

LABOR PICKETING, THE RIGHT TO PROTEST, AND THE NEOLIBERAL FIRST AMENDMENT

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ABSTRACT

In the labor world, all eyes have been on the Supreme Court's use of the First Amendment to undermine the survival of public-sector unions. However, the Court's First Amendment jurisprudence also poses a critical dilemma to private-sector unions in asserting their right to protest effectively. Unions face suffocating statutory restrictions on picketing and related protest that do not apply to any other protest speaker, restrictions that subject unions to injunctions and daunting damages. These restrictions may soon become even broader. The new Secretary of Labor may seek to extend the restrictions to non-union grassroots workers' rights organizations, and the new majority and general counsel on the National Labor Relations Board may well seek to roll back the Board's recent limitations on the application of these restrictions to various types of union protest. At the same time, recent Supreme Court decisions that have established sweeping First Amendment protections for corporate and commercial speech, in part by rejecting distinctions based on identity of speaker or subject matter of speech, offer a tantalizing route to challenge the prohibitions on labor picketing on constitutional grounds.

This article argues that notwithstanding some unfavorable precedents, a long line of First Amendment decisions on picketing, boycotts, and other protest speech require the Court to dismantle the statutory restrictions, even as narrowed by the appellate courts and the NLRB. At the same time, I argue, contrary to some advocates for labor's constitutional right to picket, that unions should avoid the temptation to rely on the Court's recent First Amendment turn. Success on those grounds would carry dangerous implications by further undermining critical distinctions between corporate or commercial speech on the one hand and labor speech on the other, and by threatening regulation of corporate or commercial speech on which unions, their members, and constituencies depend.

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I.

INTRODUCTION

In the labor world, all eyes have been on the Supreme Court's use of the First Amendment to undermine the survival of public-sector unions.¹ However, the Court's First Amendment jurisprudence also poses a critical dilemma to private-sector unions in asserting their right to protest effectively. Unions face suffocating

1. *Janus v. Am. Fed'n of State, Cty. and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), *overruling Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

statutory restrictions on picketing and related protest that do not apply to any other protest speaker, restrictions that subject unions to injunctions and daunting damages. These restrictions may soon become even broader. The new Secretary of Labor may seek to extend the restrictions to non-union grassroots workers' rights organizations,² and the new majority and general counsel on the National Labor Relations Board may well seek to roll back the Board's recent limitations on the application of these restrictions to various types of union protest. At the same time, recent Supreme Court decisions that have established sweeping First Amendment protections for corporate and commercial speech, in part by rejecting distinctions based on identity of speaker or subject matter of speech, offer a tantalizing route to challenge the prohibitions on labor picketing on constitutional grounds. This article explores whether these recent neoliberal First Amendment decisions offer a way out of the restrictions that are impairing labor's efficacy at a time of existential challenge.

The article argues first that notwithstanding some unfavorable precedents, a long line of First Amendment decisions on picketing, boycotts, and other protest speech require the Court to dismantle the statutory restrictions, even as narrowed by the appellate courts and the NLRB.³ The restrictions and the rationales that the Court has invoked to justify upholding the restrictions would fail both content and viewpoint neutrality tests. Moreover, interviews with experienced lawyers representing unions reveal serious First Amendment problems with implementation of the unworkable line that the courts and the NLRB have drawn.

Unions should take advantage of recent decisions protecting picketing of military funerals and striking down a buffer zone in front of abortion clinics to end the bans on their own protest activities. They should argue that questions of coercion should only be addressed through time, place, and manner restrictions that are specific to each protest, depending on the particular facts of that protest. In making these arguments, unions should seek to dismantle the false distinction between political speech and economic speech that has been invoked to justify the restrictions on their right to picket.

At the same time, following the old adage, "Be careful what you ask for, you might get it," I argue, contrary to some advocates for labor's constitutional right

2. In response to complaints that grassroots worker organizations are acting as fronts for labor unions while engaging in types of effective protest that are forbidden to unions, the Secretary of Labor recently announced that the government is investigating whether to categorize such grassroots groups as labor organizations, which could result in the same restrictions being applied to them. See Sharon Block, *Backhanded Compliment: Acosta Threatens Workers Centers*, ON LABOR (Nov. 20, 2017), <https://onlabor.org/backhanded-compliment-acosta-threatens-workers-centers> [<https://perma.cc/UHG4-UMVD>]; see also VIRGINIA FOXX & TIM WAHLBERG, *Letter to U.S. Labor Secretary Alexander Acosta*, HOUSE COMM. ON ED. AND THE WORKFORCE (Jan. 18, 2018), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=40241> [<https://perma.cc/JC4H-CSYJ>] (calling on Secretary Acosta to investigate and regulate worker centers as union front organizations).

3. Regardless of the merits, the viability of any argument favoring the rights of labor likely depends on the future composition of the Supreme Court. In addition to *Janus*, the "egregiously wrong" reasoning of the decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) displayed the recent past majority's hostility to collective worker action.

to picket, that unions should avoid the temptation to rely on the Court's recent First Amendment turn. Success on those grounds would carry dangerous implications by further undermining critical distinctions between corporate or commercial speech on the one hand and labor speech on the other, and by threatening to undermine regulation of corporate and commercial speech on which unions, their members, and constituencies depend.⁴

A. Background

Private-sector unions derive much of their power from their ability to inflict economic harm on their targets in order to pressure them to meet the unions' demands. Prior to 1947, at least following the enactment of the Norris-LaGuardia Act in 1932,⁵ a key to union power was the ability to call on other unions and the public to join in actions against various "secondary" targets to apply pressure to the ultimate or "primary" target.⁶ Secondary activities include actions or appeals to other workers or to the public, usually consumers, to boycott or otherwise target entities that have some relationship with the direct employer of the union's members. For example, a union representing workers at a warehouse that has a contract with a major retailer might wish to ask the public to boycott the retailer so that it will, in turn, put pressure on the warehouse company to meet the union's demands.

Appeals to solidarity with labor struggles are familiar today from the struggles in the fast-food industry. But unions, unlike other groups such as worker centers or other "community-based organizations," are legally constrained not to engage in certain types of appeals for solidarity or to provide solidaristic support to other unions.

In the early twentieth century, various state legislatures and courts limited union secondary activity in different ways, either by legislation and/or through state court injunctions. During the later years of the Great Depression, the Supreme Court protected unions against these incursions on their right to picket and engage in other forms of protest. However, in the late 1940s, after the Great Depression and World War II had ended and the country faced a massive wave of strikes by workers whose wages had been held back by the economy and war-time regulation, the Court started to shift gears and, ultimately, reversed course to a significant degree.

Meanwhile, starting in 1947, Congress put the federal brakes on unions using secondary activities in their struggles with management, with the stated goal of

4. The dissents in *Janus* sounded a similar alarm. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting) ("And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."); *id.* at 2487 (Sotomayor, J., dissenting) (joining Justice Kagan's dissent and writing separately to criticize the aggressive use of the First Amendment in recent years).

5. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115) (1982) (restricting federal court jurisdiction to issue injunctions in cases involving or arising from labor disputes).

6. A primary target is the direct employer of the workers in the union at issue. A secondary target is, in general, anyone else.

protecting “neutral” parties from economic damage resulting from someone else’s labor dispute. The Taft-Hartley Act of 1947⁷ and the Landrum-Griffin Act of 1959⁸ amended the National Labor Relations Act (“NLRA”)⁹ and imposed restrictions on secondary union activity intended to garner or provide solidaristic support for labor campaigns. Specifically, these Acts added what are now Section 8(b)(4)(i)(B) of the NLRA,¹⁰ which prohibits unions from engaging in or inducing or encouraging other workers to engage in work stoppages against secondary targets, and Section 8(b)(4)(ii)(B) of the NLRA,¹¹ which prohibits a union from threatening, coercing, or restraining anyone to cease doing business with a secondary target.¹²

Over the years, the courts and the NLRB have interpreted these provisions to prohibit picketing of secondary targets to appeal for public support for consumer boycotts, for example, and have prohibited unions from in any way engaging in or seeking a work stoppage by other workers against a secondary target. These prohibitions still matter in the real world today, as revealed in my interviews with experienced union lawyers. During a Communication Workers of America strike against Verizon in 2016, for example, the NLRB itself invoked the prohibitions to obtain a temporary injunction against the union to stop it from picketing hotels where non-striking Verizon workers were staying.¹³

B. Arguments

Much has already been written on why the *per se* prohibition on picketing of secondary targets to call for a consumer boycott or other public response should be ruled to violate the First Amendment.¹⁴ As discussed in detail below, the Su-

7. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141–197 (1947)).

8. Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519-546 (codified at 29 U.S.C. §§ 401–553 (1959)).

9. National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935).

10. *Id.* § 158(b)(4)(i)(B).

11. *Id.* § 158(b)(4)(ii)(B).

12. *See, e.g.*, Richard Blum, “*They Outlawed Solidarity!*”, 39 SEATTLE U. L. REV. 983 (2016).

13. Paulsen v. Comm’n Workers of Am., No. 16 CV 2312 (E.D.N.Y. May 12, 2016) (order granting preliminary injunction).

14. *See* Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L. J. 938 (1982); Mark Schneider, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982). *See also* James Gray Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q., Vol. 189 (1983-84); Kate L. Rakoczy, *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 (2007); Dan Ganin, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539 (2008); Charlotte Garden, *Citizens, United, and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Joseph L. Guza, *A Cure for Laryngitis: A First Amendment Challenge to the NLRA’s Ban on Secondary Picketing*, 59 BUFF. L. REV. 1267 (2011); Zoran Tasic, *The Speaker the Court Forgot: Re-evaluating NLRA Section 8(b)(4)(B)’s Secondary Boycott Restrictions in Light of Citizens United and Sorrell*, 90 WASH. L. REV. 237 (2012); Ian

preme Court has differentiated secondary labor picketing from other First Amendment-protected activity, *inter alia*, by holding that such picketing is inherently coercive of supposedly neutral parties and by distinguishing between political and economic protest, finding the latter to be less protected.

In response, commentators have specifically addressed why labor picketing is not inherently coercive of its audience, i.e., consumers, and why the First Amendment does not allow us to distinguish between protected economic picketing calling for consumer boycotts in support of civil rights and banned labor picketing calling for consumer boycotts in support of union demands. Such a distinction constitutes precisely the kind of content-based discrimination, even viewpoint discrimination, that the Supreme Court has held to be unacceptable under the First Amendment.¹⁵ In turn, in contrasting the exceptional treatment of labor picketing with a more protective approach toward commercial speech, Cynthia Estlund warned presciently in 1982, that the Court was taking steps toward reinstating the discredited approach of *Lochner v. New York*, under which the government was generally prohibited from regulating commercial activity.¹⁶

The Court's supposed distinction between picketing over "economic" issues, as opposed to issues of "public concern," holds up even less today than before. Meanwhile, somewhat ironically, the shadow of *Lochner* has arisen in First Amendment jurisprudence in ways that commentators insist should be helpful in striking down the Taft-Hartley restrictions on peaceful secondary picketing in support of consumer boycotts.¹⁷ Specifically, scholars have pointed to the decisions in *Citizens United v. FEC*,¹⁸ which prohibits distinctions with respect to types of speakers, and *Sorrell v. IMS Health Inc.*,¹⁹ which goes a long way toward breaking down the distinction between commercial speech and speech that has long enjoyed full First Amendment protection. These commentators have argued that the Supreme Court's rejection of these types of distinctions makes it impossible to justify under the First Amendment the restrictions on peaceful union picketing found in

Hayes, *The Unconstitutionality of Section 8(b)(4)(ii)(B) and the Supreme Court's Unique Treatment of Union Speech*, 28 A.B.A. J. OF LAB. & EMP. L., 129 (2012); Michael C. Harper, *First Amendment Protection for Union Appeals to Consumers*, 27 WIS. J. OF L., GENDER & SOC'Y, Vol. 177 (2012); Catherine Fisk, *Is it Time for a New Free Speech Fight? Thoughts on Whether the First Amendment is a Friend or Foe of Labor*, 39 BERKELEY J. OF EMP. & LAB. L. (forthcoming 2018).

15. See Estlund, *supra* note 14.

16. 198 U.S. 45 (1905).

17. See Garden, *supra* note 14; Tasic, *supra* note 14.

18. 558 U.S. 310 (2010).

19. 564 U.S. 552 (2011).

Section 8(b)(4)(ii)(B).²⁰ The Court's subsequent decision in *Reed v. Town of Gilbert*,²¹ declaring that all content-based distinctions among speech should be subject to strict scrutiny, adds force to these arguments. If applied literally,²² the *Reed* decision's insistence on application of strict scrutiny to all content-based distinctions could nullify just about any distinction among instances of speech based on whether they are economic or commercial in nature, the usual grounds for upholding the restrictions against union secondary pickets and boycotts.

These scholars' arguments are not simply theoretical. In the last two years, unions have tried unsuccessfully to deploy *Reed* to fend off restrictions on secondary activity.²³ Although one court concluded that it remains unclear just how literally the Court's strict scrutiny requirement for all content-based distinctions would actually be applied in the future, the court nevertheless acknowledged that *Reed* raised First Amendment issues concerning the facial validity of the Section 8(b)(4)(ii)(B) restrictions on peaceful secondary union activity.²⁴ Especially if *Reed* begins to take hold in a newly-configured Supreme Court, these challenges are likely to continue.

Part I of this article explores the evolution of the precedents concerning bans on labor picketing, in particular, secondary picketing. Interviews with union lawyers who advise and represent unions on how to follow the law reveal that the current line drawn by the NLRB in an attempt to avoid First Amendment problems under those precedents is still unworkable in practice.

Part II argues that under First Amendment precedents concerning protest speech, the ban on secondary picketing should be stricken as impermissible content-based, or even viewpoint-based, discrimination. The various rationales invoked by the Court in the past to justify differential treatment of labor protest speech, including a supposed distinction between political and economic speech, do not hold up under scrutiny. The only constitutional way to address coercion of listeners or to achieve other legitimate goals unrelated to the pickets' content is

20. See Garden, *supra* note 14; Tasic, *supra* note 14. Catherine Fisk and Jessica Rutter also deploy *Citizens United*, *McCutcheon*, and *Sorrell* to argue that restrictions on recognitional picketing under Section 8(b)(7) of the NLRA, 29 U.S.C. § 158(b)(7), violate the First Amendment. Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. OF EMP. & LAB. L. 277, 311–20 (2015).

21. 135 S. Ct. 2218 (2015).

22. The meaning of the *Reed* decision and its implications are notably unclear. Courts have wrestled with its significance with no clear outcome. See *infra* notes 197–198.

