting the other unions in Auburn, N.Y., to threaten a general strike against all who dealt with the plaintiff. For the facts, see 89 Misc. 501, 504-05, 124 N.Y.S. 97 (1915). Another New York landmark case was Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937), in which the New York Court of Appeals held that a union unsuccessful in organizing the employees of a manufacturer could picket the products of that manufacturer wherever they were sold at retail, no matter how much economic harm was done to the retailer in the process. See Note, Legality of Picketing Against a Product, 14 N.Y.U.L.Q. REV. 83 (1936).
170. F. FRANKFURTER & N. GREENE, supra note 167, at 24-46.
171. See, e.g., Smith, Crucial Issues in Labor Litigation, 20 HARV. L. REV. 429, 437-39 (1907). Professor Smith thought that if unions were allowed to do deliberate harm to everyone who dealt with the employer with whom the union was disputing, the "damage to [the third parties], and to the employer . . . and to the community would be excessive in proportion to the benefit to the defendant." Id. at 438-39.
analysis revealed no occasion in which it was desirable to permit unions to inflict deliberate harm upon third parties. This is presumably what the proponents of the Taft-Hartley Act meant when they said that they could not see "any difference between different kinds of secondary boycotts" and, therefore, passed a statute that outlawed them all.\textsuperscript{172} Of course the NLRB and the Supreme Court have made numerous exceptions to the statute passed by the Eightieth Congress.\textsuperscript{173} But this should not be allowed to obscure the point in issue: in every case the union privilege of doing deliberate harm to third parties rests on shaky social premises.

Not a great deal of litigation in the South addressed the question of the allowable area of economic conflict. What there was, surprisingly enough (or perhaps no longer surprisingly in view of what we already have seen in the southern cases), exhibited no particularly narrow conception of the allowable area of economic conflict. Indeed, Texas, the only state with numerous decisions, conceived the allowable area rather broadly.

\textit{Florida}. Two attempts by Florida courts to prevent unions from spreading boycotts beyond the immediate parties came so late as to suggest that they were influenced by Taft-Hartley boycott conceptions. In any event, the Supreme Court reversed both decisions on preemption grounds.\textsuperscript{174}

\textit{Louisiana}. In the only relevant case, a Louisiana appellate court followed the lead of the New York courts and held that drivers were privileged in a dispute with a dairy to picket grocery stores handling the dairy's products.\textsuperscript{175}

\textit{South Carolina}. A relatively late South Carolina decision held that picketing an employer's customers nationwide in a recognition dispute was wrongful at common law, but it denied an injunction on federal preemption grounds.\textsuperscript{176}

\textsuperscript{172} Senator Taft said on the floor of the Senate that: "Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." \textit{2 Legislative History of the Labor Management Relations Act} 1106 (1948). For a review of the legislative history of the secondary-boycott provisions of the Taft-Hartley Act, see S. \textit{Petro, supra} note 14, at 35-49. The conception of secondary action offered here is, I believe, identical with the one adopted by the Eightieth Congress in enacting the Taft-Hartley Act. It makes no exception in favor of unions to the principle that no one has a privilege to harm others without proving a superior social justification. This principle is extensively discussed in the third installment of this essay. \textit{See} \textit{Petro, supra} note 6.

\textsuperscript{173} See authorities cited in notes 14-15 \& 38 \textit{supra}.


Texas. The Texas courts developed a formula for the allowable area of economic conflict that was liberal enough to satisfy even Felix Frankfurter, as indicated by his opinion affirming the Texas decision in the Ritter's Cafe case.\textsuperscript{177} In Ritter's Cafe a Texas appellate court held that the Brotherhood of Carpenters, demanding recognition from an unwilling subcontractor, could not lawfully picket a restaurant owned by a person for whom the offending subcontractor was doing some building.\textsuperscript{178} On appeal to the Supreme Court, the Frankfurter opinion for the majority held that notwithstanding the free speech doctrine so recently enunciated in Thornhill,\textsuperscript{179} the Texas limitation on picketing to the industry in which the labor dispute originated was reasonable.\textsuperscript{180}

