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COMMENT

A Cure for Laryngitis: A First Amendment Challenge to the NLRA's Ban on Secondary Picketing

JOSEPH L. GUZA†

*[F]reedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum For in the absence of an effective means of communication, the right to speak would ring hollow indeed.*¹

INTRODUCTION

Labor is losing its voice.² In fact, for almost the last half-century, the American labor movement has been

† J.D. Candidate, Class of 2012, University at Buffalo Law School. I would like to thank Rich Forester, Tom Bush, Gordon Yohe, and all the other dockmen and truck drivers who, by example, taught me what it means to truly *work* for a living; this one's for you guys. Thanks to my wife, Angela, who has been relentlessly patient with the demands of law school. Thanks are also due to Richard Lipsitz, Sr., Esq. and Professor Dianne Avery, for reviewing earlier drafts of this Comment. Finally, I would like to thank Richard D. Furlong, Esq., for helping me formulate the topic of this paper, and for inspiring and encouraging my interest in labor law.

1. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting).

2. In fact, as this Comment was being drafted, a national attack on public employee collective bargaining rights was already well underway. *See, e.g.*,

suffering a serious decline.³ While many factors have contributed to this deterioration, one major factor has been the National Labor Relations Act's ("NLRA's") ban on secondary labor picketing. The ban was first created by amendment to the Wagner Act, the original NLRA.⁴ Specifically, the Taft-Hartley⁵ and Landrum-Griffin Acts⁶ emasculated the NLRA by instituting a number of union unfair labor practices that severely limited the protection afforded union activity under the Wagner Act.⁷ In particular, section 8(b)(4)(ii)(B)⁸ of the NLRA broadly prohibits union secondary boycotts, including secondary picketing.⁹ While members of the United States Supreme Court were initially suspicious of the constitutionality of the broad coverage and vague language of the secondary picketing prohibition,¹⁰ the Court has since reasoned that

David Schaper, *Union Battles: A 'National Campaign' Against Labor?*, NPR (Feb. 27, 2011), <http://www.npr.org/2011/02/27/134064498/union-battles-a-national-campaign-against-labor>.

3. See Ryan Witt, *A History Lesson on Union Power, the Law, and Income Growth Rates in America*, EXAMINER.COM (Mar. 3, 2011, 10:14 AM), <http://www.examiner.com/political-buzz-in-national/a-history-lesson-on-union-power-the-law-and-income-growth-rates> (showing the decline in union density from 1970-2011); see also JOE BURNS, *REVIVING THE STRIKE: HOW WORKING PEOPLE CAN REGAIN POWER AND TRANSFORM AMERICA 11-70* (2011) (describing the rise and decline of the labor movement from the 1930s through today).

4. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

5. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2006)).

6. Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. § 401 et seq. (2006)).

7. See Labor-Management Relations Act, ch. 120, sec. 101, § 8(b) (codified as amended at 29 U.S.C. § 158(b)(3) (2006)); Labor-Management Reporting and Disclosure Act § 704 (codified as amended at 29 U.S.C. § 158(b)(3) (2006)).

8. National Labor Relations Act (NLRA) § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

9. *Id.* § 7, 29 U.S.C. § 157.

10. See *NLRB v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*, 377 U.S. 58, 70-73 (1964) (holding that peaceful secondary pickets confined to dissuading customers from buying a primary employer's products are allowed under the NLRA).

the inherently coercive nature of picketing and the commercial nature of labor speech renders it unprotected by the First Amendment.¹¹

Nonetheless, the Court's First Amendment jurisprudence and the dubious distinction between secondary labor pickets and other types of picketing continue to cast doubt on the constitutionality of section 8(b)(4)(ii)(B).¹² Moreover, in recent years, commentators have suggested new ways of interpreting section 8(b)(4)(ii)(B) so as to avoid First Amendment problems.¹³ Even the National Labor Relations Board ("NLRB") has begun reevaluating the breadth of the secondary boycott prohibition in light of potential First Amendment issues.¹⁴

11. See, e.g., *NLRB v. Retail Store Emps. Union (Safeco)*, 447 U.S. 607, 614-15 (1980) (holding that the NLRA prohibits secondary boycotts of individual products when such boycotts threaten a business with ruin or substantial loss); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (suggesting that non-labor picketing should be subject to less restrictions than labor picketing (citing THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 444-49 (1970))).

12. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (holding that the First Amendment forbids attempts to exclude particular viewpoints that may be disfavored); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (holding that the First Amendment prohibits governmental regulation of disfavored viewpoints); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

13. See Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984) (suggesting new framework for determining whether activity is coercive); Dan Ganin, Note, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539, 1573-83 (2008) (arguing for a new conception of coercion that avoids restricting protected speech); Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1646-54 (2007) (suggesting the use of a new "coercion test" to protect unions' free speech rights).

14. See, e.g., *Sheet Metal Workers Local 15 (Brandon Reg'l Med. Ctr.)*, 365 N.L.R.B. No. 162, at 4 (May 26, 2011) ("If the First Amendment protects conduct or statements as disturbing to many as [picketing a military funeral], surely prohibiting an inflatable rat display, with a handbill referring to a 'rat employer,' would raise serious constitutional concerns."); *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 (Eliason & Knuth of Ariz.,*

This continued uncertainty and debate over which activities section 8(b)(4)(ii)(B) actually prohibits suggests a problem with the statute itself.

This Comment argues that section 8(b)(4)(ii)(B), insofar as it sweeps in peaceful secondary labor picketing, violates the First Amendment's protection against viewpoint discrimination, and should be found unconstitutional in the next appropriate case to reach the Supreme Court. Part I will discuss the historical development of the NLRA's ban on secondary boycotts and its coverage of secondary picketing. Part II will discuss the Supreme Court's reasoning concerning the picketing ban and the First Amendment, as well as the Supreme Court's First Amendment jurisprudence concerning secondary picketing other than labor picketing.¹⁵ Part III will rebut the Court's arguments that labor picketing is inherently coercive and unworthy of the heightened protection owed to political speech.¹⁶ Finally, free from the distinctions the Supreme Court has erected between secondary labor picketing and other types of picketing,¹⁷ Part IV will argue, first, that section 8(b)(4)(ii)(B) constitutes unconstitutional viewpoint discrimination, and second, that section 8(b)(4)(ii)(B) is unconstitutionally vague. The Comment will conclude with

Inc.), 355 N.L.R.B. No. 159, at 14-15 (Aug. 27, 2010) (finding union bannerng at secondary target did not violate section 8(b)(4)(ii)(B) and construing statute in light of Supreme Court's doctrine of interpreting statutes narrowly to avoid constitutional issues).

15. The Supreme Court's treatment of labor and constitutional issues in general, both before and after the passage of the NLRA, has left what one commentator terms "the labor black hole in the Constitution." James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1074 (1987). *But see* Brief for Labor Law Professors as Amici Curiae Supporting Respondents at 19, *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 239 P.3d 651 (Cal. 2010) (No. S185544) (accepting as obvious that the Supreme Court has not given full First Amendment protection to labor speech, but that the rights codified in the NLRA and other statutes require a careful balancing of interests that justifies the curtailing of First Amendment protection).

16. *See, e.g., NLRB v. Retail Store Emps. Union*, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring).

17. *See, e.g., Carey v. Brown*, 447 U.S. 455, 466-67 (1980).

a meditation on a secondary picketing case in which the Court ought to find the statute unconstitutional.

I. DEVELOPMENT OF THE SECONDARY BOYCOTT BAN

Secondary boycotts have been defined as “combination[s] to harm one person by coercing others to harm him.”¹⁸ In the labor context, unions used secondary boycotts to indirectly pressure employers with which they had a labor dispute by targeting the employer’s clients, suppliers, and other business associates.¹⁹ Thus, strikes, pickets, handbilling, and other actions directed at these *secondary* targets were deemed “secondary boycotts.”²⁰ Such activities have long been the subject of legal controversy,²¹ and it is important to understand how the legal status of the secondary boycott has evolved over time. This is especially important since the ban on secondary labor picketing arose in this context.²²

A. From “Criminal Conspiracy” to the Wagner Act

As Richard Bock points out, “[e]ven before 1900, courts routinely held secondary boycotts unlawful as criminal conspiracies.”²³ While the analogy to conspiracy was eroded over time,²⁴ later courts of equity used the broad application

18. DUANE McCracken, STRIKE INJUNCTIONS IN THE NEW SOUTH 13 (1931) (citing L.D. CLARK, THE LAW OF THE EMPLOYMENT OF LABOR 290 (1911)).

19. See Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 908 (2005).

20. See *id.*

21. See *id.* at 908-18.

22. See *id.*

23. *Id.* at 908 (citing DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 70-72 (1995); RALPH M. DERESHINSKY ET AL., THE NLRB AND SECONDARY BOYCOTTS 1 (rev. ed. 1981)).

24. See, e.g., *Commonwealth v. Hunt*, 45 Mass. 111, 129-30 (1842) (holding that labor organizations are not generally subject to the law of criminal conspiracy).

of antitrust law to enjoin union secondary boycott activity.²⁵ The Sherman Antitrust Act²⁶ was interpreted to apply broadly to union activities, and the earliest injunctions under the Sherman Act involved secondary activity.²⁷ The most renowned example of this appears in the Supreme Court's decision in *Loewe v. Lawlor*,²⁸ where the Court applied section 7 of the Sherman Act to a union's nationwide boycott of a hat manufacturer in an attempt to organize the manufacturer's employees.²⁹ The union's organizing effort included secondary boycotts of wholesalers and shops that handled the manufacturer's products, which, the Court held, violated the Act.³⁰

Congress attempted to reverse the *Loewe* decision by passing the Clayton Act,³¹ but the Supreme Court soon held that the Act did not protect secondary boycotts, holding instead that the Clayton Act gave employers a private right of action to seek injunctive relief and treble damages for unions' secondary boycott activity.³² Not until 1932, after years of labor unrest and lobbying, did Congress provide meaningful statutory protection for union activity.³³

The Norris-LaGuardia Act broadly protected union activity—including secondary boycotts—from injunctive

25. See Bock, *supra* note 19, at 908 (citing DERESHINSKY ET AL., *supra* note 23, at 1).

26. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).

27. See *id.*

28. 208 U.S. 274 (1908).

29. *Lowe*, 208 U.S. at 304-05; see also Bock, *supra* note 19, at 909.

30. See *Lowe*, 208 U.S. at 304-05, 309.

31. Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27 (2006)). The Clayton Act was explicit in providing that, "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." *Id.* § 6 (codified at 15 U.S.C. § 17 (2006)).

32. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 54-55 (1927); see also Bock, *supra* note 19, at 910.

33. See Bock, *supra* note 19, at 910.

relief.³⁴ Shortly after enacting Norris-LaGuardia, Congress passed the National Industrial Recovery Act of 1933 (“NIRA”), featuring the first statutory protections of the right to organize and bargain collectively, as part of the New Deal.³⁵ While NIRA was not able to survive constitutional challenge,³⁶ the Wagner Act, the original NLRA, was passed in 1935.³⁷ The Wagner Act established and protected employees’ organizational and collective bargaining rights,³⁸ prohibited a number of employer “unfair labor practices,”³⁹ and contained procedures for establishing a union’s status as a representative of employees.⁴⁰ The Act became the first New Deal legislation to survive a constitutional challenge.⁴¹

Already bolstered by the Norris-LaGuardia and Wagner Acts, labor rights seemed to reach their pinnacle when the Supreme Court definitively denied the applicability of the antitrust laws to organized labor activity.⁴² While unions still faced the possibility of violating state antitrust laws,⁴³

34. Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (2006)); *see also* Bock, *supra* note 19, at 910.

35. *See* National Industrial Recovery Act of 1933, Pub. L. No 73-67, 48 Stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

36. *See A.L.A. Schechter Poultry Corp.*, 295 U.S. at 550 (holding NIRA unconstitutional).

37. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

38. *Id.* § 7 (codified as amended at 29 U.S.C. § 157).

39. *Id.* § 8(1) (codified as amended at 29 U.S.C. § 158(a)).

40. *Id.* § 9 (codified as amended at 29 U.S.C. § 159).

41. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

42. *See* United States v. Hutcheson, 312 U.S. 219, 231, 236 (1941) (holding the Sherman Act inapplicable to boycott of company products due to the safeguards provided by the Norris-LaGuardia and Clayton Acts); Apex Hosiery Co. v. Leader, 310 U.S. 469, 503, 512-13 (1940) (holding the Sherman Act inapplicable to a sit down strike because the strike was not intended to restrain trade within the meaning of the Act).

43. *See, e.g.,* Carpenters & Joiners Union of Am. v. Ritter’s Café, 315 U.S. 722, 727-28 (1942) (holding that picketing a neutral restaurant can be enjoined by state antitrust law consistent with the Fourteenth Amendment’s Due Process Clause).

they remained relatively free to engage in secondary boycotts and other secondary activities.⁴⁴ But soon this would change.

B. *Taft-Hartley, Landrum-Griffin, and the NLRA's Secondary Boycott Ban*

In 1947, facilitated by the Republican takeover of both the House of Representatives and the Senate,⁴⁵ Congress passed the Labor-Management Relations Act,⁴⁶ informally dubbed the Taft-Hartley Act, after the Act's sponsors, Senators Robert Taft (R-OH) and Fred Hartley, Jr. (R-NJ).⁴⁷ John L. Lewis, President of the United Mine Workers of America, called the Act "the first ugly, savage thrust of Fascism in America," while others dubbed it a "slave-labor law."⁴⁸ President Truman attempted to prevent the enactment of Taft-Hartley, but his veto was overridden.⁴⁹ The President warned Congress that Taft-Hartley held "seeds of discord which would plague [the] nation for years to come" and would "reverse the basic direction of [the United States'] national labor policy."⁵⁰ He was not mistaken.

Intended to be part of "conservative America's own 'new deal,'"⁵¹ the Taft-Hartley amendments to the NLRA sought,

44. See HAROLD W. METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT 40-57 (1945) (discussing unions' rights to strike, picket, and boycott after passage of the Norris-LaGuardia Act).

45. See PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 495-99 (2010) (discussing the political atmosphere surrounding the passage of the Taft-Hartley Act).

46. Labor-Management Relations (Taft-Hartley) Act, Pub. L. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2006)).

47. DRAY, *supra* note 45, at 496 (indicating the act would become known as the Taft-Hartley Act).

48. *Id.* at 498.

49. *Id.* at 498-99.

50. *Id.* (quoting ROBERT D. PARMET, THE MASTER OF SEVENTH AVENUE: DAVID DUBINSKY AND THE AMERICAN LABOR MOVEMENT 217 (2005); IRVING RICHTER, LABOR'S STRUGGLES: 1945-1950, at vii (1994)).

51. *Id.* at 496.

among other things, a return to the common law prohibition of secondary boycotts.⁵² Taft-Hartley's secondary boycott provisions included the availability of injunctive relief and required the regional offices of the NLRB to pursue such relief upon evidence of a violation.⁵³ While definitively reversing or curbing many of the advances organized labor had won through the passage of the Norris-LaGuardia and Wagner Acts, the Taft-Hartley amendments contained a number of loopholes that allowed unions to avoid some of the new legal consequences of engaging in secondary boycotts.⁵⁴

The Taft-Hartley loopholes only served as temporary shelter from the increasing intensity of anti-union legislation.⁵⁵ In 1959, Congress set out to close these loopholes with the passage of the Landrum-Griffin Act.⁵⁶ The Landrum-Griffin amendments tightened and broadened the NLRA's restrictions on secondary boycotts,⁵⁷ leaving us with the statute we have today.⁵⁸

52. Bock, *supra* note 19, at 913.

53. National Labor Relations Act (NLRA) § 10(l), 29 U.S.C. § 160(l) (2006); *see also* Bock, *supra* note 19, at 913.

54. There were four major loopholes, as defined by Richard Bock: (1) the definitions of "employee" and "employer" excluded certain groups from the Act's coverage and thus exempting them from coverage of the secondary boycott ban; (2) the Act left open the possibility of unions appealing to single employees or working on a one-by-one basis to achieve secondary boycotts; (3) the Act did not explicitly prohibit direct action against neutral employers; and (4) the Act did not explicitly forbid unions and neutral employers to enter into voluntary "hot cargo" agreements. Bock, *supra* note 19, at 913-14.

55. *Id.* at 914.

56. Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. § 401 et seq. (2006)). The LMRDA is colloquially known as the Landrum-Griffin Act, after its sponsors, Phillip Landrum (D-GA) and Robert Griffin (R-MI). *See* DRAY, *supra* note 45, at 545-46.

57. Labor-Management Reporting and Disclosure Act § 704 (codified as amended at 29 U.S.C. § 158).

58. *See* Bock, *supra* note 19, at 914-15. One commentator has dubbed the NLRA, as it exists after the Taft-Hartley and Landrum-Griffin amendments, "a statute at war with itself." Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 153.

While commentators have noted the byzantine language of section 8(b)(4)(B),⁵⁹ the basic purpose of the statute is to shield a neutral party “from pressure imposed due to controversies not its own.”⁶⁰ Section 8(b)(4)(i) forbids engaging in strikes and work stoppages and inducing others to do the same.⁶¹ Section 8(b)(4)(ii) forbids threats, coercion, and restraining others.⁶² Both sections apply to actions that have an object described in section 8(b)(4)(B).⁶³ Despite the long list of prohibited objects, section 8(b)(4)(B)’s focus is on union activity that forces the neutral secondary target to “cease doing business” with the primary employer.⁶⁴ Thus, any secondary activity falling under section 8(b)(4)(i)(B) or section 8(b)(4)(ii)(B) is not protected by the NLRA if the object of the activity is to get the secondary target to “cease doing business” with the primary disputant.⁶⁵ Of particular

59. See Bock, *supra* note 19, at 917. Section 8(b)(4)(B) makes it an unfair labor practice for a labor organization or its agents:

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

.....

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in products of any other producer, processor, manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

National Labor Relations Act (NLRA) § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (2006).

60. Bock, *supra* note 19, at 917.

61. National Labor Relations Act § 8(b)(4)(i), 29 U.S.C. § 158(b)(4)(i); Bock, *supra* note 19, at 917.

62. National Labor Relations Act § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii); Bock, *supra* note 19, at 917.

63. Bock, *supra* note 19, at 917.

64. *Id.*

65. National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B).

interest is the resulting ban on secondary labor picketing provided by section 8(b)(4)(ii)(B).

C. *Section 8(b)(4)(ii)(B) and Secondary Picketing*

The language of section 8(b)(4)(ii)(B) sweeps a number of activities under its umbrella, including secondary labor picketing. The operative language of the statute makes it an unfair labor practice “to threaten, coerce, or restrain any person” with the object of compelling that person “to cease doing business with any other person.”⁶⁶ Secondary labor picketing, which traditionally involves several union members holding signs and marching in front of a secondary target, falls under this section because a common object of such picketing is to get the secondary business to stop doing business with the union’s primary target.⁶⁷ This pressure has traditionally been viewed as “coercive.”⁶⁸

While the Supreme Court’s interpretation of section 8(b)(4)(ii)(B) has vacillated,⁶⁹ the legislative history of the Landrum-Griffin Act supports a plain reading of the statute, making clear that the statute was intended to broadly prohibit secondary activity, with the exception of “publicity . . . for the purpose of truthfully advising the public.”⁷⁰ For instance, then Senator John F. Kennedy,

66. *Id.* § 8(b)(4)(ii)(B).

67. *See* NLRB v. Fruit & Vegetable Packers & Warehousemen (*Tree Fruits*), 377 U.S. 58, 77 (1964) (“Picketing, in common parlance and in § 8(b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else’s premises; (2) speech, that is arguments, usually on a placard, made to persuade other people to take the picketers’ side of a controversy.”).

68. Ganin, *supra* note 13, at 1543 (“The common law view of illegality rested upon the presumption that secondary pressure was inherently and categorically coercive.” (citing JOHN W. WHITEHEAD, *THE RIGHT TO PICKET AND THE FREEDOM OF PUBLIC DISCOURSE* 70-71 (1984))).

69. *See infra* Part II.

70. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (“*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer

reporting on the compromise reached in the final Landrum-Griffin bill, stated:

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

...

Under the language of the conference, [ultimately resulting in present section 8(b)(4)(ii)(B)] we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.⁷¹

Senator Kennedy stated further:

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. *We were not able to persuade the House conferees to permit picketing in front of that secondary shop*, but we were able to persuade them to agree that the union shall be free to conduct informational activity *short of picketing*. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.⁷²

Senator Kennedy's remarks clearly demonstrate the legislature's intention to broadly prohibit secondary picketing as an unfair labor practice under section 8(b)(4)(ii)(B).⁷³ While one might argue that such a broad restriction helps to reduce industrial labor strife,⁷⁴ it also

with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.").

71. 105 CONG. REC. 17,720 (1959).

72. 105 CONG. REC. 17,898-99 (1959) (emphasis added).