23. The Ninth Circuit has twice rejected arguments that *Reed* requires that longstanding consent decrees prohibiting unions from violating Section 8(b)(4)(ii)(B) be modified to remove those prohibitions. *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229*, 891 F.3d 1182 (9th Cir. 2018); *NLRB v. Teamsters Union, Local No. 70*, No. 71-01092, 2016 WL 4434612 (9th Cir. Aug. 22, 2016), *cert denied*, 137 S. Ct. 2214 (2017). See also *520 S. Mich. Ave. Assocs. v. UNITE HERE Local 1*, No. 10 C 01422 (N.D. Ill. March 25, 2016).

24. The district court in *520 South Avenue Michigan Associates* noted that the Seventh Circuit had provided mixed signals in applying *Reed*, citing *Norton v. Town of Springfield*, 806 F.3d 411 (2015) (striking down an anti-panhandling ordinance under *Reed*) and *BBL, Inc. v. City of Angola*, 809 F.3d 317 (7th Cir. 2015) (declining to reject zoning ordinance under *Reed*). *520 S. Mich. Ave. Assocs.*, No. 10 C 01422 at 8.

through reasonable time, place, and manner restrictions and not through an outright prophylactic ban.

Part III, on the other hand, challenges attempts to protect union picketing by invoking recent Supreme Court decisions advancing the supposed First Amendment rights of for-profit corporations and of those engaged in commercial activity. Heeding Estlund's warning concerning the return to *Lochner*, and the recent arguments of Tamara Piety and others concerning the dangers implicit in the expansion of First Amendment protections for corporate and commercial speech,²⁵ Part III argues that unions should, to the extent possible, avoid relying on these decisions. Instead, unions should defend the validity of the distinction between commercial and corporate speech on the one hand, and other speech, including labor protest, on the other. Moreover, there exist compelling societal reasons for permitting greater regulation of commercial and corporate speech on which unions, their members, and constituents depend. Rather than contributing to the breaking down of distinctions on which such state regulation is based, unions should instead situate their First Amendment claims squarely within the tradition of protecting the right to engage in collective protests.

II.

WHERE WE ARE TODAY: THE JUDICIAL AND ADMINISTRATIVE TUG OF WAR OVER THE FIRST AMENDMENT AND SECONDARY LABOR PICKETING

A. The Decisional Law

1. The Supreme Court Sets the Stage

Prior to the 1930s, during the age of *Lochner*, the Supreme Court generally took the position that employers had a constitutional right under the 14th Amendment's due process clause to pursue their businesses free from interference.²⁶ In

25. Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015); Tamara R. Piety, *'A Necessary Cost of Freedom'? The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012); Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. 16 (2010); see also Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133; Sophia Z. Lee, *The Lochner-Era Roots of the Conservative First Amendment*, AM. CONST. SOC'Y FOR LAW AND POLICY: ACS BLOG (Apr. 14, 2015), <http://www.acslaw.org/acsblog/the-lochner-era-roots-of-the-conservative-first-amendment> [https://perma.cc/UG8C-SYSZ].

26. See *Truax v. Corrigan*, 257 U.S. 312 (1921); Estlund, *supra* note 14, at 940 n.12 (discussing 19th-century treatment of picketing as tortious) and n.13 (explaining the evolution of protections against use of injunctions against picketing and other labor activity). See also LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016) (detailing how courts deployed the Bill of Rights in the early part of the 20th century to protect business interests from labor agitation). For countervailing trends, see James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1086–89 (1987) (analyzing the views of Justices Holmes and Brandeis and the Court's decision in *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923) (finding a due process right to strike)). Despite language to the contrary in the Clayton Antitrust Act, §§ 6, 20, Pub. L. No. 212, 38 Stat. 731, 738 (1914) (codified as amended at 15 U.S.C. § 17, 29 U.S.C. § 52) (1976), courts found collective labor activity to violate antitrust laws and issued anti-labor injunctions accordingly. See Estlund, *supra* note 14, at 940 n.13.

1937, during the Depression, the Court reversed course.²⁷ The Court then laid the foundation for the First Amendment right to picket in the famous *Thornhill v. Alabama* decision.²⁸ Although the *Thornhill* Court acknowledged the state's power to regulate labor conflict,²⁹ it held that it "does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern."³⁰

Indeed, labor's principal legal accomplishment prior to the enactment of the National Labor Relations Act was to deprive the federal judiciary of its power to enjoin peaceful labor actions through the Norris-LaGuardia Act in 1932. *See supra*, note 5

27. *Senn v. Tile Layers Protective Union, Local 5*, 301 U.S. 468 (1937) (upholding the authority of the state to authorize unions to promote legal goals through picketing).

28. 310 U.S. 88 (1940). On the same day, the Court reversed similar convictions for picketing in *Carlson v. California*, 310 U.S. 106 (1940) (striking down a similar statute as unconstitutional on its face). Prior to *Thornhill*, the Court had begun to recognize the First Amendment rights of labor speech. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 531 (1939) (holding that "the right peaceably to assemble and to discuss [labor] topics, and to communicate respecting them whether orally or in writing, is a privilege inherent in citizenship of the United States which the [Fourteenth] Amendment protects."). Later that year, the Court reversed convictions for handbilling activities in *Schneider v. State*, 308 U.S. 147 (1939). For several years after *Thornhill*, the Court continued to affirm labor's First Amendment right to picket. *See AFL v. Swing*, 312 U.S. 321 (1941) (upholding labor's constitutional free speech right to picket absent an employer-employee relationship); *Bakery and Pastry Drivers, Local 802 v. Wohl*, 315 U.S. 769 (1942) (rejecting a ban on picketing sites other than those of the targets of the unionizing campaign, noting the absence of "violence, force or coercion, or conduct otherwise unlawful or oppressive" or any "actual or threatened abuse of the right to free speech through the use of excessive picketing"); *Cafeteria Emps. Union, Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (reiterating the First Amendment protections for picketing and holding that "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies – like 'unfair' or 'fascist' – is not to falsify facts."); *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (reversing conviction of union leader for giving a speech in violation of restraining order, affirming right of unions to assembly and speech under the First Amendment, and declaring that "[f]ree trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."). Some commentators have criticized the Supreme Court's decision in *Thomas* for explicitly recognizing an employer's First Amendment right to speak about its labor relations. *See, e.g.*, Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 Berkeley J. Emp. & Lab. L. 356, 376–78 (1995). Story even criticizes the *Thornhill* decision for invoking the First Amendment on behalf of unions, instead of the NLRA right to self-organization, arguing that it led to the recognition of employer free speech rights that have had a coercive impact interfering with workers' right to self-organize. *Id.* at 370–73. *See also* Weinrib, *supra* note 26 (critically detailing the evolution of the ACLU's position on labor speech from defending labor's "right of agitation" to successfully advancing a more neutral approach to labor speech that included employer free speech rights). Others have argued that labor protest, including picketing, would be better protected by the freedom of assembly clause of the First Amendment than the free speech clause. Marion Crain & John D. Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791 (2015).

29. 310 U.S. at 103–04.

30. *Id.* at 104. The *Thornhill* Court acknowledged that labor picketing might persuade some people to refrain from doing business with the establishment at issue, but noted, "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.* The Court distinguished cases in which violence was involved, finding there to be nothing inherent about labor picketing that presents a "clear and present danger of destruction of life or property, or invasion of the

Although the early to mid-1940s were banner years for labor picketing and other activities in Supreme Court jurisprudence, the Court identified certain limits to First Amendment protections for picketing. First, it found that a persistent pattern of violent behavior could remove those protections.³¹ Second, it held that those protections did not apply when the target of the labor picket was a sufficiently “neutral” party.³² Third, the Court also began to see picketing as involving both speech and conduct (“speech-plus”), and therefore subject to state regulation more than pure speech would be.³³ Finally, the court developed the doctrine that it could ban labor picketing if the picketing had unlawful objectives.³⁴ Over the next decade, the Court applied that doctrine even to labor pickets that were aimed noncoercively at consumers or that violated only state policy preferences and not criminal statutes.³⁵ By 1957, the Court had completed a transformation of the jurisprudence on the First Amendment and labor picketing: “This series of cases . . . established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.”³⁶

right of privacy, or breach of the peace.” *Id.* at 105. The Court noted that picketing conducted in a manner that threatened “imminent and aggravated danger” could “justify a statute narrowly drawn to cover the precise situation giving rise to the danger.” *Id.*

31. *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292–96 (1941) (upholding injunction against picketing where the violence was not episodic or isolated but warning that the right to free speech in the future cannot be forfeited because of “dissociated acts of past violence”). In defending labor’s general right to picket, the Court characterized peaceful picketing as “the workingman’s means of communication.” *Id.* at 293.

32. *Carpenters and Joiners Union of Am., Local No. 213 v. Ritter’s Caf. . .*, 315 U.S. 722, 725 (1942) (finding that the state had a right to determine whether “the common interest” was best served by imposing restrictions on the weapons of economic injury).

33. *Bakery and Pastry Drivers and Helpers, Local 802 v. Wohl*, 315 U.S. 769, 76–77 (Douglas, J., concurring); *see also Int’l Bhd of Teamsters, Local 695 v. Vogt*, 354 U.S. 284, 289 (1957).

34. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

35. *Hughes v. Superior Court*, 339 U.S. 460, 465–66 (1950) (“Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance.”); *Int’l Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 479 (1950) (deferring to state’s policy to justify ban on picketing); *Bldg. Serv. Emp.’s Int’l Union, Local 262 v. Gazzam*, 339 U.S. 532, 536–37 (1950) (same); *Local Union No. 10, United Ass’n of Journeymen v. Graham*, 345 U.S. 192, 201 (1953) (same).

36. *Vogt*, 354 U.S. at 293. Having already authorized states to protect “neutrals,” and having given them broad discretion to create unlawful objectives for labor picketing, the Court took no time in confirming Congress’ power to do so in the Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141–197 (1947)). *See IBEW, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) (holding that the finding of an unfair labor practice for peaceful picketing involved no unconstitutional abridgment of free speech, citing to *Gazzam*, *Hanke*, *Hughes*, and *Giboney*). In 1959, Congress tightened up those prohibitions against secondary activities in the Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 401–553 (1959)). For a detailed explanation of the 1947 and 1959 amendments, *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 (2005). The statute has several provisos that qualify the restrictions on secondary activity generally including the publicity proviso, which allows for publicity other than picketing “for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or

In the following decades, the Court engaged in a tug-of-war to determine the precise scope of the Taft-Hartley prohibition. In *NLRB v. Retail Store Employees Union, Local 1001*, (“*Safeco*”), the Court upheld an order of the NLRB against secondary picketing.³⁷ Focusing on the potential coercive effect of the picket on the target, not consumers, the Court found that the secondary picketing forced the secondary companies to choose between their survival and severance of their ties with the primary employer. Relying on the unlawful objectives rationale, the *Safeco* Court summarily rejected concerns that the ban on picketing might violate the First Amendment, noting that “[s]uch picketing spreads labor discord by coercing a neutral party to join the fray.”³⁸ In the Court’s understanding, coercion seems to be tied to two factors: effectiveness of the speech and supposed neutrality of the target.

The concurrences in *Safeco* reflected just how far from *Thornhill* the Court had traveled. Justice Blackmun expressed a reluctance to “to hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”³⁹ Justice Stevens’ concurrence echoed refrains from a number of the cases discussed above. He acknowledged that the ban on union secondary picketing was content based, normally a basis for finding a ban unconstitutional. But he found the ban permissible, not only because it furthered a congressional objective of protecting neutrals, but also because picketing, in contrast to handbilling, calls for “an automatic response to a signal rather than a reasoned response to an idea.”⁴⁰ In Justice Stevens’ characterization, a culture of solidarity is somehow less than reasoned, and regulation is needed to protect innocent businesses from the programmed responses of the working class.

In contrast to *Safeco*, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council and NLRB (DeBartolo II)*, the Court

products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.” 29 U.S.C. § 158(b)(4). This proviso is quite limited, as written. See discussion of *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983) *infra* notes 41–43 and accompanying text.

37. 447 U.S. 607 (1980). Earlier, in *NLRB v. Fruit and Vegetable Packers, Local 760* (“*Tree Fruits*”), 377 U.S. 58 (1964), the Court had addressed whether a picket at a secondary site was tied closely enough to the primary dispute to avoid the Section 8(b)(4)(ii)(B) bar. After combing the legislative history of the Taft-Hartley and Landrum-Griffin amendments concerning secondary activity, the Court found no unfair labor practice in the union’s “secondary” picketing of retail stores, where the picketing was confined to persuading customers to cease buying the product of the primary employer, even if the picketing of the primary employer’s product might have led to the secondary employer dropping that item as a poor seller. The Court’s decision reflected “concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.” *Id.* at 63.

38. 447 U.S. at 616.

39. *Id.* at 617–18 (Blackmun, J., concurring). He left open the possibility of voting down a ban on peaceful picketing “unsupported by equally substantial governmental interests.” *Id.* at 618.

40. *Id.* at 619 (Stevens, J., concurring). The Courts’ fear of signaling for a work stoppage may have improperly influenced its approach to picketing strictly in support of consumer boycotts.

upheld the right of a union to engage in peaceful distribution at mall entrances of handbills, which urged customers not to shop at any of the mall's stores until the owner promised that contractors paying fair wages would be hired for all mall construction.⁴¹ The handbills "truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a *wholly legal course of action*, namely, not to patronize the retailers doing business in the mall."⁴² Echoing Justice Stevens' negative view of picketing in *Safeco*, the Court noted that handbills containing the same message as a picket may be less effective and less likely to be coercive, because they depend on "the persuasive force of the idea."⁴³

Even as the Court's labor picketing jurisprudence was abandoning a First Amendment framework, in the context of civil rights struggles, the Court was developing a robust view of the right to engage in protest, including picketing and consumer boycotts.⁴⁴ In the landmark case of *NAACP v. Claiborne Hardware Co.*,⁴⁵ the Court reversed injunctive relief and damages in an action against civil rights organizations and over one hundred individual activists arising out of a multi-year boycott of white businesses in Claiborne County, Mississippi to protest racial injustice in the county. According to the Mississippi courts, the boycott was carried out through a variety of means, including nonviolent picketing, as well as some threats of violence and even acts of violence. The Supreme Court ruled that notwithstanding some incidents of violence, each other element of the campaign, for example, the meetings, and speeches and nonviolent picketing of white merchants was "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments."⁴⁶ As the Court defined the issue, the "black citizens named as defendants . . . banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."⁴⁷ The Court noted that it had already "recognized that 'by collective effort individuals can make their views known, when individually, their voices would be faint or lost.'"⁴⁸ In short, the nonviolent elements of a collective boycott campaign, including picketing, against merchants, designed to

41. 485 U.S. 568 (1988). This decision was the second issued by the Supreme Court in this case. See *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983).

42. 485 U.S. at 575 (emphasis added).

43. *Id.* at 580 (citation omitted).