Other Texas decisions were more generous in terms of union privilege. A union involved in a dispute with plaintiff-employer was held privileged to picket at a point where a railroad entered the plaintiff's premises to make pick-ups and deliveries, even though the object was obviously to induce the railroad's employees to refuse to service the plaintiff, a clear case of D→T→P.\textsuperscript{181} Furthermore, a union was held privileged to picket the main customer of a trucking company that refused to grant recognition.\textsuperscript{182} And in a dispute with one of several related family businesses a union was allowed to picket the others.\textsuperscript{183} The Texas Supreme Court, however, held that in a dispute with an oil company involving its vessels, a union was not privileged to picket the company's refining subsidiary,\textsuperscript{184} but this decision was reversed on preemption grounds.\textsuperscript{185}

Conclusion. Here, as elsewhere, the decisions of the southern courts displayed no particular sternness with unions, let alone antiunion animus. On

\textsuperscript{178} 149 S.W.2d at 697.
\textsuperscript{179} Thornhill v. Alabama, 310 U.S. 88 (1940), struck down as unconstitutional on its face an Alabama statute that prohibited all picketing without "just cause." Id. at 106.
\textsuperscript{180} 315 U.S. at 728. There were several other Texas decisions against picketing that crossed industrial lines: Office Employees Local 129 v. Houston Lighting & Power Co., 314 S.W.2d 315 (Tex. Civ. App. 1958) (picketing of a utility's construction project in a dispute over a discharge); General Drivers Local 743 v. Dallas County Constr. Employers' Ass'n, 246 S.W.2d 677 (Tex. Civ. App. 1951) (picketing of a mason subcontractor in a dispute over transit-mix truckdrivers held enjoinable on suit by subcontractor, though perhaps not on suit by transit-mix company); Borden Co. v. Local 133, Int'l Bhd. of Teamsters, 152 S.W.2d 828 (Tex. Civ. App. 1941) (injunction against picketing of grocery stores in dispute with dairy denied, but injunction granted against picketing of ice company). Carter v. Bradshaw, 138 S.W.2d 187 (Tex. Civ. App. 1940) (injunction issued when, in dispute with a building contractor, Carpenters' Union picketed a building erected by the contractor for plaintiff-automobile dealer as latter was moving in). Ex parte Henry, 147 Tex. 315, 215 S.W.2d 588 (1948).
\textsuperscript{184} Ex parte George, 163 Tex. 103, 358 S.W.2d 590 rev'd, 371 U.S. 72 (1962). On remand the defendant was discharged, 364 S.W.2d 189 (Tex. 1963).
\textsuperscript{185} Ex parte George, 371 U.S. 72 (1962).
the contrary, the New York influence was evident in the wide range accorded to the “allowable area of economic conflict” and to the privilege of unions deliberately harm third parties in the name of “primary action.”

VI. BUSINESS BOYCOTTS IN THE SOUTHERN COURTS

Secondary boycotts are not exclusively union measures. Indeed, in most of the confederate states the courts were called upon to consider secondary boycotts by businessmen before they were confronted with union boycotts. These nonunion boycotts were all of the general type, \( D \rightarrow T \rightarrow P \), even though the details might differ. No particularly instructive cases were found in Alabama,\(^{186}\) Arkansas, or Florida,\(^{187}\) but there were some in all other southern states. In each, as the prima facie tort theory would suggest,\(^{188}\) business boycotts were held actionable whenever intentional harm to the plaintiff appeared and the defendant was unable to convince the court that the harm was justified. Those who charge antiunion bias in the southern courts must somehow contend with these cases, which, for the most part, applied to business firms and businessmen restrictions on secondary pressures at least as rigorous as those imposed upon unions. On the dubious assumption that one can tell whether a court is antiunion by its attitude toward secondary boycotts,\(^{189}\) the southern courts would rate as both antiunion and antibusiness!