73. *See id.*

74. *See, e.g.,* NLRB v. Retail Store Emps. Union (*Safeco*), 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring) ("I am reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression

raises First Amendment concerns about content-based viewpoint limitations on the free speech of unions and their members.⁷⁵

II. THE SUPREME COURT'S FIRST AMENDMENT DOUBLE STANDARD

The broad ban placed on secondary labor picketing has plagued the Supreme Court since the inception of the Taft-Hartley and Landrum-Griffin amendments, requiring the Court to develop various theories to avoid an interpretation of section 8(b)(4)(ii)(B) that would violate the protections of the First Amendment.⁷⁶ While the Court has continued to distance itself from the constitutional issues surrounding section 8(b)(4)(ii)(B)'s ban on secondary picketing, it has developed a body of First Amendment jurisprudence that suggests that section 8(b)(4)(ii)(B) both creates an impermissible viewpoint restriction on free speech and is unconstitutionally vague.⁷⁷ A successful argument based on either of these grounds would require the invalidation of section 8(b)(4)(ii)(B).

The Supreme Court, however, has identified distinctions between secondary labor picketing and political speech that serve as barriers to raising the constitutional issue.⁷⁸ Thus, before arguing that the NLRA's ban on secondary picketing is unconstitutional, it will be necessary to review some of the Supreme Court's decisions concerning the constitutionality of section 8(b)(4)(ii)(B), as well as some

and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”)

75. See, e.g., *NLRB v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*, 377 U.S. 58, 76-80 (1964) (Black, J., concurring).

76. See Ganin, *supra* note 13, at 1540-51.

77. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 957-60 (2010) (viewpoint discrimination); *United States v. Lanier*, 520 U.S. 259, 265-67 (1997) (vagueness); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801-04 (1984) (viewpoint discrimination); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784-86 (1978) (viewpoint discrimination); *Baggett v. Bullitt*, 377 U.S. 360, 366-72, 379 (1964) (vagueness).

78. See *infra* Part II.A-B.

of the Court's decisions concerning the First Amendment protection of non-labor picketing.

A. *Secondary Picketing and the First Amendment*

Since the passage of the Landrum-Griffin amendments, the Supreme Court has rarely dealt substantively with the constitutionality of section 8(b)(4)(ii)(B) as it applies to secondary labor picketing.⁷⁹ The Court has never found the statute unconstitutional, but an overview of some of the cases highlights the tension between First Amendment protection and the ban on secondary picketing.

The Supreme Court first addressed the secondary picketing ban in *NLRB v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*.⁸⁰ In *Tree Fruits*, a union struck companies that sold apples produced in the state of Washington to Safeway supermarkets.⁸¹ In furtherance of the strike, the union initiated secondary pickets outside several Safeway stores in an effort to persuade customers not to purchase the apples.⁸² While the union members marched in front of customer entrances, they did not impede deliveries or prevent customers from entering the stores.⁸³ The Court's task was to decide whether the union's picketing was coercive under section 8(b)(4)(ii)(B).⁸⁴

While the Court was concerned that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment,"⁸⁵ the Court ultimately found that the legislative history and language of the statute did not provide sufficient evidence of Congress's intent to prohibit all secondary picketing.⁸⁶ In his majority opinion, Justice Brennan drew a distinction between picketing aimed at one

79. See e.g., *Tree Fruits*, 377 U.S. at 65-68; *Safeco*, 447 U.S. at 611-12.

80. See *Tree Fruits*, 377 U.S. at 63-67.

81. *Id.* at 59-60.

82. *Id.* at 60.

83. *Id.* at 61.

84. See *id.* at 59.

85. *Id.* at 63.

86. *Id.* at 63-69, 71-73.

struck product and picketing aimed at a secondary target's entire business.⁸⁷ Justice Brennan found that secondary picketing aimed at only one struck product was not coercive, reasoning that coercion is not a function of economic loss but of whether the picketing in question "creates a separate dispute with the secondary employer."⁸⁸ Since the union was picketing against the one struck product, the picket was less like secondary activity than primary activity.⁸⁹

While the Court's holding was favorable to the union, it ultimately raised the constitutionality of section 8(b)(4)(ii)(B) only to avoid the issue.⁹⁰ Having found the union's picketing non-coercive under the statute, it found no need to address the First Amendment issue.⁹¹ Moreover, a reading of Justice Harlan's dissent suggests that the Court was playing fast and loose in its reliance on legislative history.⁹² As Justice Harlan indicated, the legislative history is riddled with statements from senators, both for and against the Landrum-Griffin Act, that clearly evidence the legislature's intent to prohibit *all secondary picketing*.⁹³

Further, Justice Black, agreeing with Justice Harlan's portrayal of the broad secondary picketing ban, found section 8(b)(4)(ii)(B) unconstitutional on First Amendment grounds.⁹⁴ Black, in his concurrence, found that the statute was an impermissible viewpoint restriction that only banned picketing "when picketers express particular views," noting that:

[W]hen conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press [I]t is difficult to see that the section in question intends to do anything

87. *Id.* at 63.

88. *Id.* at 72.

89. *See id.*

90. *See Ganin, supra* note 13, at 1549.

91. *See Tree Fruits*, 377 U.S. at 63-73; *see also Ganin, supra* note 13, at 1549.

92. *See Tree Fruits*, 377 U.S. at 84-92 (Harlan, J., dissenting).

93. *See id.*

94. *See id.* at 76-80 (Black, J., concurring).

but prevent dissemination of information about the facts of a labor dispute – a right protected by the First Amendment.⁹⁵

More than ten years later, the Court addressed Justice Black's First Amendment concerns in *NLRB v. Retail Store Employees Union (Safeco)*.⁹⁶ In *Safeco*, a union had a primary dispute against an insurance underwriter.⁹⁷ The union subsequently picketed title companies that derived over ninety percent of their profits from the underwriter's policies.⁹⁸ Even though, as in *Tree Fruits*, the union only picketed one product,⁹⁹ the Court found the union's picketing coercive in violation of section 8(b)(4)(ii)(B).¹⁰⁰

For the Court, the distinguishing feature of the picketing in *Safeco* was that it threatened the secondary target with "ruin or substantial loss,"¹⁰¹ i.e., the picketing was *effective*. On finding the picketing violated the Act, the Court held that the NLRA's ban on secondary picketing did not violate the First Amendment.¹⁰² Despite the plurality's quick dismissal of the free speech issue, Justice Blackmun and Justice Stevens each had more "substantial rationales" for defending the constitutionality of section 8(b)(4)(ii)(B).¹⁰³

Blackmun thought the plurality should have considered whether the ban on secondary picketing was constitutional,¹⁰⁴ but concluded that the ban was tolerable since Congress was "striking [a] delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."¹⁰⁵ While

95. *Id.* at 77-78.

96. 447 U.S. 607 (1980).

97. *Id.* at 610.

98. *Id.* at 609.

99. *Tree Fruits*, 377 U.S. at 70.

100. *Safeco*, 447 U.S. at 614-15.

101. *Id.* at 614.

102. *Id.* at 616.

103. Ganin, *supra* note 13, at 1550.

104. *Safeco*, 447 U.S. at 616-17 (Blackmun, J., concurring).

105. *Id.* at 617-18.

expressing reservations, Justice Blackmun's concurrence ultimately supported the idea that secondary labor picketing was in itself coercive.¹⁰⁶ Justice Stevens, however, went further than Blackmun's balancing rationale, advancing a substantive "speech-plus" argument to distinguish labor picketing from other speech that received greater protection under the First Amendment.¹⁰⁷

Stevens invoked a speech/conduct dichotomy introduced by the Court in *Cox v. Louisiana*.¹⁰⁸ The dichotomy rejected the notion that the First Amendment provided "the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing" as it gives "those who communicate ideas by pure speech."¹⁰⁹ In Stevens' opinion, "the conduct element[,] rather than the particular idea being expressed[,] is usually "the most persuasive deterrent" in the labor context.¹¹⁰ Thus, under Stevens' reasoning, the NLRA's ban on secondary picketing is permissible because it only affects "that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea."¹¹¹ As Dan Ganin explains, under this "speech-plus doctrine . . . labor protests lose their First Amendment protection when they persuade by force of conduct rather than cogency of ideas."¹¹² The upshot of all this, however, is that—under Stevens' formulation—labor picketing falls outside First Amendment protections, because it triggers "a reflexive response."¹¹³ The result is that labor picketing is regarded as inherently coercive, a position that harkens back to the old common law view of

106. *See id.*

107. *See id.* at 618-19 (Stevens, J., concurring) (noting that picketing is a mixture of both speech and conduct).

108. 379 U.S. 536, 555 (1965).

109. *Id.*; Ganin, *supra* note 13, at 1551.

110. *Safeco*, 447 U.S. at 619 (Stevens, J., concurring).

111. *Id.*

112. Ganin, *supra* note 13, at 1551.

113. *Id.*; *see Safeco*, 447 U.S. at 619 (Stevens, J., concurring).

labor unions as criminal conspiracies.¹¹⁴ Unfortunately, Justice Stevens' concurrence provided an "enduring justification[] for constitutionally barring labor picketing."¹¹⁵

B. *Non-Labor Picketing and the First Amendment*

Outside the labor arena, the Supreme Court is extremely protective of picketing activity.¹¹⁶ In fact, in a trilogy of First Amendment picketing cases, the Supreme Court goes so far as to erect a wall separating labor picketing from certain types of "public issue" picketing—justifying the ban on secondary labor picketing, while effectively immunizing other types of picketing from content-based restrictions.¹¹⁷ While this may not be surprising—given the Court's imprimatur of section 8(b)(4)(ii)(B)'s constitutionality—at one point it seemed possible that the Supreme Court might invalidate the NLRA's secondary picketing ban based on its First Amendment jurisprudence.¹¹⁸

In *Police Department of Chicago v. Mosley*, the Court invalidated a non-picketing ordinance for drawing "an impermissible distinction between labor picketing and other

114. See *supra* Part I.A.

115. Ganin, *supra* note 13, at 1551 (citing *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1210 (9th Cir. 2005)). One irony of Justice Stevens' speech-plus doctrine is that it rests on the same assumption as Justice Black's concurrence in *NLRB v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*, 377 U.S. 58, 77-78 (1964). While Justice Stevens sees in the combination of conduct and speech a justification for banning secondary picketing, Justice Black sees the potential for unconstitutional restriction of free speech. For further discussion, see *infra* Part III.A.

116. See e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (upholding citizen boycott of businesses through peaceful picketing as protected speech and not conduct eligible to receive compensatory damages); *Carey v. Brown*, 447 U.S. 455 (1980) (finding a statute prohibiting picketing of residences and dwellings unconstitutional); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972) (finding a city ordinance restricting picketing around schools unconstitutional).