44. See, e.g., *Carey v. Brown*, 447 U.S. 455, 460 (1980) (citing *Thornhill* in striking down a ban on peaceful non-labor picketing as subject matter discrimination violative of equal protection guarantees); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (striking down a ban on non-labor picketing as an impermissible content-based discrimination between types of speech). In *Mosley*, the Court rejected the city's warnings that non-labor picketing would be more prone to produce violence, affirming that "[p]redictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Id.* at 100-01. The Court noted that the City of Chicago argued that labor pickets tend to be pro forma, whereas civil rights pickets can get violent. *Mosley*, 408 U.S. at 100 n.7.

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

46. *Id.* at 907.

47. *Id.*

48. *Id.* (citation omitted).

pressure the government to meet certain demands, constituted protected speech and conduct.⁴⁹

On the one hand, the Court's protective treatment of civil rights picketing undermined the rationale for treating labor picketing as inherently coercive and therefore subject to broad regulation, even outright banning, to further some state policy. The Court's summation in that part of the decision would lead one to believe that it was implicitly overruling its precedents permitting bans on secondary labor picketing.⁵⁰ Its grand language affirming the right to protest to achieve economic, social, or political change would resonate with unions seeking to raise wages in the fast-food and other low-wage industries today.

On the other hand, in trying to distinguish civil rights picketing from labor picketing, those decisions, particularly *Claiborne Hardware*, helped create what James Gray Pope has called a "black hole" for labor speech in the First Amendment hierarchy, with political speech, including civil rights speech, at the top as most protected.⁵¹ In arguably gratuitous dicta, the *Claiborne Hardware* Court carved out labor picketing, particularly secondary labor picketing from First Amendment protection. Citing the foundational unlawful objectives decision,⁵² and Justice Blackmun's concurrence in *Safeco*, the Court, per Justice Stevens (whose concurrence in *Safeco* is discussed above), drew a sharp line between regulation of economic and political activity, categorizing labor picketing, including secondary picketing, as economic and therefore subject to the "broad powers" of the states to regulate.⁵³ Finding that the Claiborne County boycott was "political activity," in contrast, the Court restated the principle that political activity is on "the highest rung of the hierarchy of First Amendment values."⁵⁴ The Court noted

49. In upholding the First Amendment rights of the boycott protesters, the Court invoked *Thornhill*, *Schneider*, and *Thomas*. Quoting *Thomas*, the Court reaffirmed that the "First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Claiborne Hardware*, 458 U.S. at 910. Most significant, the Court invoked *Schneider* and *Thornhill*, both labor picketing cases, to rebut the lower court's view that the campaigners' distribution of pamphlets could be enjoined because the purpose of distributing literature was not to inform the public, but to "force" businesses to sign certain agreements. *Id.* at 911 ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.") (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

50. *Id.* at 911–12 ("In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.' . . . Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition – rather than through riot or revolution – petitioners sought to change a social order that had consistently treated them as second-class citizens.") (quoting *Thomas v. Collins* 323 U.S. at 530).

51. Pope, *supra* note 14. For an early example of the Court's disparate treatment of labor speech, compare *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding conviction for using sound amplification in labor dispute) with *Saia v. New York*, 334 U.S. 558 (1948) (striking conviction for using sound amplification on religious subject).

52. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

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

54. *Id.* at 913.

that one major purpose of the Claiborne County boycott was to influence government action,⁵⁵ and that there was no suggestion that the NAACP or the individual protesters “were in competition with the white businesses or that boycott arose from *parochial economic interest*.”⁵⁶

In sum, with the *Safeco*, *Claiborne Hardware*, and *DeBartolo II* decisions, the Court bequeathed the lower appellate courts and the NLRB a baffling set of contradictory pronouncements and principles on labor picketing and the First Amendment. On one side of the ledger, precedent has established that picketing generally includes protected speech as well as conduct that can be regulated, but pickets usually cannot be banned outright in anticipation of possible violence. Thus, pickets are not inherently coercive to the intended audience, and even if they may result in economic harm to their intended targets, the First Amendment protects their speech element as long as they remain peaceful and do not seek to induce illegal activity. Additionally, the Court held that secondary labor boycotts are permissible as long as they communicate to the public through handbilling or other noncoercive activity and not through picketing. On the other side of the ledger, the Court has continued to treat union picketing, and only union picketing, as in some sense inherently coercive and subject to outright banning, depending on the target and the potential impact on the intended target.

2. *The Circuit Courts Weigh In*

A series of Circuit Court of Appeals and Board decisions concerning secondary actions by construction (mostly carpenters) unions have applied *DeBartolo II* to expand the range of secondary protest activities that unions can engage in, thus avoiding First Amendment problems. In *Overstreet v. United Brotherhood of Carpenters and Joiners of America*,⁵⁷ the Ninth Circuit Court of Appeals, relying on *DeBartolo II*, ruled against the NLRB and for the union where it had held up banners announcing a labor dispute. The court contrasted bannereting with the physical act of patrolling a locality involved in picketing, as Justice Stevens emphasized in his *Safeco* concurrence, and that the mere presence of a picket line can induce a refusal to cross the line.⁵⁸ The court concluded that interpreting Section 8(b)(4)(ii)(B) to prohibit the bannereting “would pose a ‘significant risk’ of infringing First Amendment rights.”⁵⁹

Similarly, the D.C. Circuit, in *Sheet Metal Workers’ Internat’l Assoc. Local 15 v. NLRB*, reversed the Board’s finding of a violation of Section 8(b)(4)(ii)(B), observing that the mock funeral conducted by the union lay “somewhere between the lawful handbilling in *DeBartolo* and unlawful picketing or patrolling.”⁶⁰ The

55. *Id.* at 914.

56. *Id.* at 915 (emphasis added).

57. *Overstreet v. United Bhd. of Carpenters, Local 1506*, 409 F.3d 1199 (9th Cir. 2005).

58. *Id.* at 1210.

59. *Id.* at 1211–12.

60. *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007). On an earlier application for a temporary injunction in the same case, the Eleventh Circuit had found

Court ultimately held that the mock funeral did not threaten, coerce, or restrain anyone within the meaning of the NLRA.⁶¹ The court also acknowledged the “specific guidance as to what kinds of protest activities government may and may not proscribe” as “coercive or intimidating” in the Supreme Court’s cases on buffer zones for anti-abortion protesters.⁶² The Court noted that different rules for labor protests would constitute unconstitutional viewpoint discrimination.⁶³ The Court also rejected the Board’s invocation of *Claiborne Hardware*’s treatment of labor picketing, observing that the decision’s statement concerning the “delicate balance” between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from industrial strife left open the question of what constitutes “coerced participation” in a labor dispute, adding that this statement “does nothing to suggest coercion may be defined so broadly as to crimp the free speech guarantee of the First Amendment.”⁶⁴ The D.C. Circuit also concluded that after *DeBartolo II* an objective of trying to persuade customers to boycott a secondary target is not by itself violative of Section 8(b)(4)(ii)(B).⁶⁵

3. *Eliason & Knuth: The Board weighs in on bannering*

In 2010, the Board changed its direction from the positions advanced unsuccessfully in the above cases, holding in *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 and Eliason & Knuth of Arizona (Eliason & Knuth)* that a union’s display of large stationary banners announcing a labor dispute at a secondary site did not violate Section 8(b)(4)(ii)(B).⁶⁶ In that case, the parties stipulated that, leaving aside the holding of the banners, the union representatives did not engage in any other confrontational activity.⁶⁷

The Board found no contention that the union had threatened the secondary employers or coerced or restrained them, as those words are “ordinarily understood, i.e., through violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries’ business.”⁶⁸ Combing the legislative history

that the NLRB had reasonable ground to find a violation of Section 8(b)(4). *Kentov v. Sheet Metal Workers’ Int’l Ass’n, Local 15*, 418 F.3d 1259 (11th Cir. 2005). The D.C. Circuit’s decision followed a full development of the factual record by the NLRB and, at the later stage, applied a less deferential standard. *Sheet Metal Workers’*, 491 F.3d at 436.

61. *Id.*

62. *Id.* The Court cited *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding an injunction creating 300-foot buffer zone around abortion clinic was unconstitutional burden on protesters’ free speech rights), and *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a statute making it unlawful within 100 feet of entrance to abortion clinic to make unwanted physical approach to within eight feet of another person to pass out handbills, display signs, or engage in oral protest, education, counseling).

63. *Id.*

64. *Id.* at 436–37.

65. *Id.*

66. *United Bhd. of Carpenters, Local 1506 (Eliason & Knuth)*, 355 N.L.R.B. 797 (2010).

67. *Id.* at 798–99.

68. *Id.* at 800.

of both the Taft-Hartley and Landrum-Griffin amendments, the Board found evidence that they were intended to cover secondary boycotts carried out through picketing of neutrals, but not to “interfere with the constitutional right of free speech.”⁶⁹

The Board went on to decide that holding a stationary banner did not constitute proscribed picketing. First, the Board noted that under existing jurisprudence, “categorizing peaceful, expressive activity at a purely secondary site renders it unlawful without any showing of actual threats, coercion or restraint,” unless it falls within a narrow exception.⁷⁰ In that context, the Board held that “expressive activity that bears some resemblance to picketing should not be classified as picketing unless it is qualitatively different from other nonproscribed means of expression and the qualitative differences suggest that the activity’s impact owes more to intimidation than persuasion.”⁷¹ What makes picketing coercive, according to the Board, is the use of signs and patrolling to create “a physical, or, at least, a symbolic confrontation between the picketers and those entering the worksite,” and “this element of confrontation has long been central to our conception of picketing for purposes of the Act’s prohibitions.”⁷² The Board then held that the holding of stationary banners in the case before it did not create such a confrontation.⁷³

Looking at *Eliason & Knuth*, in light of *Overstreet* and *Sheet Metal Workers*, how does a union determine if a sign is a picket sign or a banner? If movement is a procession or a patrol? If the chants or music are too loud? If the banner is too likely to grab the attention of someone entering or exiting the building? Moreover, just how many representatives may the union have present before their numbers become “confrontational?” How close can the banners be to the entrance to the site, and how close to the entrance can the handbilling take place? In sum, the Board’s sincere effort to navigate this indecipherable line has left us almost as confused as before.

B. Perspectives of Union Lawyers

Against this confusing legal background, in the fall of 2014, I interviewed several experienced lawyers representing unions in various industries concerning the impact of the current restrictions on peaceful secondary activities directed at

69. *Id.* at 801 (citations omitted).

70. *Id.*

71. *Id.* at 802.

72. *Id.* (citations omitted). There some tension between Justice Stevens’ accusation in *Safeco* that unions merely “signal” their audiences and the concern that unions have to resort to “confrontation” to convince their audiences to honor their demands. If unions could really just signal, they would not have to resort to confrontation, whether peaceful or otherwise.

73. The Board later cited language in *Eliason & Knuth* when agreeing that the appropriate legal standard for evaluating whether non-picketing conduct is “coercive” and therefore in violation of Section 8(b)(4)(ii)(B) of the Act is whether the conduct “directly caused or could reasonably be expected to directly cause, disruption of the secondary’s operations.” Laborers’ Int’l Union Local 872, 363 N.L.R.B. 168 n.2 (Apr. 29, 2016) (citation omitted). But the meaning of “disruptive” remains unclear in light of the insistence on “confrontational” as the standard, as borne out by the experiences of practitioners discussed below.

consumers.⁷⁴ These lawyers consistently reported that the restrictions on secondary activity do matter to unions in the formulation and execution of campaigns, particularly in construction and other industries in which sub-contracting is common. In those industries, secondary targets, such as general contractors, developers, or building owners, determine the possible parameters of pay and other compensation and working conditions because they control the budgets.⁷⁵ They also have the power to decide whether to use a union or non-union sub-contractor. Therefore, the lawyers interviewed reported that unions need to address the role of these secondary players and consider them as possible targets to ensure the use of union labor.

1. *The Interview Results*

The lawyers interviewed confirmed the need to counsel clients regularly concerning the scope of the restrictions on secondary activity when campaigns are

74. To protect confidentiality, I do not identify the lawyers, the unions they represent, or even the specific industries. All had extensive experience advising and representing unions on what constitutes permissible and impermissible picketing. I chose these lawyers based on referrals from practitioners I know, with the goal of speaking to lawyers with experience in a range of industries in which these picketing issues arise. I prepared a single set of questions for all of them but then followed up on whatever observations each lawyer reported. Detailed contemporaneous notes of the interviews are in the author's possession.

75. The line between primary and secondary employers has been called "more nice than obvious" by the Supreme Court. *Int'l Union of Elec. Workers, Local 761 v. NLRB*, 366 U.S. 667, 674 (1961). Under some circumstances, an apparently secondary employer may be deemed to be an "ally" of the primary employer and therefore not protected by the prohibitions against secondary union activity. For an explanation of the "ally doctrine," see *THE DEVELOPING LABOR LAW*, 1901 (John E. Higgins, Jr. ed., 6th ed. 2012). For a debate between a board majority and a dissent on the proper application of the ally doctrine to determine whether the targets of picketing are truly neutral and therefore secondary, see *Service Emp.'s Int'l Union, Local 525*, 329 N.L.R.B. 638 (Aug. 27, 2010). The standard for "joint employment" under the NLRA is currently hotly contested. See *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015), *appeal filed, sub nom.*, *Browning-Ferris Indus., Inc. v. NLRB*, Case No. 16-1028 (D.C. Cir.). The Board's previous General Counsel approved numerous complaints naming the McDonald's franchisor together with various franchisees on a joint employer liability theory. See *NLRB Office of the General Counsel Issues Consolidated Complaints*, NLRB (Dec. 19, 2014), <http://www.NLRB.gov/news-outreach/news-story/NLRB-office-general-counsel-issues-consolidated-complaints-against> [<https://perma.cc/8XVF-WFDV>]. However, the current General Counsel recently settled those complaints, but without resolving the joint employer status of McDonald's. *Proposed Settlement Agreements Presented*, NLRB (Mar. 20, 2018), <https://www.NLRB.gov/news-outreach/news-story/proposed-settlement-agreements-presented-mcdonald%E2%80%99s-usa-llc-et-al> [<https://perma.cc/2PVK-DQVC>]. An administrative law judge subsequently rejected the settlement, in part because it does not address the liability of McDonald's as a joint employer. See Daniel Wiessner, *U.S. Labor Board Judge Rejects McDonald's Bid to Settle Franchisees' Case*, REUTERS (July 17, 2018), <https://www.reuters.com/article/us-mcdonalds-nlr/u-s-labor-board-judge-rejects-mcdonalds-bid-to-settle-franchisees-case-idUSKBN1K72LT> [<https://perma.cc/R6HM-W7N5>]. The House of Representatives recently passed a bill, H.R. 3441, that would, inter alia, legislatively overrule the Board's 2015 Browning-Ferris joint employer decision. See Cole Rosengren, *House Passes 'Save Local Business Act' to Reverse Joint Employer Standards*, WASTE DIVE (Nov. 8, 2017), <https://www.wastedive.com/news/house-passes-save-local-business-act-to-reverse-joint-employer-standards/510356/> [<https://perma.cc/6TMJ-85FL>]. The new chair of the NLRB has proposed rules to address the issue of joint employment. *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018).

being formulated and executed. They also have had to defend unions from NLRB charges brought to challenge activity as secondary. One referred me to a \$1.7 million court judgment against a union.⁷⁶

While in the experience of these lawyers, the Board cases concerning alleged Section 8(b)(4) violations are usually settled, the following are challenges that interview subjects raised: 1) that it is difficult and time consuming to train staff and members on what they can and cannot do in order to avoid sanctions, because the lines are complex and seem arbitrary; 2) that the current rules undermine the ability of the rank and file to act collectively, in part because the determination on whether conduct is unlawfully “confrontational” can depend, among other things, on the number of people engaging in the conduct at any time; 3) that Board investigators presume that secondary activity violates the ban on “confrontational” activity, even when the facts do not support that conclusion, so that considerable resources are used to defend such charges; and 4) that the rule that picketing is inherently coercive is out of date factually and legally and leads to legally inappropriate limitations on secondary activity.