**Georgia.** The simplest variety of secondary boycott, and the kind that the defendant finds most difficult to justify, is that of inducing a third party to break a contract with the plaintiff. Shortly after the Civil War, the Georgia Supreme Court was asked to decide whether it was actionable for a defendant to induce a violation of an employment agreement between the plaintiff and some former slaves. Although judgment for the plaintiff was reversed on a damages issue, and the court was not sure that there was a valid contract between the plaintiff and his former slaves, it held that inducing the former slaves to leave the plaintiff was actionable anyway.\(^{190}\) Georgia also held that it was wrongful for a combination of retailers to boycott wholesalers who per-

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\(^{186}\) But the general sentiment against secondary types of coercion is evident in Abingdon Mills v. Grogan, 167 Ala. 146, 52 So. 596 (1910) (statute prohibiting enticement of employees or inducements to quit held applicable to mill employment) and Sparks v. McCrary, 156 Ala. 382, 47 So. 332 (1908) (threatening plaintiffs customers in plaintiffs store with legal action held actionable). In Brooks v. Ingraham, 186 Ala. 106, 65 So. 138 (1914), however, the defendant was held privileged to warn the plaintiffs customers to stay off his, the defendant's, land.

\(^{187}\) Chipley v. Atkinson, 23 Fla. 206, 1 So. 934 (1887), although a much-cited case, is technically inconclusive despite the strong prima facie tort language declaring it actionable to induce breach of an at-will contract. Id. at 218-19, 1 So. at 940-41.

\(^{188}\) See note 16 supra.

\(^{189}\) This idea is what St. Antoine proposes as a touchstone, supra note 14 at 5.

\(^{190}\) Salter v. Howard, 43 Ga. 601 (1871). See also Kinney v. Scarborough Co., 138 Ga. 77, 74 S.E. 772 (1912) (inducement to break employment contracts with plaintiff and to go to work for rival firm held actionable and enjoinable). Inducing breach as a paradigmatic prima facie tort is discussed in the third installment of this essay. See Petro, supra note 6.
sisted in dealing with the plaintiff, a competing retailer;\textsuperscript{191} and for a cartel of printers to combine with a union to oust the plaintiff, a printer who refused to join the cartel.\textsuperscript{192} On the other hand, a combination to refuse to hire workers who quit their jobs without notice was held to be justified.\textsuperscript{193}

\textit{Louisiana.} Perhaps influenced by a strong Missouri opinion,\textsuperscript{194} the Louisiana Supreme Court early held that it was lawful “in itself” for a combination of insurers to refuse to cover any steamer that employed the plaintiff as master.\textsuperscript{195} Some forty years later, however, it held that when a company and its foreman combined “without justifiable cause” to discharge employees who dealt with the plaintiff, the latter had a good cause of action.\textsuperscript{196} And similarly, when a group of businessmen induced salesmen not to lodge at the plaintiff’s hotel, the Louisiana court upheld the plaintiff’s cause of action.\textsuperscript{197} But an employee’s suit against a union for allegedly inducing employers to refuse to hire him was dismissed for improper pleading.\textsuperscript{198}

\textit{Mississippi.} Mississippi also held secondary boycotts by businessmen actionable in the absence of good cause. Plaintiff in the \textit{Globe & Rutgers} case charged some rival insurance companies with a conspiracy to induce one of its agents to quit. Defendants allegedly sought to injure the plaintiff because of its refusal to participate in the defendants’ cartel. Had the plaintiff been ruined by regular competition, said the court, there could have been no recovery; but here there was no just cause for the deliberate injury to plaintiff and therefore the complaint was good.\textsuperscript{200} The earlier Louisiana and Missouri decisions, said the court, were “out of harmony with modern decisions” that took seriously the idea that there should be a remedy for every wrong.\textsuperscript{201} Similarly, Mississippi held it actionable for an employer without just cause to discharge