117. See *Claiborne Hardware*, 458 U.S. at 932-34; *Carey*, 447 U.S. at 470-71; *Mosley*, 408 U.S. at 99-102.

118. See *Mosley*, 408 U.S. at 95-98.

peaceful picketing.”¹¹⁹ In *Mosley*, the ordinance in question banned all picketing except for labor picketing outside of public schools.¹²⁰ Interestingly, the Court drew on two concurrences by Justice Black in support of its holding¹²¹—one from *Cox v. Louisiana*,¹²² and the other from *Tree Fruits*.¹²³ The Court noted that “time, place, and manner” restrictions were sometimes necessary for certain types of picketing, but even then those restrictions must be “carefully scrutinized” and “tailored to serve a substantial government interest.”¹²⁴ When it came to content-based restrictions on picketing, however, the Court found that such restriction “*is never permitted*.”¹²⁵ Thus, for the *Mosley* Court, picketing could not be restricted based on its content without violating the First Amendment.¹²⁶

Though *Mosley*, with its reliance on Justice Black’s *Tree Fruit* concurrence, might have signaled the beginning of the end for the NLRB’s secondary boycott ban, the Court would soon begin to distinguish labor picketing from other types of picketing.¹²⁷ In *Carey v. Brown*, while striking down an Illinois statute similar to the one in *Mosley*, the Supreme Court intimated that public issue picketing is more deserving of protection than labor picketing.¹²⁸ Noting that public issue picketing is “an exercise of . . . basic constitutional rights in their most pristine and classic form”¹²⁹ and that such picketing “has always rested on the highest rung of the hierarchy of First Amendment values,”

119. *Id.* at 94.

120. *Id.* at 92-93.

121. *Id.* at 97-98.

122. 379 U.S. 536, 581 (1965).

123. 377 U.S. 58, 76 (1964).

124. *Mosley*, 408 U.S. at 98-99.

125. *Id.* at 99 (emphasis added).

126. *See id.*

127. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912-13 (1982); *Carey v. Brown*, 447 U.S. 455, 466-68 (1980).

128. *See Carey*, 447 U.S. at 466-67.

129. *Id.* at 466 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (internal quotation marks omitted).

the Court dismissed Illinois' argument that labor picketing deserved special protection.¹³⁰ While not going so far as to conclusively distinguish between the two types of picketing, the Court cited to an academic text "suggesting that nonlabor picketing is more akin to pure expression than labor picketing and thus should be subject to fewer restrictions."¹³¹

While *Carey* only insinuated the constitutional inferiority of labor picketing to public issue picketing, the Court soon affirmed this distinction.¹³² In *NAACP v. Claiborne Hardware Co.*, the Supreme Court found that the First Amendment protected a civil rights boycott of white merchants.¹³³ While the Court held that certain violent acts committed by some individuals were not protected activity, it also held that threats of social ostracism and other kinds of non-violent coercive pressure were constitutionally protected.¹³⁴ Referring to the conduct in question, the Court stated that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."¹³⁵

The *Claiborne Hardware* Court, unlike the *Mosley* or *Carey* Court, was quick to clarify that in some instances restrictions on picketing may be necessary, despite their "incidental" effect on First Amendment freedoms.¹³⁶ As an example, the Court cited Justice Blackmun's reasoning in *Safeco* that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of Congress' striking the delicate balance between union freedom of expression and

130. *Id.* at 466-67.

131. *Id.* at 466 (citing EMERSON, *supra* note 11, at 444-49).

132. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982).

133. *Id.* at 909-11.

134. *Id.*

135. *Id.* at 910. This is incredibly ironic given both the language of section 8(b)(4)(ii)(B), and Justice Stevens' speech-plus doctrine, which suggests that labor picketing is inherently coercive.

136. *Id.* at 912 ("Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances.").

the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”¹³⁷ The Court went further by dubbing “public issue” picketing “essential political speech lying at the core of the First Amendment,” while identifying labor picketing as speech representative of “parochial economic interests.”¹³⁸ Ultimately, the *Claiborne Hardware* Court “indicated that labor picketing should be regarded as a form of commercial speech meriting less constitutional protection than political speech.”¹³⁹

Under the Supreme Court’s analysis, two features distinguish labor picketing and public issue picketing. First, labor picketing is viewed as inherently coercive as a result of its conduct element, which tends to elicit a reflexive response.¹⁴⁰ Second, labor picketing is viewed as a form of commercial speech,¹⁴¹ which is afforded less protection than political speech.¹⁴² Without these supposedly distinctive features, secondary labor picketing and public issue picketing would be constitutionally indistinguishable, and equally protected by the First Amendment.

III. THE FALSE DICHOTOMY OF LABOR PICKETING AND “PUBLIC ISSUE” PICKETING

After elucidating the Supreme Court’s double standard for labor picketing and “public issue” picketing, the arguments for First Amendment protection of labor

137. *Id.* (citing *NLRB v. Retail Store Emps. Union (Safeco)*, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring)) (internal quotation marks omitted).

138. *Id.* at 915 (quoting *Henry v. First Nat’l Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)) (internal quotation marks omitted).

139. Ganin, *supra* note 13, at 1554 (citing *Claiborne Hardware*, 458 U.S. at 912-13); see also Brian K. Beard, Comment, *Secondary Boycotts After DeBartolo: Has the Supreme Court Handed Unions a Powerful New Weapon?*, 75 IOWA L. REV. 217, 232 (1989).

140. See *supra* text accompanying notes 112-15.

141. Commercial speech has been defined as speech “related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

142. See *supra* text accompanying notes 137-39.

picketing almost make themselves. Before making any arguments concerning the constitutionality of section 8(b)(4)(ii)(B), however, it will be important to test the veracity of the distinctions that supposedly render secondary labor picketing a less protected form of speech than “public issue” or political picketing.

A. *Is Labor Picketing Really Inherently Coercive?*

Justice John Paul Stevens’ speech-plus doctrine seeks to justify the ban on secondary labor picketing by arguing that the conduct element of such picketing makes it inherently coercive.¹⁴³ But is this really the case? Justice Hugo Black’s concurrence in *Tree Fruits* raises some doubts.¹⁴⁴ Justice Black was well aware of the conduct element of secondary labor picketing, and yet he held a view that was in complete opposition to Stevens’ view.¹⁴⁵ In fact, Black thought that the mixture of conduct and speech was precisely the reason why secondary labor picketing should not be subject to broad prohibition.¹⁴⁶ Because a total ban on secondary labor picketing would include picketing that was not coercive, Black thought that “regulation of . . . non-protected conduct may at the same time encroach on freedom of speech.”¹⁴⁷ Of course, if picketing is somehow inherently coercive, then Justice Black’s concerns are inapposite. However, there are several problems with the speech-plus doctrine and the conclusion that picketing is inherently coercive.

First, in an era of multinational conglomerates and powerful corporate interests, it seems unlikely that most forms of picketing will actually result in coercion. True coercion—where picketing leaves the picketed employer

143. *NLRB v. Retail Store Emps. Union (Safeco)*, 447 U.S. 607, 619 (Stevens, J., concurring).

144. *NLRB v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*, 377 U.S. 58, 76-80 (Black, J., concurring).

145. Compare *Tree Fruits*, 377 U.S. at 76-80 (Black, J., concurring), with *Safeco*, 447 U.S. at 619 (Stevens, J., concurring).

146. *Tree Fruits*, 377 U.S. at 77-78 (Black, J., concurring).

147. *Id.* at 77.

with no choice but to comply with a union's demands¹⁴⁸—seems less likely to occur in a world where most businesses can afford to either tolerate the picketing or to suspend their business relationship with the primary employer with whom the union has a labor dispute. While Justice Holmes certainly made an important point when he wrote, “a page of history is worth a volume of logic,”¹⁴⁹ history does not stand still. Thus, the historical assumption of the inherently coercive nature of labor picketing does not make much sense in an era where social, political, and economic forces make it unlikely that picketing will result in coercion. Moreover, the basis for the historical assumption that labor picketing is inherently coercive has been called into serious doubt by legal scholars for some time now.¹⁵⁰

Second, because American labor law as a whole is most often interpreted by the courts as *limiting* the rights of *employees*,¹⁵¹ there is something disconcerting about labeling effective picketing—namely, picketing that actually is effective against an employer—as “coercive.” Given the incredible power the law gives to employers, labeling a form

148. See, e.g., ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 14 (2001) (“When we speak about most forms of labor compulsion, we are talking about situations in which the compelled party is offered a choice between disagreeable alternatives and chooses the lesser evil.”).

149. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

150. See Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 BUFF. L. REV. 1, 81-83 (1988) (detailing how the Supreme Court altered the conceptual boundaries of employers' property rights to include access to labor); *id.* at 96-98 (exploring how Chief Justice Taft's social assumptions influenced his view that “peaceful picketing is a contradiction in terms” (quoting *Truax v. Corrigan*, 257 U.S. 312, 340 (1921))); see also WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 85 (1989) (explaining how equity judges expanded the contours of property rights, which had been primarily limited to tangible objects, to include anything that had “pecuniary” or “exchangeable value”—“including a man's business or labor”).

151. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19-28 (1983) (arguing that the underlying assumptions and values of labor law are weighted towards protecting the interests of management while limiting employees' rights).

of collective action “coercive” because it actually works appears to be a decision driven by ideology¹⁵²—not justice.¹⁵³

Third, even if one grants that “coercive” is an accurate description of certain kinds of effective picketing, instead of finding that secondary labor picketing violates the NLRA’s secondary boycott ban because it is coercive, what actually seems to be happening is that courts and the NLRB are finding that picketing is coercive *because it is picketing!* Thus, the Board will often look to see whether secondary labor activity looks more or less like picketing when determining whether a union violated section 8(4)(ii)(B).¹⁵⁴ Because the speech-plus doctrine assumes that the combination of speech and conduct always (or even mostly) results in coercive activity, the courts and the NLRB tend to view picketing as inherently coercive.¹⁵⁵ This assumption begs the question and is not born out in fact.¹⁵⁶

Fourth, if labor picketing is inherently coercive because of its combination of conduct and speech, then why should primary labor picketing be legal?¹⁵⁷ In fact, if picketing always contains a conduct element, then why should any picketing—labor or otherwise—be free of regulation?¹⁵⁸ Since picketing by definition includes more than pure speech—i.e., people marching around while holding signs—

152. *See id.*; *see also* BURNS, *supra* note 3, at 115-36 (describing how American labor law works as a system of labor control).