Construction unions, in particular, are having to put considerable legal resources into defending activities that they believe are necessary to their campaigns, and the costs of getting the line wrong can be prohibitive. Some unions are choosing to abandon tactics that they believe to be protected, such as area standards picketing,⁷⁷ in order to avoid the risk of liability. Other unions, that might push the current limits of permissible activity and still engage in activities that they then must defend before the Board or in court, are having to invest in significant legal resources to receive detailed advice on such activities.

The lawyers reported several ways that unions’ protest activity is chilled by the existing rules and their lack of clarity in application. Some limit their activities to primary targets or to those activities, such as leafleting, billboards, and performances, that do not involve picketing or patrolling. More than one reported having to use videos to defend unions against false accusations.

Other chilling effects were reported. One lawyer conceded that a union he works with probably shies away from trying any activity that is close to the line that might cause damages. Thus, the union’s actions tend to be more symbolic. He found the restrictions to be time consuming and require the investment of considerable resources that make it harder for the union to succeed, particularly in protesting the use of non-union contractors. Another lawyer echoed the concern about losing damages suits and said that it is not worth it to risk such results. This lawyer also noted that there has been an increase in such actions in recent years.

76. *Fid. Interiors v. United Bhd. of Carpenters*, 675 F.3d 1250 (11th Cir. 2012).

77. Area standards picketing is picketing in which a union seeks to denounce labor practices that fall below area standards, generally set by union contracts. See *Area Standards Picketing Law and Legal Definition*, US LEGAL, <http://definitions.uslegal.com/a/area-standards-picketing> [<https://perma.cc/LZN8-STG7>] (last visited May 14, 2015).

The lawyers also reported prejudices against union protest in practice. One lawyer reported problems with Board investigators' presumptions when addressing secondary activity. For example, one of the lawyers interviewed asserted that some at the NLRB and in the courts appear to have the idea that pickets are used to block entrances, a proposition that they say is a "leftover" from an earlier time. Another lawyer, whose work is national in scope, complained that all picketing is inappropriately presumed to be "confrontational," and therefore coercive, and that as a result, anything that can be likened to picketing can be the subject of NLRB charges.

According to the lawyers I interviewed, the restrictions imposed in the latter half of the 20th century have real impacts on workers' ability to communicate with the public and on their own experience of solidarity. For example, one lawyer complained that employers try to limit the number of people involved in an activity, regardless of whether the employer can actually show intimidation. At the same time, as another lawyer pointed out, in a place like New York City, it often takes a lot to get the attention of passersby. Two people with leaflets get lost in the sea. The Board and courts do recognize that certain "attention-getting devices," like inflatable rats or drumming are not picketing.⁷⁸ But this lawyer complained that limits on the number of protestors undermines solidarity among the members. Another lawyer explained that if the union had the full range of what the lawyer considers First Amendment activities to use against secondary targets and did not have to worry about incurring legal sanction, its picketing would be more effective.

Moreover, the vagueness of the rules generates inconsistent approaches. Whereas one lawyer reported using bannerling and sound systems, as long as they were stationary, another reported that the unions they advise mostly use handbilling or mobile billboard trucks near a site, that they only occasionally use bannerling, and never use sound systems. One lawyer reported that the numbers of union members at an event was critical to not running afoul of the Board while another insisted that numbers of people involved in an event did not matter. Since these were all experienced and respected practitioners, it is fair to say that the confusion must derive, at least in part, from the lack of clarity in the rules as applied.

Noting that the statute does not actually refer to picketing directly, one lawyer described the law as "a series of traps for the unwary" and complained that uncertainty gets in the way of creativity. The confusing standard has become whether activity is too much like picketing. This confusion plays out in court. The lawyer pointed to the *Sheet Metal Workers* case, discussed above, in which two different federal appellate courts reached opposing decisions on the legality of the same

78. For decisions holding that use of stationary inflatable rats by unions is protected by the First Amendment, see, e.g., *Constr. & Gen. Laborers', Local Union No. 330 v. Grand Chute*, 834 F.3d 745 (7th Cir. 2016); *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2004); *Microtech Contracting Corp. v. Mason Tenders Dist. Council*, 55 F.Supp.3d 381 (E.D.N.Y. 2014); *New Jersey v. DeAngelo*, 197 N.J. 478 (2009). But see Tzvi Mackso-Landsberg, *Is a Giant Inflatable Rat an Unlawful Secondary Picket under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519 (2006).

activity, in that case, a mock funeral.⁷⁹ Like other lawyers interviewed, he noted that the line between permitted and prohibited can be as subtle as whether a sign is placed on a stick.

Some lawyers described simply using alternatives forms of protest to accomplish their goals. For example, one lawyer described campaigns that have relied on appeals to the public to contact elected officials, general contractors, and owners to protest the use of non-union labor and standards that undermined the local economy. That lawyer nevertheless saw a disadvantage in not being able to send a message by picketing and reported that problems most frequently arose with mass activity at a site. Another declared that while unions have had some success with non-picketing tools, such as negotiating agreements with those entities with actual control over labor relations, corporate campaigns, and outreach to elected officials, he believed that the restrictions on secondary protest activity are overbroad and prevent or punish unions for engaging in activities that others can engage in.

2. Implications of the Interviews

As this brief survey suggests, from the perspective of union lawyers, there are significant downsides to the NLRB drawing the line on labor protest short of “confrontation” or patrolling. On the one hand, if the union engages in labor protest, it faces the costs and risks of having to defend itself against claims of coercion that are purely theoretical and not based on the kind of threatening or violent behavior that the *Claiborne Hardware* Court held can and must be distinguished from peaceful picketing. On the other hand, when being cautious to avoid these costs and risks, the union’s ability to promote worker solidarity and its effectiveness are undermined by *per se* eliminating behavior that is “confrontational,” even though peaceful.⁸⁰ For example, the chilling effect of the current rule will cause a union not to use a more noticeable number of members in a protest, or not to use an effective sound system, or not to engage in area-standards picketing.

Finally, unions are chilled in engaging even in protected activity, because they cannot figure out where to draw the line between peaceful non-confrontational and peaceful but confrontational activities. The conflicting interpretations of current rules by experienced practitioners, for example, on the significance of the number of participants or the role of music, show that the Board’s current attempts to draw a line is hopelessly overbroad and vague.⁸¹ In *Claiborne Hardware, Milk Wagon*

79. Compare *Kentov v. Sheet Metal Workers’ Int’l Ass’n, Local 15*, 418 F.3d 1259 (11th Cir. 2005) (granting a temporary injunction against a union protest under Section 8(b)(4)), with *Sheet Metal Workers’ Int’l Ass’n., Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) (reversing Board finding of a union violation of Section 8(b)(4) for the same activity, though after full development of the record).

80. See *Crain & Inazu*, *supra* note 28, at 1836–37 (criticizing how labor law labels picketing as coercive because it is confrontational and arguing that the restrictions imposed on union protest undermine “the message of worker solidarity, persistence, and determination.”).

81. *Guza*, *supra* note 14, at 1305–11; *Rakoczy*, *supra* note 14, at 1636–37 (commenting prior to the Board’s decision in *Eliason & Knuth*).

Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.,⁸² and *Thornhill*, the Court distinguished between conduct that is peaceful and conduct that loses protection because of violence;⁸³ protesters and the public can make similar distinctions. That is not to say that people never differ over whether a particular comment or act is threatening of actual harm and crosses a line from protected to prohibited. But there is a long history of courts deciding whether conduct is sufficiently threatening or menacing to cross that line. In contrast, asking protesters not to be “confrontational” generates hopeless confusion.⁸⁴

Without being linked to avoidance of actual coercive behavior, the *Eliason & Knuth* standard of what makes activity coercive is not nearly as clear as it might appear at first.⁸⁵ Patrolling with signs in front of an entrance or exit is prohibited, but as we have seen from the mock funeral case, it is not at all clear at what point expressive movement converts from protected street theater to prohibited “patrolling.” If issues like whether the number of protesters matters and where to draw the numerical line confuse experienced lawyers, how are union members without a lawyer behind them supposed to know if their behavior is statutorily protected or illegal and subject to injunctions and damages? If, as some lawyers allege, uncertainty of the breadth of the rule prevents unions with fewer legal resources or greater risk aversion to simply abandon any permitted activity in order to avoid the potential negative legal consequences, the rule would seem to chill the effectiveness of the activity that the NLRA was intended to permit and to run afoul of the vagueness doctrine.

III.

RESPECTING THE FIRST AMENDMENT RIGHT OF LABOR TO PICKET

In these costs and barriers, and in the chilling of worker self-expression, we can see how the ban on secondary labor picketing violates core First Amendment principles. These experiences are symptomatic of the larger problem that the ban on secondary picketing and the rationales used to justify it are inconsistent with

82. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292–96 (1941).

83. *See supra* at notes 30, 31.

84. Michael Oswald offers a critique of the decisional law on whether employee or employer activity is coercive under federal labor law, arguing that the Board and courts should look at fear and control to determine if conduct is coercive. Michael M. Oswald, *The Content of Coercion*, 52 U.C. DAVIS L. REV. (forthcoming 2019). In the case of picketing, Oswald agrees that picketing should not be seen as *per se* coercive. *Id.* at 64. He argues that by examining the degree of control that the listener retains to determine if a picket is coercive, decisionmakers can rely on factual metrics. *Id.* This approach gives specific content to what a time, place, and manner analysis of a specific picket could look like to avoid the vagueness of the Board’s standard of whether the conduct is “confrontational,” and the confusion described by practitioners.

85. *See United Bhd. of Carpenters, Local 1506 (Eliason & Knuth)*, 355 N.L.R.B. 797, 802 (2010) (“The core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is . . . the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite. This element of confrontation has long been central to our conception of picketing for purposes of the Act’s prohibitions.”).

those principles. As set forth above, normally, as long as a group's self-expression, including picketing, does not coerce the people they confront through violence or convincing threats of imminent violence, the First Amendment protects that expression.⁸⁶ There is no basis for treating secondary labor picketing, a form of union self-expression, any differently from any other kind of picketing, whether the target is primary, secondary, or both (as in *Claiborne Hardware*). Like other forms of picketing, labor picketing is not inherently coercive of its audience, and any coercion by picketers should, under the First Amendment, be addressed through narrowly tailored restrictions.

As we have seen from the civil rights context, the First Amendment does not permit the government to ban or restrict picketing in support of a consumer boycott because of the economic harm that a successful picket might cause. That analysis, which began with *Thornhill*, should still apply with equal force to labor picketing. The various rationales that the Court invoked in the past to justify differential treatment of labor protest speech do not hold up under scrutiny. Without those rationales, differential treatment of labor picketing constitutes impermissible content and even viewpoint-based discrimination. Four years after the Supreme Court upheld the principle that public streets and sidewalks play a special historical role as places for the "exchange of ideas" that listeners would otherwise tune out,⁸⁷ unions should not be shy about arguing that the First Amendment applies with equal force to their sidewalk protests.⁸⁸

A. Coercion of Listeners

As Estlund argued following the *Safeco* and *Claiborne Hardware* decisions over thirty years ago, the exceptional treatment of labor picketing seems to confuse coercion of listeners, i.e., the public, with the potentially damaging, arguably coercive effect of consumer boycotts on their intended targets.⁸⁹ There is nothing about labor picketing that is inherently coercive toward listeners,⁹⁰ and the proper

86. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (reversal of conviction of KKK member under statute that purported to punish mere advocacy, not distinguished from incitement to imminent lawlessness, and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, as violative of First Amendment).

87. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

88. By invoking the *McCullen* decision, I do not endorse the Court's reading of the factual record in that case. In applying the First Amendment, factual context should matter in determining whether conduct is actually coercive. Promoters of the protective zone in the *McCullen* case pointed to a history of harassment of women seeking to exercise their constitutionally-guaranteed right to obtain abortions. See *McCullen v. Coakley*, 571 F.3d 167, 172 (2009) (describing legislative testimony on violence and unduly aggressive behavior toward vulnerable women seeking abortion services that informed the enactment of the state law at issue). Nothing in my argument for even-handed application of First Amendment principles is intended to suggest that when applying these First Amendment principles, courts should turn a blind eye to a record of actually coercive behavior, or to the power dynamics that determine when threatening conduct is actually coercive.

89. Estlund, *supra* note 14, at 952; see also Ganin, *supra* note 14, at 1574.

90. Estlund, *supra* note 14, at 952–53. Of course, labor picketing is a statutorily protected activity, demonstrating that the law does not regard labor picketing as inherently coercive or beyond the acceptable forms of persuasive expression. Since there is nothing about the conduct of secondary

First Amendment analysis concerning secondary labor picketing calling for a consumer boycott should focus on reasonable time, place, and manner restrictions of the picketing⁹¹ to prevent coercion and not on the impact or objectives of the consumer boycott.⁹² The Court's singling out of labor picketing as coercive of listeners is not content neutral and betrays an agenda that improperly favors business over labor.⁹³ Indeed, by specifying which objectives of picketing are unlawful, the Section 8(b)(4)(ii)(B) ban on secondary picketing constitutes a flagrant form of improper viewpoint discrimination.⁹⁴

Nor is the ban on secondary labor picketing rescued from First Amendment opprobrium by the distinction between speech and conduct. As an unintended result of Justice Douglas's concurrence in *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*,⁹⁵ the Court developed a "speech-plus" doctrine to justify regulating or even banning types of labor picketing, even peaceful picketing on the grounds that picketing involves both speech and conduct and that the conduct is subject to regulation. But that approach is applied uniquely to ban labor picketing, violating content neutrality.⁹⁶ And the speech-plus doctrine does not justify regulating, let alone banning, the speech elements of conduct that includes speech and nonspeech aspects.⁹⁷

labor picketing that is different, per se, from primary protected activity, it is hard to see why the former should be treated as inherently less worthy of constitutional protection than the latter. See Guza, *supra* note 14, at 1290; Ganin, *supra* note 14, at 1566.