\textsuperscript{193} Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S.E. 177 (1904). In a case involving no suggestion of an employer blacklist, the Georgia Supreme Court struck down a statute requiring employers to provide any dischargee with a written explanation of the reasons for the discharge. Wallace v. Georgia C. & N. Ry. 94 Ga. 732, 22 S.E. 579 (1894). A union blacklist characterizing an employer as “unfair” was found to be nonlibelous in J.B. Watters & Son v. Retail Clerks Local 479, 120 Ga. 424, 47 S.E. 911 (1904).
\textsuperscript{194} Hunt v. Simonds, 19 Mo. 583 (1854). The court said that the defendants in this case had an absolute right to refuse to insure the plaintiff’s vessel, but it might equally have held that the risks implicit in the casualty insurance business constitute a sufficient justification for refusals to insure.
\textsuperscript{197} Webb v. Drake, 52 La. Ann. 290, 26 So. 791 (1899).
\textsuperscript{198} Nyland v. United Bhd. of Carpenters Local 1960, 156 La. 604, 100 So. 733 (1924).
\textsuperscript{199} Globe & Rutgers Fire Ins. Co. v. Firemen’s Fund Fire Ins. Co. 97 Miss. 148, 52 So. 454 (1910).
\textsuperscript{200} \textit{Id.} at 163, 52 So. at 456.
\textsuperscript{201} \textit{Id.} at 164, 52 So. at 456-57.
or to threaten to discharge employees for dealing with the plaintiff.\footnote{202}{Wesley v. Native Lumber Co., 97 Miss. 814, 53 So. 346 (1910).} 

\textit{North Carolina}. The attitude of North Carolina toward business boycotts was much the same. Although it held in \textit{State v. Van Pelt}\footnote{203}{136 N.C. 633, 49 S.E. 177 (1904).} that union boycotts to gain the closed shop were not criminal conspiracies, the North Carolina Supreme Court, besides holding that inducing breach of contract was actionable,\footnote{204}{Haskins v. Royster, 70 N.C. 601 (1874).} held that an employers' blacklisting combination was wrongful,\footnote{205}{Holder v. Cannon Mfg. Co., 135 N.C. 392, 47 S.E. 481 (1904) (prima facie tort approach adopted).} as was a refusal by an employer to deal with anyone who hired an employee he had fired for joining a union.\footnote{206}{Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).} Comparable blacklisting by a union might have been held actionable, the court said, except that in North Carolina unions were not suable entities.\footnote{207}{See Hallman v. Wood, Wire & Metal Lathers' Int'l Union, 219 N.C. 798, 15 S.E.2d 361 (1941).} In a relatively recent case worthy of note, the North Carolina Supreme Court granted a recovery in tort when the defendant, a general contractor, broke its contract with the nonunion plaintiff-subcontractor in order to induce plaintiff to violate the state's right-to-work law by yielding to a union's closed shop demand.\footnote{208}{Poole & Kent Corp. v. Thurston & Sons, Inc., 286 N.C. 121, 209 S.E.2d 450 (1974).} 

\textit{South Carolina}. South Carolina found employer blacklisting as objectionable as did North Carolina, even without proof of an agreement to blacklist.\footnote{209}{Rhodes v. Granby Cotton Mills, 87 S.C. 18, 68 S.E. 824 (1910).} Similarly, a federal district court in South Carolina held tortious a breach of contract designed by the defendant, a general contractor, to induce plaintiff-subcontractor to violate the state's right-to-work law.\footnote{210}{Gregory Elec. Co. v. Custodis Constr. Co., 312 F. Supp. 300 (D.S.C. 1970).} 

\textit{Tennessee}. Developments here paralleled those in the other confederate states. Over a powerful dissent by Judge Freeman along prima facie tort lines, the Tennessee Supreme Court, using "lawful in itself" reasoning, held that the defendant in \textit{Payne v. Western Atlantic R.R.}\footnote{211}{81 Tenn. 507 (1884).} was absolutely privileged to discharge employees who dealt with the plaintiff. Thirty years later Judge
Freeman's dissent became the majority view. *Hutton v. Watters*\(^{212}\) expressly overruled the *Payne* decision and found it actionable for school authorities to threaten the expulsion of students who boarded with the plaintiff, when the only motive was the refusal of the plaintiff to eject a boarder when requested to do so by the president of the school.\(^{213}\) Tennessee was also as hard on the boycotting activities of business cartels,\(^{214}\) and on employer-union combinations to oust competitive businesses,\(^{215}\) as were the other southern states.