153. *See* MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 636 (10th ed. 1993) (“[T]he quality of being just, impartial, or fair.”).

154. *See, e.g.*, United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 (Eliason & Knuth of Ariz., Inc.), 355 N.L.R.B. No. 159, at 5-6 (Aug. 27, 2010) (holding, in part, that union members’ use of a large stationary banner was not picketing and thus was not a violation of section 8(b)(4)(ii)(B)).

155. *See supra* Part II.

156. *See* Rakoczy, *supra* note 13, at 1644 (noting the lack of evidence of the inherent disruptiveness of certain union picketing tactics).

157. *See* National Labor Relations Act (NLRA) § 8(b)(4)(i)(B), 29 U.S.C. §158(b)(4)(i)(B) (2006) (“[N]othing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing.”).

158. *See* Ganin, *supra* note 13, at 1566 (“[I]f all picketing is inherently coercive, then all picketing should be subject to regulation on the same terms as labor picketing.”).

all picketing should be subject to regulation similar to that of section 8(b)(4)(ii)(B), at least under Justice Stevens' speech-plus doctrine. However, the Court has clearly rejected such unbridled regulation in its "public issue" picketing decisions.¹⁵⁹ Moreover, the acknowledgement that labor picketing and "public issue" picketing both contain a conduct element that is "more than" speech demonstrates that the conduct element of secondary labor picketing does not distinguish such picketing from other forms of picketing.¹⁶⁰

Fifth, even assuming that picketing *is* inherently coercive, that does not necessarily justify subjecting secondary labor picketing to broad prohibition. In fact, the Court has already stated as much with respect to "public issue" picketing.¹⁶¹ In *Claiborne Hardware*, the Court noted that "[s]peech does not lose its protected character . . . simply because it may embarrass others or *coerce* them into action."¹⁶² Ironically, the Court partly relied on *Thornhill v. Alabama*,¹⁶³ an early secondary labor picketing case, in which the picketers' object was to "induce" customers not to patronize a certain employer.¹⁶⁴ In light of these holdings, it is questionable that "coerciveness" offers a substantial justification for regulating unions' free speech rights.¹⁶⁵

159. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972).

160. Ganin, *supra* note 13, at 1566.

161. See *Claiborne Hardware*, 458 U.S. 886, 908-12 (1982).

162. *Id.* at 910 (emphasis added).

163. 310 U.S. 88 (1940).

164. *Claiborne Hardware*, 458 U.S. at 909 ("[P]eaceful picketing was entitled to constitutional protection, even though . . . the purpose of the picketing 'was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer.'" (quoting *Thornhill*, 310 U.S. at 99)).

165. At least two commentators have argued that the Court's unique treatment of labor picketing as coercive activity stems from the Court's implicit political alignment with business interests and property rights over and above labor interests. See Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 959-60

The above deconstruction of the speech-plus doctrine demonstrates its failure to articulate a legitimate distinction between secondary labor picketing and other types of picketing. Because it does not articulate a feature of labor picketing sufficiently distinct to separate it from other types of picketing,¹⁶⁶ Justice Stevens' theory does not serve as a bar to a First Amendment challenge to section 8(b)(4)(ii)(B).

B. *Is Labor Picketing More Like Commercial Speech than "Public Issue" Picketing?*

In *Carey*¹⁶⁷ and *Claiborne Hardware*,¹⁶⁸ the Supreme Court indicated that labor picketing does not deserve the same level of constitutional protection as "public issue" picketing. The "labor-speech-as-commercial-speech argument"¹⁶⁹ is founded on the premise that there is a hierarchy of First Amendment values, "with political or public-issue speech at its apex and commercial or economic speech occupying a subordinate echelon."¹⁷⁰ The *Claiborne Hardware* Court explained that "[a] nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions."¹⁷¹ Accordingly, the Court held that "[w]hile States have broad power to regulate economic activity, [there is no] comparable right to prohibit peaceful political activity"¹⁷² Thus, the "labor-speech-as-commercial-speech" view highlights the economic nature of

(1982); Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1495-97 (1982).

166. See Ganin, *supra* note 13, at 1567 ("Ultimately, since the inducement of automatic responses is not an idiosyncratic attribute of labor picketing, the speech-plus argument fails to account for the disparate treatment of labor and nonlabor speech.").

167. 447 U.S. 455, 467 (1980).

168. 458 U.S. at 912.

169. Ganin, *supra* note 13, at 1569.

170. *Id.* (citing *Carey*, 447 U.S. at 466-67; *Claiborne Hardware*, 458 U.S. at 913).

171. *Claiborne Hardware*, 458 U.S. at 912.

172. *Id.* at 913.

labor relations, and assumes that all labor speech, picketing, and secondary activity is primarily economic in nature, not political. Aside from the irony that the boycott in *Claiborne Hardware* caused almost one million dollars worth of lost business earnings over a seven-year period,¹⁷³ there are at least two problems with equating secondary labor picketing with commercial speech.¹⁷⁴

First, the Supreme Court has softened its stance on secondary boycott speech that does not involve picketing.¹⁷⁵ In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council (DeBartolo II)*, the Court held that section 8(b)(4)(ii)(B) does not prohibit peaceful handbilling¹⁷⁶ that advocates a secondary boycott unaccompanied by picketing.¹⁷⁷ The case involved a construction union's peaceful handbilling urging the public to refrain from patronizing any of the businesses in a mall.¹⁷⁸ The handbilling was secondary activity because the union's primary dispute was with a subcontractor retained to construct a department store in the mall.¹⁷⁹ In holding that the handbilling was not prohibited by section 8(b)(4)(ii)(B), the Court noted that the handbills did not utilize "typical commercial speech . . . for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace."¹⁸⁰ In other words, the speech utilized in the

173. *See id.* at 893.

174. Ironically, "[t]he constitutional status of commercial advertising has risen as that of labor picketing has declined." Note, *supra* note 165, at 949 (describing the Supreme Court's increased protection of distinctly commercial speech as compared to labor speech).

175. *See* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 588 (1988).

176. "Handbilling" is a term used to describe the distribution of leaflets and handbills. *See, e.g., Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315-16 (1968), *overruled on other grounds by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

177. *DeBartolo II*, 485 U.S. at 579-80, 588.

178. *Id.* at 570.

179. *Id.*

180. *Id.* at 576.

union's handbills was more akin to "public issue" or political speech, the restriction of which would pose "serious questions of the validity of [section] 8(b)(4) under the First Amendment."¹⁸¹

Given the expansive protection afforded to handbilling under *DeBartolo II*,¹⁸² it is unfortunate that the Court maintained its distinction between pure speech and picketing. Noting that "picketing is qualitatively different from other modes of communication,"¹⁸³ the Court went on to reiterate Justice Stevens' speech-plus doctrine.¹⁸⁴ As has already been demonstrated, however, the speech-plus doctrine collapses under the weight of its own assumptions.¹⁸⁵ Without a concrete and reliable means of distinguishing secondary labor picketing from other forms of peaceful communication, the *DeBartolo II* Court's "qualitative" distinction between secondary labor picketing and handbilling for purposes of limiting its otherwise expansive view of labor speech is unconvincing.¹⁸⁶ Thus, given the collapse of the pure speech/speech-plus dichotomy, as well as the expansive protection afforded to labor speech in *DeBartolo II*, secondary labor picketing ought to be afforded the same First Amendment protections as other forms of political speech.

The second problem with categorizing secondary labor picketing as commercial speech is that it unfairly and inaccurately characterizes the nature of secondary labor picketing. While it is certainly possible for a union to picket a secondary target simply for economic-self interest, even when unions engage in such pickets they do so for larger socio-political reasons.¹⁸⁷ As one commentator has perceived:

181. *Id.* at 575.

182. *Id.* at 579-80.

183. *Id.* at 580 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979)).

184. *Id.*

185. *See supra* Part III.A.

186. *See DeBartolo II*, 485 U.S. at 580.

187. *See Ganin, supra* note 13, at 1569-72 (discussing the inherently political nature of labor picketing); Note, *supra* note 165 (discussing the inherently

[A] labor dispute, like a charge of race discrimination, is clearly of interest to members of the public not directly involved. Indeed, the success of the union's consumer picket depends upon public interest and support; absent the potential for such interest, there would be no need for restrictions. Just as the race discrimination of a single business reflects the broader phenomenon of racism and the problems of black citizens in a predominantly white society, a single labor dispute reflects the position of workers in an economic system based on private ownership and control of production. Each picket appeals to public solidarity with the picketing group in its particular dispute and in its larger struggle.¹⁸⁸

When viewed in the larger political context of workers' struggle for dignity, improved working conditions, and better wages, it is difficult to see how secondary labor picketing can be separated wholesale from, for example, African American citizens' struggle for racial equality or women's struggle for equal pay.¹⁸⁹ This is especially so when one considers the fact that the latter also exert economic pressure on the business community.¹⁹⁰ Recent boycotts enacted by a women's rights group¹⁹¹ and threatened by Latino citizens highlight this fact.¹⁹²

Moreover, to view labor speech through the narrow prism of commercial interest is to ignore the historical development of the American Labor Movement and its members' fight for industrial democracy.¹⁹³ This history reveals a whole class of people struggling for a voice in

political nature of labor picketing); Rakoczy *supra* note 13, at 1638-41 (discussing the communicative nature of labor picketing).

188. Note, *supra* note 165, at 955.

189. Ganin, *supra* note 13, at 1570-71 (discussing the larger context of economic struggle and analogizing it to women's appeal for equal wages).

190. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912-15 (1982) (finding that civil rights boycott was protected activity despite its exertion of economic pressure).

191. See Allison Stevens, *Wal-Mart's Critics Stage Holiday Protests*, WOMEN'S ENEWS (Dec. 13, 2005), <http://www.womensenews.org/story/business/051213/wal-marts-critics-stage-holiday-protests>.