91. Time, place, and manner restrictions are content-neutral and uniformly-applied restrictions that affect the impact on the general public of certain aspects of speech, see *Cox v. Louisiana*, 379 U.S. 536, 554–58 (1965) (governmental authorities have duty and responsibility to keep streets open), such as noise, see, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding sound restrictions for park events); or the placement of signs, see, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) ("The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest."). Crain and Inazu criticize judicial approaches to time, place, and manner restrictions, arguing that the exclusive consideration of the right to free speech without the right of assembly has led to restrictions that disregard the connection between expression and context and that incentivize unions to structure their protests as more like speech and less like conduct. Crain & Inazu, *supra*, note 28, at 1836–37. They argue that "the speech-based analysis of contemporary cases misses the connections that a protest involving large numbers of people may foster and the message that it communicates about worker solidarity, persistence, and determination." *Id.* at 1837. I agree that attention to the right of assembly could highlight the need to honor methods of expression in protests that are not purely verbal, but I would also argue that an analysis focused on freedom of speech should also honor those methods of expression when evaluating the legitimacy of time, place, and/or manner restrictions.

92. See Estlund, *supra* note 14, at 953; see also Ganin, *supra* note 14, at 1581; Rakoczy, *supra* note 14, at 1653.

93. See Estlund, *supra* note 14, at 960; Schneider, *supra* note 14, at 1469; see also Pope, *supra* note 14 (critiquing a First Amendment hierarchy that places commercial speech over labor speech).

94. Guza, *supra* note 14, at 1299–1305.

95. 315 U.S. 769, 776–77 (1942) (Douglas, J., concurring).

96. Ironically, in a recent decision reaffirming the need for exacting scrutiny of content-based distinctions, the Court, in dicta, cited approvingly to *Giboney* to demonstrate its ability to distinguish between speech and conduct. *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

97. Schneider, *supra* note 14, at 1494–95. See also Crain & Inazu, *supra*, note 28, at 1805–06

In *United States v. O'Brien*,⁹⁸ cited in both *Police Department of Chicago v. Mosley*⁹⁹ and *Claiborne Hardware*, the Court established the principle that under the First Amendment, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental limitations* of First Amendment freedoms.”¹⁰⁰ The Court further held that the governmental interest involved must be “unrelated to the suppression of free expression” and that the “incidental restriction” on First Amendment freedom must be “no greater than is essential to the furtherance of that interest.”¹⁰¹ Thus, the government must proceed with caution when curtailing the nonspeech aspects of expressive conduct. It is often exceedingly difficult, if not impossible to distinguish between speech and conduct, since all speech involves some element of conduct.¹⁰²

Many forms of speech have spatial or non-verbal aspects, including parades, marches, and theatrical performances.¹⁰³ Indeed, picketing can be seen as a form of street theater.¹⁰⁴ Anyone who has attended a pep rally for a sports event, or, for that matter, a political rally, knows that the call to action at these events is hardly a paradigm of Enlightenment reasoning. Yet, it is difficult to imagine government being permitted to restrict such events, beyond neutral time, place, and manner restrictions, to the degree that labor picketing has been limited by Congress and the Court, supposedly because of its appeal to something other than enlightened reasoning.¹⁰⁵ These other forms of collective expression on the streets or elsewhere that mix speech and “nonspeech” elements are not seen as inherently coercive even though they can be hateful and terrifying, including calls to violence.¹⁰⁶

(arguing that the distinction between speech and “speech plus” would not have been sustainable if the court had applied the freedom of assembly clause of the First Amendment instead of only the free speech clause, because “every assembly is ‘speech plus’”).

98. 391 U.S. 367 (1968).

99. 408 U.S. 92 (1972).

100. *O'Brien*, 391 U.S. at 376 (emphasis added).

101. *Id.* at 377.

102. See Eugene Volokh, *Speech as Conduct*, 90 CORNELL L. REV. 1277 (2005) (criticizing attempts at distinguishing between speech and conduct). See also Schneider, *supra* note 14, at 1489 n.131 (citing LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 599–601(1978)); *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning cases).

103. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (rejecting application of public accommodation anti-discrimination law to parade organizers’ exclusion of group from parade as violative of First Amendment); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (holding that an arrest, conviction, punishment for marching peacefully on sidewalk to publicize dissatisfaction with race discrimination infringed First Amendment rights, including rights of free speech and assembly).

104. As the D.C. Circuit held in *Sheet Metal Workers*, not all street theater is picketing. 491 F.3d 429, 432–33 (D.C. Cir. 2007).

105. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us [concerning a picket at a military funeral], we cannot react to that pain by punishing the speaker.”).

106. See, e.g., *id.* (overturning jury tort verdict against church picket of military funeral as violating First Amendment); *Virginia v. Black*, 538 U.S. 343 (2003) (reversing conviction for attempted cross burning with intent to intimidate because jury instruction stating that public cross

Nevertheless, under the case law, including even *DeBartolo II* and its progeny, only secondary labor picketing or anything too closely resembling it can be completely banned without violating the First Amendment.

The use of the “speech-plus” rationale to limit only labor picketing should not have survived *Claiborne Hardware*’s validation of peaceful picketing as a means of supporting a call for a consumer boycott. Indeed, the *Claiborne Hardware* case included allegations of violent and threatening conduct which, as the Court recognized, lacked First Amendment protection. But the Court insisted that the protesters only be held liable for the specific consequences of unprotected violent or threatening activity, so that the rest of the campaign, including picketing and boycotting, remained protected as First Amendment activity. There is no legitimate reason why that same analysis should not be applied to labor picketing.¹⁰⁷ The *Thornhill* and *Meadowmoor* decisions navigated that terrain by giving labor picketing wide berth unless and until it is enmeshed in a pattern of violence.

Similarly, there is no basis to presume that labor picketing is more prone to violence than non-labor picketing, as recent events in Charlottesville have borne out. Indeed, in *Mosley*, the defendants argued precisely the opposite, that whereas labor picketing had become relatively passive or even perfunctory,¹⁰⁸ civil rights picketing, the type later addressed in *Claiborne Hardware*, was more prone to violence.¹⁰⁹ The Court rejected any sort of presumption as to what kind of picketing might be more prone to violence and rejected any content-based distinctions among types of picketing. Thus, the Court’s own reasoning leaves no room for treating labor picketing less protectively under the First Amendment than other forms of picketing under the First Amendment or for presuming a need to deviate from the precedents set forth in *Thornhill* and *Meadowmoor* and in *Claiborne Hardware*’s insistence on only narrowly tailored responses to actual violence.

The Court’s recent abortion buffer zone decision in *McCullen v. Coakley*,¹¹⁰ set forth an approach to restrictions on expressive conduct in public spaces that

burning was prima facie evidence of intent to intimidate violated First Amendment); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (ordinance in cross-burning case stricken as facially unconstitutional under First Amendment because it imposes special prohibitions on speakers who express views on disfavored subjects, and includes viewpoint discrimination); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (imposing procedural safeguards with respect to review of injunction prohibiting Nazi march); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (reversal of conviction of KKK member under statute that purported to punish mere advocacy, not distinguished from incitement to imminent lawlessness, and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, as violative of First Amendment); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (reversing disorderly conduct conviction resulting from speech vigorously criticizing various political and racial groups).

107. As *Schneider* observed, the common law treated picketing as coercive because it was either violent or violence prone. *Schneider*, *supra* note 14, at 1491. As he also observed, if a union coerces participation in pickets by imposing unlawful sanctions on people who cross a picket line, the response that is consistent with the First Amendment would be to punish the unlawful sanctions and not ban the picketing. *Id.*

108. See JOE BURNS, *REVIVING THE STRIKE* (2011) (arguing that strikes have become too tame and law abiding).

109. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982).

110. 134 S. Ct. 2518 (2014).

unions should argue be applied equally to labor picketing.¹¹¹ That approach reinforced the point that any concerns about coercive conduct by picketers can and should be addressed through reasonable time, place, manner restrictions or on-site policing and not in blunderbuss prophylactic bans on expressive activity. In *McCullen*, the Court struck down a law creating a 35-foot buffer zone around the entrances of abortion clinics. In reaching its conclusion, the Court focused on the special historical role that public streets and sidewalks have played as “venues for the exchange of ideas.”¹¹² The Court extolled these public spaces as places where “a listener often encounters speech he might otherwise tune out.”¹¹³ Therefore, the Court subjected the buffer zones at issue to “First Amendment scrutiny” guided by the principle that the “‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content’ applies with full force in a traditional public forum.”¹¹⁴ The Court added that as “a general rule, in such a forum the government may not ‘selectively ... shield the public from some kinds of speech on the ground that they are more offensive than others.’”¹¹⁵

The Court nevertheless reiterated that “even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”¹¹⁶ However, “for a content-neutral time, place, or manner regulation to be narrowly tailored, it must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”¹¹⁷ “Such a regulation, unlike a content-based restriction of speech, ‘need not be the least restrictive or least intrusive means of’ serving the government’s interests.” But the government still “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”¹¹⁸

The Court’s analysis in *McCullen* should apply with equal force to regulation of labor picketing. The rule should not be content-based. It should be the same for all forms of picketing, and it should not burden picketing beyond what is necessary to prevent coercion of the public at the site. Section 8(b)(4)’s outright ban clearly would not pass this test.

For First Amendment purposes, there is no basis in precedent or logic for banning expressive conduct that does not present a “clear and present danger”¹¹⁹

111. The AFL-CIO submitted an amicus brief to the Supreme Court in *McCullen*, in support of the position that prevailed.

112. 134 S. Ct. at 2529.

113. *Id.* It is curious that the Court has been so concerned with the coercive potential of labor speech in public spaces, which are literally policed by the state to maintain order.

114. *Id.* (citing *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

115. *Id.* (citation omitted).

116. *Id.* (citations omitted).

117. *Id.* at 2535 (citation omitted).

118. *Id.* (citations omitted).

119. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

of inciting “imminent lawless action,”¹²⁰ simply because it might have a powerful impact on the listeners. Indeed, as noted above, the Court has even found hate-speech that risks inflicting significant emotional harm to be protected under the First Amendment.¹²¹

Prohibiting even “symbolic confrontation” simply cannot be squared with the First Amendment. Symbolic confrontation is by definition expressive, since the confrontation is reduced to a symbol and is not actual. There is an important expressive value in being able to confront consumers at the site of the dispute, that is, at the site where the union claims that its members are being harmed.¹²² It is far more expressive and effective to march together at the very site of the harm than to post stationary signs or engage only in handbilling. Marching together conveys solidarity and allows workers forcefully to express together feelings such as righteous anger or intense fear of grievous harm, and what the public does right at that spot either hurts or helps these workers.¹²³ Requiring those who are distributing handbills, holding banners, or engaging in street theater to place themselves

120. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *see also Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (finding that picketing conducted in a manner that threatened “imminent and aggravated danger” could “justify a statute narrowly drawn to cover the precise situation giving rise to the danger.”). The Court has identified “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Those limited categories of speech that can be banned without violating the First Amendment include “fighting words,” that is, “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 572. Other categories include “the lewd and obscene, the profane, and the libelous.” *Id.* For *Claiborne Hardware*’s discussion of *Chaplinsky* and *Brandenburg*, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–28 (1982).

121. *See supra* note 106. That said, none of the Supreme Court decisions protecting hate speech prohibit courts from imposing time, place, and manner restrictions to prevent violence. For example, nothing about the First Amendment prevented the police or the court ruling on the recent white supremacist marches in Charlottesville from prohibiting the marchers from carrying guns and other weapons or from separating the racist and anti-racist marchers to stave off bloodshed. *See Henry Graff, Judge Grants Injunction, Jason Kessler Can Have Unite the Right Rally at Emancipation Park*, NBC29 (Aug. 11, 2017, 11:36 AM), <http://www.nbc29.com/story/36115819/judge-grants-injunction-jason-kessler-can-have-unite-the-right-rally-at-emancipation-park> [<https://perma.cc/K8C3-FP45>].

122. *See Overstreet v. United Bhd. of Carpenters, Local 1506*, 409 F.3d 1199, 1211–12 (9th Cir. 2005) (acknowledging a First Amendment right to communicate views in the presence of individuals the speaker believes are engaging in immoral or hurtful behavior).

123. Both Estlund and Schneider took the Court to task for deriding labor picketing, “the workingman’s speech,” as involving merely an emotive appeal and therefore lacking full First Amendment protection. Both commentators attacked his notion, expressed in the *Safeco* concurrence, that labor picketing (apparently unlike the civil rights picketing addressed in his decision in *Claiborne Hardware*) involves merely “signaling” to its intended audience, who can then be expected to obey the signal in lock step. *See Estlund, supra* note 14, at 953–54; Schneider, *supra* note 14, at 1492; *see also Ganin, supra* note 14, at 1567; Hayes, *supra* note 14, at 138–39. Estlund correctly accused Justice Stevens’ position as betraying class bias. As she argued, with that characterization, Justice Stevens seemed to imply that labor picketing simply triggered class loyalties and such an appeal to class loyalties did not amount to rational discussion worthy of First Amendment protection. As she pointed out, that argument would apply to any speech appealing to deeply held shared beliefs, including most political speech and the picketing in *Claiborne Hardware*. Even if one could actually distinguish between the rational and the emotional, a dubious proposition, there is no basis in First Amendment law to deny protection to emotional appeals. Political speech, the most protected type

sufficiently far from the entrance and exit of the site so as not to seem “confrontational” undermines their ability to make their message heard by the people who are entering and exiting. Limiting the numbers of protesters to a number that will not seem “confrontational” similarly undermines the experience and message of solidarity.

Much of the Court’s desire to restrict labor picketing appears to be related to the spatial immediacy between the speakers and their audience. When one walks by a picket line, there may be a lot of angry people conveying a message that concerns the actions one is about to take, for example, patronizing a business. Emotions run high. Tempers may flare, and unpleasant heated exchanges may occur. But as in *Claiborne Hardware*, those aspects of a picket line have not caused the Court to remove constitutional protection in other contexts. Moreover, as the Court in *Claiborne Hardware* noted, for those who are arguing against the status quo, it is important to be able to engage in interactive speech, speech that is not disassociated from the place and time of the dispute. It would be disconcerting to say that we enjoy the right to free speech, but that such freedom is limited to spaces where the speech cannot be heard by the intended listeners, such as the ironically-labeled “free speech zones” or “protest zones” for anti-war protesters that came to being in the George W. Bush years.¹²⁴

The traditional “clear and present danger” test does not require making protest innocuous or irrelevant. To the contrary, while the clear and present danger test is intended to prevent actual violence or threat of imminent violence, in other words, conduct that is in fact coercive, it is also meant to ensure that conduct that is expressive, but not coercive, *is* protected by the First Amendment. As with all other protest speech, reasonable time, place, and manner restrictions should be sufficient to address concerns about actual coercion.