**Texas.** Long the South's most commercially and industrially developed state, as well as its largest, Texas was in the forefront in its legal development as well. In the area of business boycotts the Texas courts relatively early took a stance compatible with the prima facie tort principle. In *Delz v. Winfree*,\(^{216}\) a much-cited case, the Texas Supreme Court ruled that a genuinely primary act, such as a refusal to deal on unsatisfactory terms, was privileged, but that if a combination should put pressure on third parties to refuse to sell to or buy from the plaintiff, some ground of justification would have to be established or the boycott would be held actionable.\(^{217}\) On the other hand, if a defendant was concerned only in removing the plaintiff's unfair competition when it complained to the plaintiff's employer about his conduct, the defendant would not be liable even though plaintiff was discharged as an unintended consequence of the complaint.\(^{218}\) So too, a medical society\(^{219}\) and an association of

\(^{212}\) 132 Tenn. 527, 179 S.W. 134 (1915).

\(^{213}\) *Id.* at 540, 179 S.W. at 137.

\(^{214}\) *E.g.*, Bailey v. Master Plumbers, 103 Tenn. 99, 52 S.W. 853 (1899) (expressing a powerful antimonopoly, procompetition sentiment).

\(^{215}\) *Lichter v. Fulcher*, 22 Tenn. App. 670, 125 S.W.2d 501 (1939) (plaintiff allowed punitive as well as compensatory damages against the defendant, a contractors' association, which had combined with a labor organization to eliminate plaintiff's competition by denying him access to workers). Indicating a similar commitment to free competition, the Tennessee Supreme Court struck down a Nashville ordinance requiring the union label on all city printing. *Marshall v. City of Nashville*, 109 Tenn. 495, 71 S.W. 815 (1903).

\(^{216}\) 80 Tex. 400, 16 S.W. 111 (1891).


\(^{218}\) Swift & Co. v. Allen, 151 S.W. 645 (Tex. Civ. App. 1912) (an extremely instructive case on the essentially teleological, hence "subjective" character of all legal doctrine). *See also* Robison v. Texas Pine Land Ass'n, Tex. Civ. App. 40 S.W. 843 (1897) (threats to discharge employees who patronized plaintiff's competing store held justified competition); Donavan v. Texas & P.R. Co., 64 Tex. 519, 521 (1885) (discharge of plaintiff as unintended result of defendant's refusal to allow plaintiff to enter restricted area held not attributable to defendant, hence not actionable as against defendant, although court said that "under some circumstances" the discharge might provide a cause of action against the plaintiff's employer).

\(^{219}\) Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App.1920) (osteopath excluded from medical society because of dubious "M.D." degree also excluded from use of defendant-hospital, a common consequence of the cartel arrangements of the medical profession, resting ultimately on the
insurance brokers\textsuperscript{220} were privileged to exclude certain persons from membership, even though the exclusion brought temporal harm, when it was based on socially justifiable grounds. Finally, in a case suggesting a typical southern antipathy toward employer blacklisting of employees, a Texas appellate court saw nothing unconstitutional in a statute requiring employers to give written reasons for discharges.\textsuperscript{221}

VII. SOME PROVISIONAL CONCLUSIONS AND AN HYPOTHESIS

Since not all relevant features of the southern labor cases have been covered in this Article, conclusions expressed now must be provisional, pending review of the remaining features in the second part of this essay. The conclusion at present must be that there was no significant difference in the substantive law applied to labor disputes in the South and North. At least there was no suggestion of a sterner attitude toward union action in the southern courts than the prevalent ones in the North. Indeed, we have seen that in several instances the southern courts tended to follow the "liberal" prounion view of the New York Court of Appeals rather than the "conservative" view associated with the Massachusetts Supreme Judicial Court.\textsuperscript{222}

There may have been a tendency among some of the southern courts to restrict certain types of secondary boycotts more narrowly than the New York courts did, but these southern restrictions were not as rigorous as those prevailing in the bulk of the northern courts, which tended to be less "liberal" than the New York Court of Appeals.\textsuperscript{223} Moreover, as the section on business boycotts shows, the southern courts were at least as hard on anticompetitive business boycotts as they were on union attempts to monopolize labor markets.\textsuperscript{224} Thus, if they were "antiunion" they were "antibusiness" as well—a fittingly silly conclusion to an ill-founded charge. More seriously, though, the almost universal common-law acceptance of the closed shop by the southern courts\textsuperscript{225}—prior to the enactment of the right-to-work laws in the late forties and fifties—should by itself put to rest the notion that judicial "antiunionism" accounted for the allegedly poor performance of unions in the South.