192. See Julia Preston, *Latino Groups Urge Boycott of Arizona Over New Law*, N.Y. TIMES, May 7, 2010, at A16.

193. See, e.g., DRAY, *supra* note 45, at 225-27.

determining the conditions in which they find themselves.¹⁹⁴ Viewed through this historical lens, labor speech is overwhelmingly and fundamentally political speech.¹⁹⁵ Thus, labor's use of picketing—whether primary or secondary—is not solely or ultimately commercial in nature, but is more akin to political appeals to the public to aide workers in their collective efforts to achieve better terms and conditions of employment.¹⁹⁶ Indeed, even when unions are concerned mainly with wages, “the drive for higher wages is not reducible to monetary concerns,” but is symbolic of workers' struggle for “an affirmation of power, personal worth, and citizenship.”¹⁹⁷

Further, it must be emphasized that acknowledging the larger political reality of secondary labor pickets should not be a matter of aligning oneself with or against labor. For, as the Court noted in *Claiborne Hardware*, while certain views and practices are offensive to others who do not hold those views, protected political speech “need not meet standards of acceptability.”¹⁹⁸ To extend this notion to secondary labor picketing, if labor speech is in fact political in nature, then workers' rights to express their views on “the benefits of unionism to the community” or “the dangers of inadequate wages to the economy,”¹⁹⁹ should be protected whether those views are expressed on a picket sign or a handbill, and whether one's political compass is pro-labor or anti-union. This outcome is logically compelled by the Court's First

194. *Id.*

195. *Id.*

196. See Ganin, *supra* note 13, at 1570-71; see also DRAY, *supra* note 45, at 122-66 (chronicling the history of organized labor's struggle for dignity, living wages, and the eight-hour work day).

197. Pope, *supra* note 15, at 1111. Pope goes further and states, “[t]he more meaningless the work, the more important this [symbolic importance] aspect of the wage becomes. Wage demands often reflect perceived inequities rather than a simple desire for ‘more.’” *Id.* (citing Jack Fiorito & Charles R. Greer, *Determinants of U.S. Unionism: Past Research and Future Needs*, 21 INDUS. REL. 1, 11 (1982)).

198. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)) (internal quotation marks omitted).

199. *DeBartolo II*, 485 U.S. 568, 576 (1988).

Amendment jurisprudence, once the speech-plus doctrine is shown to be illusory.²⁰⁰

Thus, for the Supreme Court of the United States to hold that secondary labor picketing does not fall under the auspices of the First Amendment's protection of political speech is nothing less than a failure to acknowledge the larger socio-political reality in which workers exist.²⁰¹ The Court's myopia should not be allowed to so easily disenfranchise working people of their constitutionally protected right to free expression.²⁰² Since the objects of secondary labor picketing extend "beyond matters of merely commercial interest and [involve] fundamental public concerns," it is an error in ontology to restrict secondary labor picketing by equating it with commercial speech.²⁰³ As such, it is no true obstacle to a First Amendment constitutional challenge.²⁰⁴ As Professor Julius Getman concludes:

The distinction drawn between the economic activity involved in the labor cases and the political activity relating to public

200. See *supra* Part III.A. In other words, this outcome is logically compelled because the notion of picketing as an "inherently coercive" activity was an outgrowth of the view that picketing involved speech "plus" conduct (Justice Stevens' speech-plus doctrine). Since the speech-doctrine was shown to collapse on itself, *supra* Part III.A, there is no relevant distinction to justify the wholesale restriction of secondary picketing. Therefore, if labor speech is protected political speech, secondary labor picketing is subject to the same protection as so-called "pure speech."

201. Ganin, *supra* note 13, at 1572 ("[I]t is inaccurate and belittling to equate labor protests with mere profit-making activity such as product advertising.").

202. *Id.* at 1570-71 ("[I]t is analytically unsound, historically myopic, and fundamentally biased to equate labor speech with commercial speech that simply proposes a commercial transaction or is solely related to economic self-interest."); see also *id.* at 1572 ("If even political and morally righteous union activity can be blithely proscribed, then the distinction between labor and political speech seems to reflect nothing more than class bias.").

203. Anderson, *supra* note 13, at 823.

204. It should also be noted that, to the extent labor speech and political speech can be separated at all, "[o]ver the past several decades, historic transformations in both political systems and labor relations have burst the boundary between them." Pope, *supra* note 15, at 1119 (discussing, in part, how the fluidity of capital and changing contexts of labor disputes have contributed towards highlighting the political nature of labor protests).

issues is analytically unsound, historically inaccurate, and culturally myopic. What, for example, distinguishes the retail-store employees' appeal to the public for support, which the Court held was not constitutionally protected in the *Retail Store Employees Union* case, from the public boycott that the Court protected in *Claiborne Hardware*? Both cases involve appeals aimed at achieving immediate economic benefits for a limited group, and both appeals were ultimately premised on a broader goal of redistributing economic benefits: to blacks in one case, to labor in the other. To suggest that one goal is of greater public concern than the other is to view labor through the Court's artificially created prism by which collective bargaining becomes dissociated from any broader, nobler, more enduring purpose.²⁰⁵

IV. SECTION 8(B)(4)(II)(B) IS UNCONSTITUTIONAL

If the above arguments are correct and persuasive, then the barriers that the Supreme Court has erected between labor picketing and political speech—the structural integrity of which this Comment argues were mostly illusory—must fall. Having demolished such artificial constructions, secondary labor picketing is entitled to the same First Amendment protection as political speech. Once this congruity between labor speech and political speech is acknowledged, however, it becomes clear that section 8(b)(4)(ii)(B) cannot withstand a First Amendment challenge and that the statute is unconstitutional.

There are at least two arguments that can be made to challenge the constitutionality of the NLRA's secondary picketing ban. First, section 8(b)(4)(ii)(B)'s ban on secondary boycotts constitutes impermissible viewpoint discrimination, and is thus unconstitutional under the First Amendment.²⁰⁶ Second, the language of section 8(b)(4)(ii)(B)

205. JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT 239-40 (2010).

206. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) (finding statute that restricted corporate election expenditures violated First Amendment prohibitions against viewpoint discrimination); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”).

is inherently vague, and thus violates due process requirements.²⁰⁷

A. *Section 8(b)(4)(ii)(B) Constitutes Viewpoint Discrimination*

The First Amendment has long afforded speakers protection from content-based viewpoint discrimination.²⁰⁸ As the Court stated in *Mosley*:

There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.²⁰⁹

The Court has consistently held that First Amendment protection from viewpoint discrimination applies to public issue and political speech.²¹⁰ Since labor speech can be considered to be fundamentally political in nature,²¹¹ labor communications should be afforded the same protection as other types of political speech under the First Amendment. Most recently, the Supreme Court has reaffirmed its strong stance against viewpoint restrictions on political speech in *Citizens United v. Federal Election Commission*.²¹² An examination of the Court’s understanding of First Amendment speech protection and viewpoint discrimination

207. See, e.g., *United States v. Lanier*, 520 U.S. 259, 266 (2007) (“[T]he vagueness doctrine bars enforcement of ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *Baggett v. Bullitt*, 377 U.S. 360, 380 (1964) (finding state statutes requiring state employees to take loyalty oaths unconstitutionally vague).

208. See cases cited *supra* note 206.

209. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (internal citation omitted).

210. See *supra* Part II.B.

211. See *supra* Part III.B.

212. 130 S. Ct. 876, 896-911 (2010).

in *Citizens United* will be helpful in understanding why the NLRA's ban on secondary boycotts is unconstitutional.²¹³

In *Citizens United*, the Supreme Court found that a federal statute barring independent corporate expenditures for electioneering violated the First Amendment.²¹⁴ While this holding in itself may prove advantageous to labor unions,²¹⁵ it is the Supreme Court's broad and categorical statements with regard to First Amendment protection for political speech that is most relevant to the scope of this Comment.²¹⁶ In broad, sweeping language, the Court put to rest any fears that it would come down softly on Congressional restriction of political speech.²¹⁷

Attacking restrictions placed on corporate financing of election related communications, Justice Kennedy wrote, “[w]e find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”²¹⁸ In the course of a ten page lecture against viewpoint restrictions on political speech, the Court drew on a variety of cases and legislation²¹⁹—even

213. See generally Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 5 (2011) (“*Citizens United*’s broad articulation of First Amendment principles . . . undermines the reasoning by which the Court has repeatedly—and at times inexplicably—upheld limitations on unions’ picketing and boycott activity . . .”).

214. *Citizens United*, 130 S. Ct. at 917.

215. Steven J. Law, *Organized Labor and Citizens United*, WALL ST. J., March 11, 2010, at A15 (explaining that the *Citizens United* decision will allow labor unions to allocate more funds to election expenditures).

216. While the Court’s discussion of the First Amendment and viewpoint discrimination takes place in the context of political speech during an election campaign, the Court’s use of broad, sweeping language suggests wider applicability. See *Citizens United*, 130 S. Ct. at 898-907.

217. See *id.*

218. *Id.* at 899.

219. Intriguingly, the Court discussed the first prohibition of independent political expenditures by corporations and labor unions under the Labor Management Relations Act—otherwise known as the Taft-Hartley Act—with apparent disdain. *Id.* at 900. The Court was apt to note President Truman’s warning that the expenditure ban was a “dangerous intrusion on free speech.” *Id.* (quoting MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 80-334, at 9 (1947)).

referencing the Framers of the Constitution.²²⁰ The Court emphasized the indispensability of political speech to decision-making in a democratic society,²²¹ and noted that the worth of speech “does not depend upon the identity of its source, whether corporation, association, *union*, or individual.”²²² Particularly galling to the Court was the fact that the statute restricting corporate expenditures on election campaigns implicitly denied a political voice to certain kinds of corporate entities while leaving others relatively unrestricted.²²³

In finding content- and identity-based speech restrictions unconstitutional, Justice Kennedy noted two particularly disconcerting aspects of such restrictions.²²⁴ First, such restrictions are often used as a means to censor speech by controlling content.²²⁵ Second, such restrictions can function to give preference to certain speakers.²²⁶ Speaking of the latter, the Court observed that:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.

220. *Id.* at 906 (“The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communication political ideas when the Bill of Rights was adopted.”).

221. *Id.* at 904 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

222. *Id.* (quoting *Bellotti*, 435 U.S. at 777) (emphasis added).

223. *Id.* 905-07 (finding that the federal statute would allow corporations that owned media outlets to have a political voice, while corporations that did not have media outlets would be denied a political voice).

224. *Id.* at 898-99 (“Premised on a mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”).

225. *Id.* at 899.

226. *Id.*

The First Amendment protects speech and speaker, and the ideas that flow from each.²²⁷

The *Citizens United* Court thus left no doubts about the First Amendment's prohibition of viewpoint restrictions on political speech. Given the Court's reasoning in *Citizens United*, and given the fundamental political nature of labor speech,²²⁸ statutes that restrict labor speech because it is labor speech violate the First Amendment. Based on this line of reasoning, section 8(b)(4)(ii)(B) is unconstitutional.

Because section 8(b)(4)(ii)(B) restricts secondary labor picketing, while allowing other non-labor groups to engage in the same activities, the statute constitutes viewpoint discrimination. Justice Black realized this in his concurrence in *Tree Fruits*.²²⁹ Under Justice Black's view in *Tree Fruits*, the union's secondary picket was illegal under the NLRA.²³⁰ However, whereas the union was technically barred from picketing the grocery stores to highlight employees' primary dispute with their employer, a human rights group (for instance) would be free to picket the grocery store to inform the public that the apples were harvested by migrant workers who were mistreated, discriminated against, and paid low wages.²³¹ Thus, under

227. *Id.*

228. *See supra* Part III.B.