Of course, if the union’s confrontational message is not convincing, the call to boycott will not be honored and the union will look weak and ineffectual. That is the risk that the union undertakes with any picket, including those of secondary targets, just as with handbilling, bannering, street theater, or other forms of expression that are more stationary. That is how the First Amendment is supposed to work. Contrary to the notion that a union can simply signal or order the public to honor its demands, the union must try to persuade the public of the merit of its claims. Under the First Amendment, the union should have the same opportunity as others to try to persuade the public and should be able to use the tool of picketing to demonstrate its own worthiness, unity, numbers, and commitment.¹²⁵

of speech under the First Amendment, often appeals to emotion far more than reason. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (overturning disorderly conduct conviction for wearing jacket in courthouse with “Fuck the Draft” on it); *see also* *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning cases).

124. *See, e.g.*, Henry Graff, *Free Speech Under Fire: The ACLU Challenge To “Protest Zones”*, ACLU (2018), <https://www.aclu.org/fact-sheet/free-speech-under-fire-aclu-challenge-protest-zones> [<https://perma.cc/6ZVG-DA48>] (last visited Nov. 2, 2017).

125. *See* CHARLES TILLY, *SOCIAL MOVEMENTS, 1768–2004*, 3–5 (2004); Fisk & Rutter, *supra* note 20, at 316–20.

However, as discussed above, in *Safeco*, the Court seemed to be trying to make sure that secondary picketing should never be too effective. Even *DeBartolo II* seems to prefer handbilling over picketing precisely because it is less effective. This is in direct contravention of the Supreme Court's admonition in other cases that expression is no less protected because of its persuasiveness.¹²⁶ These decisions reinforce that picketing, by being more visible, by displaying solidarity, and by invoking labor traditions, can have an impact that handbilling, or even stationary bannering or street theater at a distance from the entrance or exit of a site, cannot have. The potential effectiveness of expressive conduct is not a legitimate First Amendment basis on which to ban it.¹²⁷ Except where the expressive conduct creates a clear and present danger of violence or physical intimidation, nothing in First Amendment jurisprudence allows the state to ban or even curtail expressive conduct simply because it inspires a strong public response.

Striking the prohibition on secondary labor picketing in support of a consumer boycott is necessary to bring the law governing such picketing in line with First Amendment law concerning picketing generally. It would end the content-based and viewpoint-based discrimination against labor picketing that currently poisons even the less restrictive recent approach to secondary labor protest. Labor picketing, like other forms of picketing would still be subject to limited policing to ensure that it does not become actually coercive.

B. Coercion of Targets

As we have seen, the Court has established the principle that the government can prohibit secondary labor picketing if that picketing seeks results that would violate public policy. In particular, the Court has permitted government to insulate certain targets from peaceful labor picketing, activity that would otherwise be protected by the First Amendment. However, once the Court held in *Claiborne Hardware* and implicitly in *DeBartolo II* that consumer boycotts are protected under the First Amendment, the potential harm of such boycotts cannot constitutionally serve as a basis to ban unions from picketing in support of such boycotts.

1. Unlawful Objectives

In the late 1940s and 1950s, the Court created the “unlawful objectives” doctrine to justify restrictions on labor picketing. Mark Schneider called this doctrine “the bastard descendent of the discredited theory of labor combination as criminal conspiracy,”¹²⁸ arguing that the Court created this doctrine to harmonize First Amendment analysis with the common law treatment of labor picketing.¹²⁹ The unlawful objectives doctrine originated in *Giboney v. Empire Storage & Ice*

126. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

127. See Schneider, *supra* note 14, at 1493–94; see also Fisk & Rutter, *supra* note 20, at 316–20; Guza, *supra* note 14, at 1288–89; Rakoczy, *supra* note 14, at 1639–40.

128. Schneider, *supra* note 14, at 1476–77.

129. *Id.* at 1477.

Co.,¹³⁰ a case in which the Court found picketing to be a constituent part of an illegal scheme in restraint of trade.¹³¹ The doctrine soon morphed into the principle articulated in *International Brotherhood of Teamsters, Local 695, AFL v. Vogt*,¹³² that the government has the authority to prohibit picketing that could yield results in conflict with what a legislature or court declare to be public policy. In *Safeco*, that principle was deployed to justify protection of supposedly neutral parties, simply because Congress had decided to protect those “neutrals.” That extension of the unlawful objectives doctrine eviscerated any First Amendment protection of protest activity, because a government could simply declare the objectives of the protest to be contrary to public policy.¹³³

After *Claiborne* and *DeBartolo II*, however, the Court cannot claim that secondary consumer boycotts are against public policy. Nor should calls for secondary consumer boycotts, whether by unions or any other group, be considered to have an unlawful objective. The issue left for us by *DeBartolo II* is the means deployed by a union in calling for a secondary boycott in light of the ban on secondary labor picketing. *Claiborne Hardware* concerned picketing in support of a secondary boycott, though not by labor. In *Carey v. Brown*,¹³⁴ the Court held that distinctions in regulation of picketing cannot be based on subject matter. Although both of these decisions contained language stating or implying that civil rights picketing warranted greater protection than labor picketing, a point addressed below, nevertheless, they undercut the claim that secondary boycotts *per se* can be deemed to have an unlawful objective and raise significant questions about denying to labor picketing the protections bestowed on civil rights picketing.

Harkening back to *Thornhill*, these decisions make it clear that the public is free to decide not to patronize a business in order to put pressure on another party and that unions, like other groups, have the First Amendment right to call on others to inflict economic harm on a chosen target to promote their ultimate objectives. Thus, the only question that should remain after *DeBartolo II* is whether the means of calling for the boycott are so coercive as to justify state intervention.

130. 336 U.S. 490 (1949).

131. There is a dangerous circularity to the Court’s reasoning even in *Giboney*. As pointed out above, *Giboney* itself is problematic in that the Court allowed the state to prohibit union activity as a restraint of trade and then labeled picketing to be an integral part of the illegal activity. The historical and legal relationship between antitrust and labor law is beyond the scope of this essay, but there is a history of a cat-and-mouse game between antitrust law and labor in which antitrust law has been invoked to limit or punish collective labor action against businesses. Estlund, *supra* note 14, at 940 n.13. See also Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA U. CHI. L. J. 696 (2016) (detailed critique of application of antitrust law to worker collective action).

132. *Int’l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284 (1957).

133. In contrast, the Court has issued countless decisions protecting civil rights street protests that used different methods, including calls to engage in activity that had been outlawed. Nevertheless, the Court cast a protective net over these activities, woven in large measure with the First Amendment. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Gregory v. City Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

134. *Carey v. Brown*, 447 U.S. 455 (1980). See *supra*, note 44.

2. Economic Regulation

a. Issues of Economic v. Public Concern

It seems clear that the unlawful objectives test represents the Court's efforts to find a way to justify different treatment for labor picketing in a manner that favors business over labor interests, a policy judgment that has no place in First Amendment jurisprudence. Nevertheless, the dicta concerning labor picketing in *Claiborne Hardware* and the holding and concurrences in *Safeco* demonstrate that the Court came to believe that labor picketing is not entitled to as much First Amendment protection because it raises issues of economic concern to the union and its members rather than the kinds of issues of political or public concern raised by civil rights picketing. This distinction is untenable as a matter of law and fact.¹³⁵

First, it is noteworthy that even where a union's secondary boycott was overtly political and not economic in its motivation or goals, the Court found no First Amendment violation in banning the boycott.¹³⁶ Thus, the Court's disparate

135. See Pope, *supra* note 14, at 232, 240–45 (“[B]y granting constitutional protection to some rights of economic expression, the Court has stepped onto a slippery slope toward constitutional protection for general rights of economic participation.”). See also *Snyder v. Phelps*, 562 U.S. 443, 444–45 (2011) (setting a low threshold for finding that picketing of military funerals was speech of public concern based on its content form and context). In *Harris v. Quinn*, 134 S. Ct. 2618, 2642–43 (2014), the Court struck down a state agency fee requirement for home health aides who were not members of the union but who were nevertheless represented by the union, finding that negotiations with the state over budget items, such as Medicaid costs to pay for home health aide services, was a matter of public concern warranting First Amendment protection. The Court recently reiterated that position in its *Janus* decision, 138 S. Ct. at 2474–77. In this author's view, the central error of the very flawed *Harris* and *Janus* decisions does not lie in the finding that the topics of bargaining between the state and the union are matters of public concern. A thorough critique of the reasoning of the decision in *Harris* and *Janus* is beyond the scope of this article. In general, I would challenge the premise that the plaintiff in those cases had a significant First Amendment interest in not paying for the services they received from the union. In the *Janus* case, the plaintiffs got around that argument by claiming that they believed they did not derive a benefit from the contract and that their belief cannot be second guessed. Brief for Petitioner at 51–52, *Janus v. AFSCME Council 31*, No. 16-1466 (U.S. Nov. 29, 2017). Even if that argument were valid, despite the significant material gains that the unions in that case indisputably accomplished for the plaintiffs and other bargaining unit members, I would argue that it would be entirely constitutional for a union to enter an agreement with a public employer that any non-member who wishes to enjoy the benefits of the contract, e.g., increased pay, health benefits, and retirement benefits, should pay a fee to do so. True ideological objectors could opt out but would have to put their money where their mouths were. I suspect that there would be very few objectors under those circumstances, demonstrating that the Court was right to identify the free rider problem, and not some profound First Amendment interest, as the central issue presented by agency fee objectors. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). See Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 874–89 (2014) (arguing, inter alia, that in the private sector, state “right-to-work” laws should not be permitted to allow bargaining unit members to have the benefit of representation without having to pay for it).

136. *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982). See Pope, *supra* note 14, at 225–27 (critiquing the Court's disparate treatment of expressly political speech in *Allied International*); see also Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685 (1985). While it is true that that case really involved a secondary work stoppage and not a secondary picket calling for a consumer boycott, the Court's analysis did not make much

treatment of labor picketing cannot be fully explained by labeling labor picketing as only economic.

Second, as Estlund argued over thirty years ago, “a labor dispute, like a charge of race discrimination, is clearly of interest to members of the public not directly involved.”¹³⁷ As she observed, the success of a union’s appeal to the public depends on the public’s interest and support. Moreover, as with race discrimination, “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.”¹³⁸

As the fast-food strikes and today’s public debates over socially acceptable minimum wages demonstrate, these specific disputes often implicate government policy, the most public of concerns under any view of the First Amendment.¹³⁹ At the same time, civil rights pickets often have a distinctly economic aspect, as they did in *Claiborne Hardware*.¹⁴⁰

To characterize wages and benefits as something other than issues of public concern completely eviscerates the identity of most of the public as workers. Ignoring that identity also ignores the political struggles that explicitly draw on the “We are the 99%!” meme of the Occupy movement. As commentators have noted,¹⁴¹ by narrowing the mandatory subjects of bargaining¹⁴² to exclude issues such as plant relocation that are of great public concern, courts and the Board have made labor and labor issues appear narrower than they, in fact, are.¹⁴³ But even mandatory subjects of bargaining raise issues of great public concern, whether they are labeled “economic,” “social,” or “political.”¹⁴⁴

of that distinction. Instead, the Court simply derided the union for using its “considerable powers” against a neutral party “in aid of a *random political objective*.” *Allied Int’l*, 456 U.S. at 225–26 (emphasis added).

137. Estlund, *supra* note 14, at 955. See also Hayes, *supra* note 14, at 139–40 (“[T]he view that union speech concerns only economic self-interest of the speaker betrays a fundamental misunderstanding of the significance of unions’ protests.”); Guza, *supra* note 14, at 1294–96 (arguing that secondary picketing raises larger socio-political issues, such as the fight for industrial democracy and that labor speech is political speech, akin to political appeals to the public to aid workers); Ganin, *supra* note 14, at 1569–72 (“[B]oth labor and non-labor boycotts may reflect a broader goal of redistributing economic benefits, whether to minorities or workers.”).

138. Estlund, *supra* note 14, at 955 n.91 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

139. *Id.* at 955 n.92 (discussing theories tying the First Amendment to democratic governance).

140. See Guza, *supra* note 14, at 1295.

141. BURNS, *supra* note 108.

142. See, e.g., *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); see also Estlund, *supra* note 14, at 956–57.

143. See Pope, *supra* note 14, at 238–39 (“[T]he fact that unions are to some extent narrow economic organizations is as much a result of the withdrawal of constitutional protection as a justification for that withdrawal.”). For a discussion of how the distinction between mandatory and permissive subjects of bargaining might affect consumer boycotts, see James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 956–60 (1991).

144. In light of the dicta on labor picketing in *Claiborne Hardware*, discussed *supra* Section II.A.1, it is worth noting that in *Carey v. Brown*, the Court did not state that labor picketing was

In numerous cases, the Court has recognized that labor pickets raise issues of great concern to the public.¹⁴⁵ Even the most seemingly narrow economic demands, like those concerning wages and benefits, affect living standards throughout the affected communities and affect labor standards throughout a sector.¹⁴⁶ And protests on these issues can have ripple effects. The protests demanding an increase in the minimum wage to \$15 in the fast-food industry have had a remarkably broad impact on the minimum wage for workers in many sectors in a number of jurisdictions.¹⁴⁷ We have also seen evidence of this broad impact in the demonstrations against Wal-Mart. These demonstrations contributed not only to increased wages for Wal-Mart employees themselves, but for other workers in similar stores as competitor retailers have also raised wages.¹⁴⁸ The public support for the struggles of fast-food workers and the minimum and living-wage debates they have inspired demonstrate the extremely public and political nature of the fights over what constitutes a minimally decent wage level.¹⁴⁹

We are currently witnessing public labor campaigns over other issues that could be the subjects of picketing as well, for example, the issue of fair work schedules.¹⁵⁰ Scheduling in a workplace may appear to be an issue of concern solely at a given workplace, but it raises issues concerning minimally-necessary weekly wages and also questions of the impact on workers' family lives, such as arranging child care or spending time with children or other relatives in need of care and attention.¹⁵¹ Of course, other possible subjects of labor picketing, such

entitled to less protection than civil rights protection. It simply noted that the issues raised by civil rights picketing were of the highest importance as matters of public concern. 447 U.S. 455, 446–67 (1980).

145. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). Even in *DeBartolo II*, the Court conceded that the issues addressed in the handbilling were of public concern. 485 U.S. 568, 575–576 (1988).

146. See Guza, *supra* note 14, at 1295 (“[T]o 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.”).

147. See, e.g., Kevin Brice-Lall, *Beyond \$15, An Interview with Jonathan Rosenblum*, JACOBIN (Sept. 28, 2017), <https://www.jacobinmag.com/2017/09/fight-for-15-seattle-unions-jonathan-rosenblum> [<https://perma.cc/T5PE-N2KH>] (discussing the impact of the Fight for \$15 campaign and its links to issues beyond pay raises, such as to tenant rights laws, income tax issues, and paid leave).