In the writer's opinion, the general belief that unions have done particu-
larly badly in the South is as wide of the mark as is the question-begging belief that they have done poorly for "institutional" reasons. It is true that the proportion of union membership to total nonagricultural employment is lower in the confederate states than the national average. But this is also true of Arizona, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont, and Wyoming. In short, nineteen of the nonconfederate states, like the eleven confederate states, have less than the national average—thirty states in all.226 Have unions done more poorly than they should have in all thirty? If so, why?

It is also continually noted that in elections conducted by the NLRB, unions tend to lose more often than they win in the confederate states. But here too there is a distortion of reality. Indeed, as the latest Annual Report of the NLRB shows, in 1979 unions were defeated in a greater proportion of elections in Massachusetts (62 percent) and Vermont (76.9 percent) than they were in North Carolina (61.8 percent) and in South Carolina (60.4 percent). Moreover, unions lost 57 percent of the elections in Connecticut, 56.6 percent in Maine, 56 percent in New Jersey, and 59.7 percent in Pennsylvania, one of the most heavily unionized states in the country.227 It seems that unions are doing poorly in many states outside the supposedly "reactionary" South. All of the above northeastern states have impeccably "liberal" reputations, some have been heavily unionized for a long time, and states such as New Jersey and Pennsylvania have long been notorious for the power wielded there by local unions.

I propose the hypothesis that unions originally failed to flourish in the South for one set of reasons and are doing badly there now for another. There was not a great deal of unionization in the South in the past, I suggest, for the same reason that there is little or no unionization in any economically underdeveloped area. Unions are strictly secondary and strictly dispensable organizations. There is no basis for labor organization without large capital investment leading to large employment units. Moreover, there will be little or no labor organization, even when those conditions exist, unless large numbers of people believe that there is a natural antagonism between employers and employees that will result in abuse and exploitation of employees by employers unless some force intervenes to prevent them from doing so.

As soon as it is widely understood, as it is beginning to be understood today, that the employer-employee relationship is symbiotic, rather than antagonistic, and that a free labor market will provide wage workers with the greatest possible compensation for their output, public opinion formerly in favor of unions undergoes a massive, although largely silent, shift. The workers themselves begin to appreciate that what is good for their employer is good

226. See authorities cited in the notes to Tables 2 & 3 supra.
227. 44 NLRB ANN. REP. 304-05 Table 15 A. (1979).
for them, and that when the employer faces doom, as the Chrysler Corporation does now, their prosperity too is threatened. At the same time, the general public is less prone to tolerate abusive union conduct. Running more or less concurrently, though often in advance of the foregoing phenomena, business management develops skills and understanding in personnel relations that were necessarily lacking in the earlier days of the industrial revolution when other problems and challenges were more exigent.

An astute corporate executive recently said to me that any firm whose employees choose union representation is itself mainly responsible for their choice. His point was that any firm has available to it the knowledge and the techniques required to win the undivided loyalty of its employees, and to convince them that they are better off dealing directly with their employer, person-to-person, than they would be in dealing through a union. Whether or not this is true, it is widely believed. All nonunion firms of any size and sophistication expend considerable effort in "union-proofing" their employees. This is true North and South, East and West.\textsuperscript{228}

In the early period when large-scale employment units were particularly vulnerable to unionization, in part, at least, because their managements could not, would not, or did not know how to win the loyalty of their employees, there was not much unionization in the South because there was not much capital investment and not many large-scale employment units. And now, when there is greater capital investment in the South, and many more large-scale employment units, worker opinion and public opinion are no longer infatuated with unions, and corporate managements have learned that winning the loyalty of their employees is as important to the welfare of the firm as good products, astute financial management, and creative marketing. Lemuel Boulware, the noted General Electric executive who tirelessly advocated a prominent role for employee relations in corporate management, was scorned and derided in the fifties and sixties when he mounted vast communications campaigns designed to induce General Electric employees to believe that their interests were tied more intimately to the fate of their employer than they were to their unions.\textsuperscript{229} Today this is the common practice of the many nonunion firms that keep winning elections, no matter how blatantly the NLRB rigs them in favor of unions.\textsuperscript{230}