229. NLRB v. Fruit & Vegetable Packers & Warehousemen (*Tree Fruits*), 377 U.S. 58, 76-80 (1964) (Black, J., concurring).

230. *Id.* at 76.

231. *See, e.g.*, James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950-51 (1999). Pope presents a similar hypothetical:

[I]magine two people with signs standing in front of a store called Toy Town. A unionist holds the first sign, which asks consumers to boycott Toy Town because it sells Furbies, and Furbies are produced by non-union slave labor. . . . The unionist's message is illegal because it criticizes the store's policy of selling Furbies and urges consumers to express their disapproval by taking their patronage elsewhere

Now suppose that there is a third person standing in front of the store, also carrying a sign. This person is an international human rights activist, and her sign urges customers to boycott Toy Town because it sells Furbies, and the Furby company exploits Asian workers. Like the unionist, the human rights activist is urging a

Justice Black's view, labor unions are subjected to viewpoint discrimination under section 8(b)(4)(ii)(B), because they are denied an opportunity to make themselves heard through picketing while other groups are given a voice.²³² Because other non-labor groups would be free to engage in secondary picketing, and because the statute's broad ban included secondary labor picketing with otherwise lawful objects, Black concluded that section 8(b)(4)(ii)(B) banned picketing "only when the picketers express particular views."²³³

The *Citizens United* Court emphasized that such viewpoint discrimination "deprives the disadvantaged . . . class of the right to use speech to strive to establish worth, standing and respect for the speaker's voice."²³⁴ With respect to labor speech as it has been viewed in the context of this Comment, this means that restrictions that single out secondary labor picketing deprive unions of the right to have their voices heard and responded to. Thus, under contemporary First Amendment jurisprudence, section 8(b)(4)(ii)(B) should be held unconstitutional.

One might raise an objection here, recalling Justice Blackmun's acknowledgement, in *Safeco*, that Congress had to strike a balance between "union freedom of expression" and neutral employers' ability to be free from "coerced participation in industrial strife."²³⁵ That argument might go something like this: while political speech is generally protected, the potential for "industrial strife" that can accompany labor picketing justifies some Congressional restrictions. Ignoring the speech-plus assumptions that underlie such arguments for the moment, there is a separate problem with this reasoning. While the Supreme

secondary boycott of the store. However, her activity is not illegal under the Act because section 8(b)(4)(ii) applies only to unionists, leaving others free to engage in precisely the same activities. This violates the First Amendment principle of neutrality among speakers.

Id. (footnotes omitted).

232. *Tree Fruits*, 377 U.S. at 79 (Black, J., concurring).

233. *Id.*

234. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

235. *NLRB v. Retail Store Emps. Union (Safeco)*, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring).

Court *has* acknowledged that “[e]ven protected speech is not equally permissible in all places and at all times,”²³⁶ the proper legal remedy for preventing potential “strife” is to subject picketing to “reasonable time, place, or manner restrictions that are consistent with the standards announced in . . . [the Supreme Court’s] precedents,”²³⁷ not content-based restrictions on speech.

In *Snyder v. Phelps*, for example, the Court found that the Westboro Baptist Church, which had picketed the funeral of a United States Marine killed in Iraq, had obeyed all time, place, and manner restrictions applicable to its activity.²³⁸ Having complied with all applicable restrictions, the Court found that Westboro’s speech was entitled to “special protection under the First Amendment.”²³⁹ The Court went on to point out that Westboro’s picketing could not be restricted “simply” because the language used on the picket signs was “upsetting or arouse[d] contempt.”²⁴⁰ Thus, despite the private harm that Westboro’s picketing caused the Marine’s father, it was not subject to content-based restrictions insofar as the picketing constituted speech concerning a public issue.²⁴¹ If Westboro’s picketing is protected under the First Amendment, subject only to time, place, and manner restrictions, surely secondary labor picketing ought to be protected as well.²⁴²

236. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)).

237. *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

238. *Id.* at 1218-19.

239. *Id.* at 1219.

240. *Id.* at 1218. During the picketing, the Westboro Baptist Church displayed picket signs that included the following slogans: “God Hates the USA/Thank God for 911,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.” *Id.* at 1213.

241. *Id.* at 1219.

242. While *Snyder* involves a multiplicity of issues concerning the Court’s First Amendment doctrine, its holding—*on its face*—brings to light how embarrassing the Court’s doctrine on secondary labor picketing really is. On the one hand, in *Snyder*, the Court interprets the First Amendment to protect the speech of a fringe group spouting messages of hatred and bigotry at a military

In fact, the Court's decision in *Phelps* offers strong support for the NLRB's decision in *Sheet Metal Workers Local 15*.²⁴³ In that case, a union placed a fifteen-foot tall inflatable rat in front of a hospital while a union member distributed handbills to publicize a union dispute with a labor supply company.²⁴⁴ The NLRB found that the union's implementation of the rat and the handbiller was protected activity that did not violate section 8(b)(4)(ii)(B).²⁴⁵ Referring to the picket signs used in *Phelps*, the Board stated, "[i]f the First Amendment protects conduct or statements as disturbing to many as this, surely prohibiting an inflatable rat display, with a handbill referring to a 'rat employer,' would raise serious constitutional concerns."²⁴⁶

The weight of the Court's First Amendment jurisprudence and the fundamentally political nature of labor speech suggest that section 8(b)(4)(ii)(B)'s ban on secondary labor boycotts constitutes viewpoint

funeral. *Id.* at 1220. On the other hand, in the secondary labor picketing cases, the Court holds that the First Amendment does not protect union picketing of secondary businesses involved with primary employers who implement practices inimical to the interests of the working class.

243. *Sheet Metal Workers Local 15 (Brandon Reg'l Med. Ctr.)*, 356 N.L.R.B. No. 162, at 4 (May 26, 2011).

244. *Id.* at 1.

245. *Id.*

246. *Id.* at 4. While the Board correctly saw that a decision holding the union's implementation of the rat balloon in violation of section 8(b)(4)(B)(i) would raise serious constitutional concerns, the Board continues to view secondary picketing as inherently coercive. *Id.* at 3. Thus, while the Board correctly saw that a decision holding the union's implementation of the rat balloon would "raise serious constitutional concerns," *id.* at 4, it also distinguished the rat balloon from picketing. *See id.* at 3. In other words, if the Board had found the inflatable rat analogous to picketing, its implementation by the union would have violated section 8(b)(4)(B)(ii). While it might not be wise for the Board to question Supreme Court precedent, the juxtaposition of the Board's reasoning in *Sheet Metal Workers Local 15* with the Court's conception of picketing as "inherently coercive" shows how the Board's efforts to distinguish innovative forms of secondary activity from picketing verges on becoming no more than a game of words. After all, it is not difficult to argue that a fifteen-foot inflatable rat—with an inflatable cigar in its mouth, no less—placed in front of a *hospital*, embodies the requisite degree of "intimidation" to violate section 8(b)(4)(ii)(B), at least under the current Supreme Court interpretation of "picketing." *See, e.g., id.* at 7 (Hayes, dissenting).

discrimination. Because such discrimination is unconstitutional under Supreme Court First Amendment jurisprudence, section 8(b)(4)(ii)(B) should be invalidated.

B. *The Language of Section 8(b)(4)(ii)(B) is Unconstitutionally Vague*

Not only does section 8(b)(4)(ii)(b) constitute an impermissible viewpoint discrimination, but its plain language is also unconstitutionally vague.²⁴⁷ The Supreme Court's vagueness doctrine "bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."²⁴⁸ With respect to speech protected by the First Amendment, when a statute leaves individuals without clear guidance as to what kind of speech is prohibited, the statute causes those that might be affected to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."²⁴⁹ In light of the Court's own statements about the statute's language, a number of recent law review articles attempting to construe the statute's language,²⁵⁰ and the inability of the statute to provide clear guidance as to the activity it prohibits, section 8(b)(4)(ii)(B) fails to survive the vagueness doctrine.

The Supreme Court itself, as well as several other federal courts, have commented on section 8(b)(4)(ii)(B)'s vague language. In fact, the opaque language of the statute has long been a reason for the Court's attempts to limit its construction. In *DeBartolo II*, Justice White noted that the

247. See, e.g., *DeBartolo II*, 485 U.S. 568, 578 (1988) ("But more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints. Those words, we have said, are nonspecific, indeed vague, and should be interpreted with caution and not given a broad sweep." (internal citations and quotation marks omitted)).

248. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

249. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (internal quotation marks omitted).

250. See Anderson, *supra* note 13, at 36-37; Ganin, *supra* note 13, at 1582-83; Rakoczy, *supra* note 13, at 1654.

statute's prohibition of "threats, coercion, or restraints" was "nonspecific" and "vague," and thus should be "interpreted with caution and not given a broad sweep."²⁵¹ The District Court for the Western District of Washington recently noted that "coercion" is an "elastic concept," and that the "nonspecific" and "vague" language of section 8(b)(4)(ii)(B) makes determining violations of the statute a "complex" matter in which courts must use "caution."²⁵² Meanwhile, the United States Court of Appeals for the Ninth Circuit has stated that the application of section 8(b)(4)(ii)(B)'s vague language is "far from self-evident."²⁵³ Given courts' own admissions concerning the opacity of the statute, it is not clear how "men of ordinary intelligence" could be certain of its meaning and scope.²⁵⁴ However, as has been shown,²⁵⁵ despite its lack of clarity concerning the activity the statute was meant to prohibit, the Court has so far upheld the NLRA's ban on secondary boycotts.²⁵⁶

Aside from courts' own acknowledgement of section 8(b)(4)(ii)(B)'s foggy language, there are a number of recent law review notes and comments that point to the vagueness of the statute.²⁵⁷ While these authors' efforts to envision

251. *DeBartolo II*, 485 U.S. at 578 (quoting *NLRB v. Drivers*, 362 U.S. 274, 290 (1960)).

252. *Point Ruston, LLC v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters*, No. C09-5232BHS, 2010 WL 3584466, at *6 (W.D. Wash. Sept. 10, 2010).

253. *McDermott v. Ampersand Pub'g, LLC*, 593 F.3d 950, 967 (9th Cir. 2010) (quoting *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1212 (9th Cir. 2005)) (internal quotation marks omitted).

254. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

255. *See supra* Part II.