148. See Alison Griswold, *Target Employees Are Getting Raises*, SLATE (Mar. 18, 2015) http://www.slate.com/blogs/moneybox/2015/03/18/target_follows_walmart_raises_minimum_hourly_pay_to_9.html [<https://perma.cc/AA95-7RLQ?type=image>].

149. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 63–65 (2016).

150. See, e.g., *Restoring a Fair Work Week*, CTR. FOR POPULAR DEMOCRACY, <http://populardemocracy.org/campaign/restoring-fair-workweek> [<https://perma.cc/6M29-HG6L>] (last visited Mar. 29, 2018).

151. For a discussion of the ways that family leave to care for others implicates the equal protection rights of women, see *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 722 (2003).

as outsourcing¹⁵² and health and safety conditions,¹⁵³ speak to large social questions of corporate responsibility to communities with respect to community labor standards, community health impacts, and environmental degradation.¹⁵⁴

It is also worth noting that the civil rights issues raised by picketers in *Hughes v. Superior Court*¹⁵⁵ did not rescue them from the Court's retreat from protecting picketing decades before *Claiborne Hardware*. In that 1950 decision, the Court upheld the contempt conviction of picketers who were demanding that a store's employees be in racial proportion to its customers. Of course, that decision was issued before the civil rights movement gained national attention. The contrast between *Hughes* and *Claiborne Hardware* demonstrates how fickle and dependent on the impact of social movements the Court's First Amendment analysis of what is or is not of "public concern" can be. While it is important for courts to respond to the insights popularized by social movements, First Amendment protection should not depend on what is popularly recognized at any given time. Nevertheless, these inconsistencies in the Court's application of the First Amendment to different types of picketing reveal that the Court is profoundly influenced by political currents of the day.¹⁵⁶ Labor protest is currently riding a significant crest in public awareness, and labor should seize the opportunity to restore its right to picket.

152. See *Contra Costa County Teamsters Stop Outsourcing and Win Settlement Just in Time for the Holidays*, INT'L BHD. OF TEAMSTERS 856 (27 Feb. 2018), <http://teamsters856.org/news/contra-costa-county-teamsters-stop-outsourcing-and-win-settlement-just-in-time-for-the-holidays/> [<https://perma.cc/C77S-MZ2R>].

153. See Jim Hightower, *Oil Refinery Workers on Strike over Explosive Issue*, UNITED STEELWORKERS (April 21, 2015), <http://www.usw.org/blog/2015/oil-refinery-workers-on-strike-over-explosive-issue> [<https://perma.cc/HQ4L-CDWY>].

154. International labor campaigns, for example, frequently target brand names over labor abuses of suppliers. See, e.g., *Strategies*, INT'L LAB. RIGHTS FORUM, <https://www.laborrights.org/strategies> [<https://perma.cc/J9Q9-8ZKL>] (last visited Apr. 1, 2018); *Nationwide Day of Action against Abercrombie & Fitch!*, UNITED STUDENTS AGAINST SWEATSHOPS (Mar. 28, 2018), <http://usas.org/nationwide-day-of-action-against-abcrombie-fitch/> [<https://perma.cc/PK2G-MTJD>]. United States campaigns to improve health and safety conditions in Bangladesh after the Rana Plaza building collapse, for example, have focused on the brand-name retailers that sell the products produced in Bangladesh. See *Rana Plaza*, CLEAN CLOTHES CAMPAIGN, <http://www.clean-clothes.org/ranaplaza> [<https://perma.cc/R8AD-89S2>] (last visited Apr. 1, 2018). The strategy of going beyond the abusive manufacturer to the publicly-recognized end users (big name brands and retailers) to hold them accountable for the abuses by the businesses that create and supply their products demonstrates just how much a matter of public concern these secondary boycott campaigns are.

155. 339 U.S. 460 (1950).

156. It is probably no coincidence that *Thornhill* and related cases came out of a period when social movements and public policy were supporting unionization or that the march away from *Thornhill* toward *Vogt* occurred in a period of retrenchment against what elites saw as the excessive power of unions, the same retrenchment that included the enactment of the Taft-Hartley Act. See Pope, *supra* note 14, at 239–40 ("During the late 1940's and early 1950's, when excavation of the black hole [removing First Amendment from union speech] began, many observers feared that the labor movement was on the verge of becoming a dominant faction."). As Pope observed in the 1980s, "Under current conditions, however, those fears can only be described as paranoid." *Id.* at 240. But even if unions were to regain significant power, that would not justify curtailing their ability to appeal to the public for support.

b. Neutrality

Protection of neutral parties from economic harm is one of the principal substantive values that the Court has articulated when asserting its authority to ban secondary labor picketing.¹⁵⁷ Abandoning a core principle of *Thornhill*, from *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Café*,¹⁵⁸ to *Safeco*, the Court has repeatedly invoked the public policy of protecting supposedly neutral parties to defend deviating from its First Amendment approach in other contexts, such as civil rights picketing. Of course, in *Claiborne Hardware*, the Court held true to *Thornhill's* defense of the right to use speech to inflict economic harm, but only in the context of civil rights, not labor. But even if we accept for the sake of argument the Court's commitment to defending neutrals without regard to the content of the protest, it is simply indefensible to invoke this rationale to justify banning expressive conduct.

As the above discussion of the unlawful objectives doctrine and economic regulation demonstrates, people have a First Amendment right to call on the public to desist doing business with an enterprise and the public has the right to heed the call. Other than in the anomalous labor cases, there is no exception to the First Amendment that permits the state to ban any group from expressing its views on how the public as consumers should conduct themselves. Even if the state has the power to regulate some of the tools by which they inflict harm, banning unions' speech to the public is simply inconsistent with the content and viewpoint-neutrality requirements of the First Amendment. Of course, it is up to the union to convince the public that some supposedly neutral party deserves the boycott that the union seeks to have the public impose. But under the First Amendment, it is up to the public, not the government, to make that decision. Unions should have the right to share their views, even their anger, with the public and to let the public decide where it stands.

IV.

THE NEOLIBERAL TURN: FRIEND OR FOE?

In recent years, scholars have considered the impact of First Amendment decisions upholding corporate and commercial activity on arguments for labor's right to engage in secondary picketing.¹⁵⁹ Specifically, these commentators have looked primarily at two relatively recent Supreme Court decisions on the First

157. The issue of who is neutral is hotly contested. See *supra* note 75. As noted above, many non-union labor campaigns have targeted brand name companies and well-known retailers that they claim are profiting off of labor abuses in their supply chains. The NLRA itself contains a garment industry proviso partially acknowledging that, at least in that one industry, chains of production can be sufficiently integrated that different constituent parts are not "neutral" with respect to labor disputes. 29 U.S.C. § 158(e).

158. 315 U.S. 722, 725 (1942).

159. See Garden, *supra* note 14; see also Guza, *supra* note 14, and Tasic, *supra* note 14; Fisk & Rutter, *supra* note 20.

Amendment: *Citizens United v. FEC*¹⁶⁰ and *Sorrell v. IMS Health, Inc.*¹⁶¹ As set forth below, these scholars are correct as a matter of legal reasoning that these two decisions further aid arguments in support of the First Amendment right of unions to engage in secondary picketing. However, as argued above, reliance on these decisions is not necessary to make the First Amendment case for secondary labor picketing, and it poses a great risk because it is not in labor's best interest to endorse, let alone rely on, this neoliberal turn by the Court.¹⁶²

It is critical to the interests of labor and its constituents to preserve the distinction between social movement, including labor, speech on the one hand, and for-profit speech, on the other. Labor should not be treated as if it were simply another marketplace commodity. As set forth above, even the economic interests advanced by labor protest speech implicate concerns of social import that are inherently political. Recent labor campaigns highlight the role of labor protest in social justice movements. Unions should not advance arguments that would undermine the distinction between labor speech and commercial or corporate speech.

Moreover, there are compelling reasons for courts to allow commercial and corporate speech to be subjected to greater regulation that do not apply to labor protest speech. Commercial and corporate speech frequently involve power and knowledge differentials between speaker and audience that justify regulation. And the manner in which commercial and corporate speech seek to convince an audience differs starkly from that of protest speech in ways that justify state regulation that would otherwise be impermissible. These justifications for differential treatment of state regulation of commercial and corporate speech demonstrate why that regulation is vital to labor's own institutional interests and to the interests of its members and constituents.

A. *Speaker Identity and Citizens United*

In *Citizens United*, the Court struck down a ban on corporations and unions using general treasury funds for "electioneering communications" or speech that directly advocates the election or defeat of a candidate. The Court held that the ban violated the First Amendment through what it deemed to be an outright ban

160. 558 U.S. 310 (2010).

161. 564 U.S. 552 (2011).

162. I am using the term "neoliberal" in the senses described by David Harvey. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64 (2005) ("The legal framework is that of freely negotiated contractual obligations between juridical individuals in the marketplace. The sanctity of contracts and the individual right to freedom of action, expression, and choice must be protected."). See also Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 397 (2011).

on political speech.¹⁶³ In reaching this conclusion, the Court held that it was impermissible under the First Amendment to impose restrictions on certain disfavored speakers, including corporate speakers.¹⁶⁴

Under the Court's ruling, it is not legitimate to consider the identity of the speaker in determining what degree of First Amendment protection it receives: "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."¹⁶⁵ Thus, even though the speaker is an entity created by law and granted certain privileges by law, the First Amendment does not permit the state to impose restrictions on its political speech.

Commentators have argued that the *Citizen United* Court's application of speaker identity neutrality to for-profit corporations in striking down a law directed at both corporations and unions means that the Court would have to strike down restrictions on union political speech. If the Court treats union boycotts as speech, *Citizens United* would lead it to invalidate Section 8(b)(4), at least to the extent it prohibits political boycotts, notwithstanding its earlier holding on political boycotts.¹⁶⁶

Charlotte Garden has pointed out that the *Citizens United* decision "held that the fact that the goal of corporate political speech was profit did not detract from its level of First Amendment protection."¹⁶⁷ She has concluded that "if nothing except economic motivation distinguishes labor expression from other groups' expression, then surely it would violate *Citizens United* to continue to treat them differently."¹⁶⁸ In short, Garden sees *Citizens United* as undermining the First Amendment distinction between economic and political speech that seemed to underlie the treatment of labor picketing in *Safeco* and *Claiborne Hardware*.¹⁶⁹

Treating union picketing as less protected than that of civil rights or other protesters seems unsupportable under the First Amendment after *Citizens United*. Thus, *Citizens United* added a weapon to the unions' argument that after *Claiborne Hardware*, banning secondary labor picketing while finding secondary civil rights picketing to be protected by the First Amendment is content-based and even viewpoint-based discrimination. The unions can now argue that by discriminating not just on content but on speaker identity, the ban on secondary labor picketing violates the First Amendment. If the law cannot regulate corporate

163. 558 U.S. at 337.

164. *Id.* at 340–41.

165. *Id.* at 365.

166. *Int'l Longshoremen's Assoc. v. Allied Int'l, Inc.*, 456 U.S. 212 (1982). See Tasic, *supra* note 14, at 272; see also Guza, *supra* note 14, at 1302.

167. Garden, *supra* note 14 at 26–27.

168. *Id.* at 27.

169. Fisk and Rutter argue that *Citizens United*, *McCutcheon*, and *Sorrell* undermine the justifications for labor picketing restrictions offered in Justice Blackmun's concurrence in *Safeco* and the majority opinion in *Allied International*. Such justifications claim Congress had struck a "delicate balance," between union free expression and protection of neutrals. Fisk & Rutter, *supra* note 20, at 315–16.

speech more than that of other speakers, even if the motive is economic self-interest, the same should be true for unions, or so the argument goes.

B. Commercial Speech and Sorrell

The Court has never held union picketing to be commercial speech, even though it has suggested that the state can subject it to greater restriction than other protest activity under the First Amendment in order to engage in economic regulation.¹⁷⁰ Nevertheless, it is worth contrasting the Court's treatment of commercial and labor speech.

In *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, the Court held that commercial speech is not outside the protection of the First Amendment.¹⁷¹ In that case, the Court struck down a ban on advertising prescription drug prices. The Court framed the question before it as "whether speech which does 'no more than propose a commercial transaction,' . . . is so removed from any 'exposition of ideas,' . . . and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" that it lacks all [First Amendment] protection," which the Court concludes that "it is not."¹⁷² The Court reasoned that even assuming the advertiser's interest were "a purely economic one," that did not disqualify him from First Amendment protection.¹⁷³ In support of that assertion, the Court, citing labor cases including both *Swing* and *Thornhill*, noted that the "interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome."¹⁷⁴ The Court cited *Thornhill* for the proposition that the parties to a labor dispute do not have to broaden disputes to gain First Amendment protection.¹⁷⁵

Following *Virginia Pharmacy Board*, the Court established a framework for analyzing First Amendment challenges to restrictions on commercial speech that includes considering "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."¹⁷⁶ The Court established a kind of balancing test for commercial

170. *DeBartolo II* raised the possibility that union speech might sometimes constitute commercial speech but then also recognized that union speech typically raised issues of public importance. 485 U.S. 568, 576 (1988). For a critique of First Amendment commercial speech theories, see Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983); see also, David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049 (2004).

171. 425 U.S. 748, 770 (1976).

172. *Id.* at 762 (citations omitted).

173. *Id.*

174. *Id.*

175. *Id.* at 762-63.

176. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). The *Central Hudson* decision also appears to broaden the definition of commercial speech to "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. For a discussion of the variations in the Court's definition of commercial speech, see *City of Cincinnati v. Discovery*

speech, but one that requires that the regulation not be any more extensive than necessary.¹⁷⁷ In contrast, the First Amendment balancing test for labor picketing in *Vogt* imposed no such limits on regulation of labor picketing and neither does the outright ban on secondary picketing under Section 8(b)(4)(ii)(B) of the NLRA, as interpreted by the Court in *Safeco* and *DeBartolo II*.¹⁷⁸

The most critical recent decision applying the *Central Hudson* framework arrived in 2011, a year after *Citizens United*, and with it, the Court vastly expanded the protections available to commercial speech. In *Sorrell v. IMS Health, Inc.*, the Court struck down as violative of the First Amendment a state law banning the sale, distribution, and use of pharmacy data on physicians' prescription practices to data miners for pharmaceutical companies that wished to use such information in developing their marketing strategies.¹⁷⁹ The Court ruled that speech in aid of marketing was protected by the First Amendment and therefore, it subjected the state's ban to heightened scrutiny by the Court.¹⁸⁰ Applying that heightened scrutiny, the Court struck down the state ban.