\textsuperscript{228} For the predictable union response, i.e., proposed outlawry of management consultants who allegedly are responsible for effective employer antiunionism, see the statement of Mr. A. Kistler of the A.F.L.-C.I.O. before the House Labor Subcommittee on Labor-Management Relations as reported in \textit{BUREAU OF NATIONAL AFFAIRS, DAILY LABOR REPORT} No. 201 at A16-18 and E1-3 (10/16/79). For a story about one such consultant, see Martin, \textit{Labor Nemesis}, Wall St. J., Nov. 19, 1979, at 1, col. 6.

\textsuperscript{229} For a defense of Mr. Boulware and his policies, see Northrup, \textit{The Case for Boulwarism}, 41 \textit{HARV. BUS. REV.} 86-97 (1963). For Mr. Boulware's own explanation of his beliefs and practices, see L. BOULWARE, \textit{THE TRUTH ABOUT BOULWARISM} (1969).

\textsuperscript{230} Having spent a considerable portion of my time over the last 30 years monitoring the activities of the NLRB, I stand by the accusation in the text. For a few of many documented studies of blatant antiemployer and prounion bias in NLRB decisions, see S. PETRO, \textit{THE KOHLER
The charge that unions have done badly in the South because the law and
the courts have been against them is part and parcel of the ancient union la-
ment of mistreatment by managements, courts, and society in general. Unions
have never been subjected to unusual legal disabilities, not even in the earliest
days of the criminal conspiracy cases. On the contrary, from the very be-
ginning labor combinations were permitted at least as broad a scope of con-
certed action as were business combinations. As soon as courts recognized
a right in unions to engage in picketing, as well as in strikes, it was clear that
unions had acquired greater privileges than were available to anyone else, for
picketing is a coercive secondary-boycott inducement, even though it is not
always recognized as such. And then, when unions were held privileged to
engage in conduct everywhere recognized as secondary boycotting in order to
impose closed shops on unwilling employers and employees, the view that un-
ions were being specially favored by the law could no longer be seriously chal-
lenged.

These facts have not prevented and will not prevent unions and their
sympathizers from complaining of mistreatment by the courts, the legislatures,
the electorate, management, Japanese auto manufacturers, and by everyone
else. We are not entitled to ignore such union complaints, merely because they
are continually made. As long as socially significant charges of mistreatment
are made, it ought to be a function of disinterested scholarship to weigh the
complaints against the facts, so that if they are justified policy-makers will be
couraged to do something about them, but if unjustified, and especially if

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231. See Petro, supra note 6.
232. Id.
233. See sections II & IV supra. The contention here is that the universally stern attitude
taken by all courts against business boycotts, if applied even-handedly to trade-union picketing,
whether peaceable or violent, would have resulted in all picketing being actionable, whether “pri-
mary” or “secondary,” and whether by employees or by strangers, unless some socially serviceable
ground of justification were established that would justify the deliberate infliction of harm in-
tended by this boycott-inducing activity. Moreover, the general tendency of both courts and legis-
latures to hold or make unlawful purely self-regulating business combinations, if even-handedly
applied to unions, would have made unions themselves unlawful when they began to affiliate, and
strikes also unlawful when they involved the employees of more than one firm. The purpose of
these observations is not to advocate anything other than an appreciation that in holding industry-
wide unions, strikes, and picketing lawful, if peaceable, the courts of this country already had
created special privileges for unions long before Congress did so in such legislation as the Wagner
anti-unionism are flatly contrary to the facts. The truth is that unions always have been the bene-
ficiaries of special privileges in this country, even in the darkest days of “government by injunc-
tion.” These matters are dealt with in detail in the third installment of this essay. See Petro, supra
note 6.
234. See sections III and V B supra; note 233 supra.
the complaints amount only to demands for greater privilege by persons and groups already the beneficiaries of special privilege, such demands may encounter the opposition necessary to the survival of a free and productive society.