256. If the federal courts' recognition of the statute's vagueness were not enough, the NLRB's system of labyrinthine rules construing the language of section 8(b)(4)(ii)(B) might be. *See generally* Bock, *supra* note 19, at 968-69 (detailing the complexity of Board law with respect to determining whether union activity violates the NLRA's ban on secondary boycotts). In addition to the complexity of Board law in this area, the problem is compounded and highlighted by the shifts in direction the Board is subject to given the political appointment of its members.

257. *See* Anderson, *supra* note 13, at 836-37 (suggesting new framework for determining whether activity is coercive); Ganin, *supra* note 13, at 1583-83

alternative constructions of section 8(b)(4)(ii)(B) so to avoid first amendment violations are interesting and persuasive, they also are indicative of the statute's inherent lack of clarity. In fact, the variety of attempts by both the courts and their critics suggests that the real issue is the language of the statute, and not courts' narrowing interpretations.

Consider the plain language of the NLRA's secondary boycott ban.²⁵⁸ The operative language of the statute makes it an unfair labor practice "to threaten, coerce, or restrain any person" with the object of compelling that person "to cease doing business with any other person."²⁵⁹ Nowhere in the statute are the words "threaten," "coerce," or "restrain" defined. The plain meaning of such terms can be used to cover a broad or narrow array of activities, leaving the proverbial "person of common intelligence" with no clear way of knowing which activities are prohibited.

Take "coercion," for instance. The word's dictionary definition seems clear enough: "[T]o restrain or dominate by force."²⁶⁰ Yet, the definition is so broad as to cover vastly different kinds of activity. Even assuming a person of common intelligence can easily understand "restrain" or "dominate," what about force? The dictionary definition of "force" includes such varying explanations as "strength or energy exerted or brought to bear," "violence, compulsion, or constraint exerted upon or against a person or thing," and "capacity to persuade or convince."²⁶¹ Given these definitions, "to coerce" might mean a number of things. On the one hand, to coerce someone to cease doing business with another might mean forcing someone to refrain from shopping at a particular establishment through guilt—e.g., patrolling while displaying picket signs detailing a

(arguing for a new conception of coercion that avoids restricting protected speech); Rakoczy, *supra* note 13, at 1649-50 (suggesting the use of a new "coercion test" to protect unions' free speech rights).

258. National Labor Relations Act (NLRA) § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

259. *Id.*

260. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 222 (10th ed. 1993)

261. *Id.* at 455.

company's use of sweatshops. On the other hand, it could mean using threats of violence or physical force to cause someone to refrain from engaging in business with another. A world of difference lies between these examples, and yet the statute is silent as to which, if any, should be banned. The former activity is arguably protected political speech—more akin to persuasion—while the latter may be subject to criminal sanctions. The statute's failure to articulate any clear boundaries between protected political speech and criminal behavior thus renders it unconstitutionally vague on its face.²⁶²

Further and final proof of section 8(b)(4)(ii)(B)'s vagueness is the vacillation in the courts and at the Board over unions' recent creative attempts to publicize their disputes through secondary activity. Recall *Sheet Metal Workers Local 15*, where the status of a union's display of an inflatable rat was at issue.²⁶³ Before the NLRB heard the case, an administrative law judge found that the union's display of a giant inflatable rat balloon while handbilling at a secondary target constituted unlawful secondary picketing under section 8(b)(4)(ii)(B), despite the fact that an inflatable rat, by itself, does not threaten, coerce, or restrain anyone.²⁶⁴ Later, the Board reversed the decision and dismissed the complaint, finding that the union's use of the inflatable rat *did not* violate section 8(b)(4)(ii)(B).²⁶⁵ In addition, there has been vacillation between the courts and the Board as to whether ambulatory street theater, such as a mock funeral procession, violates the Act.²⁶⁶ Further, in

262. Moreover, the Court's traditional understanding of coercion in the labor context, steeped in assumptions about the inherent violence of workers and collective action, does not make the statute any clearer, as such assumptions were not and are not born out in reality. *See supra* notes 139, 141-43 and accompanying text.

263. *Sheet Metal Workers Local 15 (Brandon Reg'l Med. Ctr.)*, 356 N.L.R.B. No. 162, at 1 (May 26, 2011).

264. *Sheet Metal Workers Local 15 (Brandon Reg'l Med. Ctr.)*, 2004 NLRB LEXIS 688, at *13-15 (Dec. 7, 2004), *aff'd*, 346 N.L.R.B. No. 22 (Jan. 9, 2006), *rev'd*, 356 N.L.R.B. No. 162 (May 26, 2011).

265. *Sheet Metal Workers Local 15 (Brandon Reg'l Med. Ctr.)*, 356 N.L.R.B. No. 162, at 5 (May 26, 2011).

266. *See Ganin, supra* note 13, at 1562-63.

2010, the NLRB declared that union members holding large banners in front of secondary targets *does not* constitute unlawful secondary picketing under section 8(b)(4)(ii)(B).²⁶⁷ The unpredictability of where the Board or a court may find unlawful secondary picketing demonstrates that the statute offers no clear guidance as to the activity it seeks to prohibit. As a result, people of common intelligence must guess at its scope. This can result in the chilling of otherwise protected political speech out of fear that it is restricted.

One might object—and indeed, the Supreme Court has taken this route—that rules of statutory construction oblige the Court to construe a statute so as to avoid serious constitutional problems, “unless such construction is plainly contrary to the intent of Congress.”²⁶⁸ Thus—so the argument goes—despite the vague language of section 8(b)(4)(ii)(B), the Court should attempt an interpretation of the statute that avoids constitutional problems. There are at least two answers to this argument. First, as previously discussed, the legislative history of the statute clearly indicates Congress’s intent to broadly prohibit secondary labor picketing—and that broad prohibition has been shown to constitute an unconstitutional viewpoint restriction.²⁶⁹ Second, rules of statutory construction should not supplant the Court’s vagueness doctrine. In fact, to hold otherwise would defy logic. For, if a statute is so vague that “men of common intelligence must necessarily guess at its meaning and differ as to its application,” simple statutory interpretation will not save the statute itself from vagueness.²⁷⁰ Unless working people of common intelligence take up the study of constitutional law *en masse*, it is a safe assumption that they will still have to guess at the meaning and differ as to the application of a facially vague statute.

267. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 (Eliason & Knuth of Ariz., Inc.)*, 355 N.L.R.B. No. 159, at 5 (Aug. 27, 2010).

268. *DeBartolo II*, 485 U.S. 568, 575 (1988).

269. *See supra* Parts I.C, IV.A.

270. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

Thus, because section 8(b)(4)(ii)(B) is “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,”²⁷¹ and because such vagueness contributes to the chilling of protected political speech, section 8(b)(4)(ii)(B) should be held unconstitutional.

CONCLUSION

This Comment has endeavored to show that the National Labor Relation Act’s ban on secondary labor picketing constitutes an unconstitutional viewpoint restriction on free speech, and that the statute is facially vague. In pursuit of this goal, this Comment has surveyed the historical development of the ban on secondary labor picketing and examined the Supreme Court’s distinctions between secondary labor picketing and political speech. In addition, this Comment has attempted to expose the Court’s rationales for distinguishing secondary labor picketing from political speech as fundamentally illusory and unsound. If the preceding arguments have been accurate and persuasive, section 8(b)(4)(ii)(B) of the NLRA should be found unconstitutional. This, however, depends in part on bringing an appropriate case before the Supreme Court. This, in turn, begs the question: what would an appropriate case look like?

The answer to this question may very well depend on the concrete facts surrounding the picketing at issue. Imagine the following fact-pattern as a possibility.²⁷² Furlong runs a store in a local shopping mall called Furlong’s Fur Shop that specializes in clothing made from real and faux animal furs. Furlong receives a majority of goods from a major national manufacturer of fur clothing. As it turns out, the manufacturer is regularly involved in controversy over its business practices, for two main reasons. First, People for the Ethical Treatment of Animals (“PETA”) is unhappy with the manufacturer because it makes all of its goods using real animal furs. Second, the

271. *Id.* (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

272. *See also supra* note 231 and accompanying text.

union is unhappy with the manufacturer over its low wages and generally harsh treatment of its employees. Around the same time, both PETA and the union begin picketing Furlong's Fur Shop, because it carries goods produced at the manufacturer. Both PETA and the union comply with all applicable time, place, and manner restrictions. Shortly after the picketing begins, Furlong files an unfair labor practice charge with the NLRB against the union for violating section 8(b)(4)(ii)(B) of the NLRA.

In the above fact-pattern, both PETA and the union are picketing a business with which they have a "secondary" dispute—the *only* distinction is that the union's picketing is "labor" speech, while PETA's picketing is "political" speech. If this Comment has been at all successful, the Court's division between "labor" speech and "political" speech has been revealed as illusory. Thus, if a case based on similar facts reached the Supreme Court, the Court should have no logical choice but to find that the NLRA's ban on secondary labor picketing constitutes an unconstitutional viewpoint restriction.²⁷³ If and when it does so, perhaps the American

273. As an alternative, consider this fact pattern under which a union might challenge the constitutionality of section 8(b)(4)(ii)(B): Manufacturer "M" produces "green" energy-efficient vehicles. Union "U" has a dispute with M over its recent demands for wage and benefits concessions, despite the fact that M's profits have benefited from recent state and federal tax cuts. In addition to its labor dispute with M, U opposes the recent tax cuts, which have predominantly benefited businesses and wealthy citizens while maintaining or increasing the tax rates for middle-class citizens. In order to express its disdain for both M and the government, U pickets independent dealer "I," who primarily profits from the sale of energy-efficient vehicles produced by M. In addition to pickets advocating a consumer boycott of the independent dealers, U establishes an equal number of pickets advocating political action against local, state, and federal representatives who supported the recent tax cuts. The picket signs contain messages like: "Recall Senator R: She Robs from the Poor, Gives to the Rich!"; "Manufacturer M & Senator R—Taking the 'Green' Out of Our Wallets!"; "No More Tax Cuts for the Rich!"; "Tax Cuts + Wage Cuts = POLITICS AS USUAL, BUSINESS AS USUAL"; "Save Your Green—Don't Buy Green"; "Say NO to Corporate Greed!"; "Support Union Wages—Boycott 'I'!"; "Stand up for 'U' and Me—Boycott 'I'!!!"

In light of the arguments presented in this Comment, and given the essentially intertwined "labor" and "political" messages in the fact-pattern, the Supreme Court should find that the picketing deserves First Amendment protection. If so, section 8(b)(4)(ii)(B) ought to be found unconstitutional.

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SECONDARY PICKETING

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labor movement will reclaim some of its legal and political voice.