In reaching its holding, the *Sorrell* Court found that the statutory prohibition at issue "burdens disfavored speech by disfavored speakers."¹⁸¹ Indeed, the Court found that the statute engaged in "viewpoint discrimination," highly disfavored under the First Amendment.¹⁸² Invoking the possibility of a state seeking to burden a demonstration which it opposes, the Court stated that the "First Amendment requires heightened scrutiny whenever the government creates "a regulation of speech because of disagreement with the message it conveys."¹⁸³ The Court concluded that "commercial speech is no exception" to this principle of protection of unpopular speech under the First Amendment.¹⁸⁴ This approach to protecting commercial speech contrasts to the balancing of interests in *Vogt*, endorsed in turn

Network, 507 U.S. 410, 422–23 (1993). In any event, the Court has applied a commercial speech analysis in contexts in which business interests, such as commercial advertising, commercial handbiling, and trademarks, are at stake. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629 (1985) (attorney advertising); *41 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (commercial advertising); *City of Cincinnati*, 507 U.S. at 412 (1993) (commercial handbiling); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (trademarks). Whatever definitional challenges may arise at the edges of the commercial speech doctrine, for example, where other constitutional interests are at stake, *see infra* notes 184–89 and accompanying text, my argument is both that there is a valid distinction between speech promoting commercial interests on the one hand and political/economic speech, including protest speech, on the other. In light of this distinction, labor unions' protest speech is clearly not commercial speech.

177. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

178. Of course, under *DeBartolo II*, the union is free to use handbiling to convey its message and under the court and Board decisions discussed above, it may use stationary bannerling and some street theater. But the availability of those options does not satisfy the test that the restriction be no more extensive than necessary to serve the state's interest, given that the state could regulate the time, place, and manner of picketing without completely banning it.

179. 131 S. Ct. 2653, 2659 (2011).

180. *Id.*

181. *Id.* at 2663.

182. *Id.* at 2663–64 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

183. *Id.* at 2664 (citations omitted).

184. *Id.*

by Justice Blackmun in *Safeco*. In those cases, the Court denied First Amendment protection to expressive activity precisely because the message was disfavored by the state.

In defending its application of heightened scrutiny to commercial speech, the *Sorrell* Court conceded that “restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.”¹⁸⁵ It also conceded that the First Amendment permits restrictions on “commerce or conduct” that impose “incidental burdens” on speech.¹⁸⁶ However, the Court held that the restrictions, even on sale of the information at issue in *Sorrell*, imposed much more than an incidental burden on speech.¹⁸⁷ The Court then held that it was the state’s “burden to justify its content-based law as consistent with the First Amendment.”¹⁸⁸ Thus, even in the context of commercial activity that includes speech, as almost all commercial activity must by necessity, the Court placed a heavy burden on the state to justify restrictions that are content based.¹⁸⁹ None of that solicitude for content-based, let alone viewpoint-based, discrimination appears in the Court’s rulings on labor picketing, even though the NLRA prohibits only secondary union picketing with a specified objective, a classic case of viewpoint discrimination.¹⁹⁰

One commentator has argued that *Citizens United* and *Sorrell* together should cause the Section 8(b)(4)(ii)(B) ban on secondary labor picketing to be stricken under the First Amendment.¹⁹¹ Under this argument, *Citizens United*’s speaker neutrality principle and *Sorrell* eliminate the traditional rationales for banning secondary labor pickets. First, these decisions limit the ability of courts to invoke the unlawful objectives doctrine to justify banning labor picketing. The *Sorrell* Court discarded the deference to public policy on which the unlawful objectives rationale depends.¹⁹² Rather, it subjected the state’s restriction to heightened scrutiny, rejecting its rationales, despite conceding at the outset that the state’s interests were significant.¹⁹³ The deference to congressional balancing rationale would fail under *Sorrell* for similar reasons.

Further, on this argument, the speech-conduct distinction was undermined by the speaker neutrality principle. Given that the Court has found picketing to be protected in various non-labor settings, for example in *Claiborne Hardware* and

185. *Id.*

186. *Id.* (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

187. *Id.* at 2665.

188. *Id.* at 2667.

189. In dissent, Justice Breyer argued that the law’s “effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise.” *Id.* at 2673 (Breyer, J. dissenting). He explained that, “[t]he First Amendment does not require courts to apply a special ‘heightened’ standard of review when reviewing such an effort.” *Id.*

190. See Hayes, *supra* note 14, at 134, 136–37; Guza, *supra* note 14, at 1302.

191. See Tasic, *supra* note 14, at 272. See also Fisk & Rutter, *supra* note 20, at 281 (applying similar arguments to the limitations on recognitional picketing).

192. Tasic, *supra* note 14, at 273 (citing *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 618 (1980) (Stevens, J., concurring)).

193. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558 (2011).

Snyder v. Phelps,¹⁹⁴ it is a violation of the neutrality principle to ban only labor picketing because it includes supposedly non-speech conduct. By protecting even the sale of data from state regulation because of its impact on speech, *Sorrell* implicitly rejected the speech-conduct distinction as a basis for upholding a sweeping ban on speech-related conduct. Indeed, the sale of data, while necessary for the purchasers to use it in their marketing, is not itself an expressive activity in the way that patrolling with signs is part and parcel of a union's self-expression.¹⁹⁵

In sum, as commentators have argued, *Citizens United* poses a significant challenge to Section 8(b)(4)(ii)(B)'s ban on secondary labor picketing and after *Sorrell*, it is difficult, if not impossible, for the government to justify the ban.

The Court's subsequent decision in *Reed* buttresses those arguments. In *Reed*, the Court struck down a town's different rules for different types of street signs, holding that because the distinctions among the signs were content based, they had to be subjected to strict scrutiny.¹⁹⁶ Since any distinction between commercial speech and other types of speech is based on content, even though not necessarily on viewpoint, *Reed* casts into doubt any less protective treatment of commercial speech, or for that matter, union speech. Not only can legislatures not consider the identity of the speaker, but if applied strictly,¹⁹⁷ they cannot even consider the

194. 562 U.S. 433, 458 (2011).

195. See Tasic, *supra* note 14, at 275 (citing *NLRB v. Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (Black, J., concurring)).

196. 135 S. Ct. 2218, 2227 (2015). This term, the Court invoked *Reed* in holding that the First Amendment invalidated a state law requiring licensed pregnancy-related clinics to disseminate a government-prescribed notice informing the reader of publicly-funded family-planning services, including contraception and abortion, and requiring unlicensed clinics to disclose that they are not licensed to provide medical services. *Nat'l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018). Citing *Reed*, the Court reiterated that laws that make content-based distinctions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2371 (quoting *Reed*, 135 S. Ct. at 2226). The Court rejected a broad exception to this rule for regulation of professional speech, acknowledging only two circumstances in which it had permitted less protection against compelled speech in regulating professional activity: 1) some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech"; and 2) laws that "may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. However, the Court held that neither of these exceptions applied to the law requiring that licensed clinics provide prescribed information about other services. *Id.* The Court also held that the disclosure requirement for unlicensed clinics was unduly burdensome. *Id.* at 2377.

197. Some lower courts have been reluctant to apply *Reed* in all contexts. See, e.g., *United States v. Swisher*, 811 F.3d 299, 311–14 (2016) (discussing *Reed* and exceptions to it); *Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 155 F. Supp.3d 843 (N.D. Ind. 2016) (declining to enjoin public transit system's refusal to display organization's public service announcement); *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (declining to apply strict scrutiny to strike down zoning law concerning sexually-oriented entertainment, noting "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection."); *But see Free Speech Coalition, Inc. v. Attorney Gen.*, 825 F.3d 149, 173 (3d Cir. 2016) (applying strict scrutiny under *Reed* to statutory recordkeeping, labeling, and inspection requirements for producers of visual depictions of sexually explicit conduct); *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1173 (2016) (enjoining local anti-panhandling ordinance under *Reed*); *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015) (striking down anti-robocall statute under *Reed*); *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-

general subject matter of the speech, except under the most narrowly tailored circumstances meeting a compelling government interest.¹⁹⁸ Even *Mosley* and *Carey* did not go that far in wiping out any distinction among types of speech. Thus, in light of *Claiborne Hardware*, as well as the other picketing and boycott cases, such as *Snyder v. Phelps*, Section 8(b)(4)(ii)(B)'s ban on secondary picketing cannot survive strict scrutiny. *Claiborne Hardware*'s appeal to economic regulation in dicta distinguishing labor picketing from civil rights picketing could not survive *Reed*'s application of strict scrutiny. Although it saw its hands as tied, the district court in *520 South Michigan Associates* was correct in acknowledging at least that *Reed* poses a significant threat to Section 8(b)(4)(ii)(B).

C. The Error of Relying on the Neoliberal Turn

Advocates for labor's constitutional right to picket are correct to argue that the recent First Amendment decisions favoring corporate and commercial speech further undermine any argument seeking to justify the Section 8(b)(4)(ii)(B) ban on secondary labor picketing in support of consumer boycotts. It is fair enough to say that what is good for the goose, in this case, corporate and/or commercial speech, is good for the gander, *i.e.*, labor speech. However, it would be a strategic error for labor to rely on these decisions in seeking to strike that ban under the First Amendment. Although the distinction between political and economic speech cannot be sustained, the First Amendment distinction between social movement, including labor, speech on the one hand and profit-motivated speech

1219-T-23AAS2016, WL 4162882, at *1 (M.D. Fla. 2016) (reluctantly enjoining rule against solicitation of donations or payments because of *Reed*). Last term, in *Matal v. Tam*, 137 S. Ct. 1733 (2017), the Court, citing *Sorrell* and *Central Hudson*, as well as protest speech cases, struck down as facially violative of the First Amendment a provision of the trademark law that prohibits registration of disparaging marks. *Id.* at 1751. The Court did not rely on *Reed*.

198. The full implications of the recent *NIFLA* decision applying *Reed* remain unclear. It is possible to read *NIFLA* as reflecting the conservative majority's solicitude for the speech of opponents of abortion (which would, ironically, constitute a viewpoint preference). It is also possible to see the decision as pertaining specifically to compelled speech. But the Court's rationale goes well beyond those parameters and poses a serious threat to commonplace disclosure laws, notwithstanding the Court's claim to the contrary. *NIFLA*, 138 S. Ct. at 2376. *But see id.* at 2380 (Breyer, J., dissenting) ("Virtually every disclosure law could be considered 'content based,' for virtually every disclosure law requires individuals 'to speak a particular message.'" (citing *Reed*, 135 S. Ct. at 2218)). On the one hand, the *NIFLA* decision does distinguish cases involving specific types of compelled speech in a commercial context in which more deferential review is applied to laws compelling speech. *See, e.g., NIFLA*, 138 S. Ct. at 2372–73. However, at the same time, it applies a very constrained reading of those precedents. *See id.* at 2381–83 (criticizing the Court's treatment of precedents concerning compelled speech and its use of heightened scrutiny to economic and social legislation). Moreover, its interpretation of the concept of "noncontroversial" allows the courts wide discretion in striking down laws they do not like. For example, the decision treats as "controversial" information concerning the existence of abortion services. The fact that these services exist is unquestionably noncontroversial. The controversy would be whether to disclose that information to the public. Thus, this decision may be giving the judiciary wide discretion to decide what straightforward information is too controversial to be protected. *See infra* notes 216–222 and accompanying text. It is not clear whether or how that standard is applicable outside of the compelled speech context. *See infra* notes 210 and 223.

on the other can and should be sustained and breaking down that distinction has undesirable consequences for the labor movement and its constituents.

Unions should resist the temptation to invoke or rely on the Court's recent neoliberal First Amendment decisions for several reasons. First, the distinction between commercial and corporate speech on the one hand and other forms of political and economic speech, including labor protest, on the other hand, is a valid distinction. Unions should seek to have courts recognize that labor is not simply a marketplace commodity or factor of production and that labor speech, in particular, protest speech, is grounded in concerns and needs that are inherently political and linked to wider social issues than making a buck on a sale. Second, the features that distinguish commercial and corporate speech from other forms of speech, including labor protest, demonstrate why there are compelling societal interests, rooted in knowledge and power differentials, in regulating commercial and corporate speech that do not apply to other kinds of speech. Unions should advance those compelling interests and defend the state's regulatory authority, both to protect the state's ability to regulate labor relations and to defend regulatory systems that protect unions' members and broader constituencies. Finally, as I have already argued, labor has other solid arguments to challenge these restrictions and does not need to rely on the Court's neoliberal turn to establish solid First Amendment grounds to strike the ban on secondary labor picketing.

1. Commercial and Corporate Speech Are Different from Labor Speech and Should Be More Subject to Regulation.

There is an essential difference between speech that proposes a commercial transaction in the marketplace and speech that defies market logic by insisting that human labor not be treated simply as a commodity.¹⁹⁹ Nevertheless, in justifying the need to protect commercial speech, the Court collapses critical differences between labor and commercial speech. In *Virginia Pharmacy Board*, the Court tried to build on *Thornhill* to arrive at a justification for protecting commercial speech. The Court quoted *Thornhill*'s observation that a labor dispute in one factory might have widespread economic repercussions to make the point that the same may be

199. See 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce."). See also Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 948 (2011); Estlund, *supra* note 14, at 958. That is not to say either that the definition of commercial speech will always be clear in application, see Shiffrin, *supra* note 170, at 1212, or that commercial speech can never implicate other critical public concerns, such as freedom of the press or access to constitutionally-protected services. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 264 (1964) (setting forth heightened First Amendment standard for defamation claims against publisher of advertisement); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (striking down Virginia statute prohibiting advertising availability of out-of-state abortion services on First Amendment grounds, noting that "the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia."). But those instances of commercial speech should be protected on the basis of those public concerns, concerns which are distinct from giving or getting the best value when selling or purchasing commercial goods or services.

true of advertising for a single factory. But the Court's analogy leaves something to be desired. While it is true that commercial speech, including advertising, can have ramifications for the economy that go well beyond a particular business, that is where the comparison ends. In any given case, there may be reasons why restrictions on commercial speech should be stricken in the interests of consumers in a marketplace of goods and services, but those market values still differ from the non-market and even anti-market values of labor protest speech, even though the protest speech addresses issues of economic concern, because labor protest is grounded in the assertion that labor is not a commodity.

A union might at times use market logic as part of an appeal to the public. It may, for example, argue to the public that in using non-union labor, an employer is compromising the quality of the goods or services it produces, perhaps even putting the consumers at risk. We have seen examples in some of the cases discussed above, such as the mock funeral and accompanying banners in *Sheet Metal Workers*. However, the union's underlying appeal to the public is most often grounded in a challenge to the logic of the market, that is, the logic of commerce. The union is asking for the public to stand in solidarity with the workers, in solidarity with values other than pure markets concerns. In making their demands, union members, like other protesting workers, are asserting their humanity and challenging the notion that they and their labor are simply commodities or factors of production. That appeal is inherently political.

A commercial advertisement might cleverly deploy some political sentiment,²⁰⁰ but, in general, the purpose is completely different from that of labor speech and it is not purposefully political. It is intended to convince people to engage in business transactions in order for the company that is advertising its products to make money according to the logic of the market.²⁰¹ Government intervention against calls for labor solidarity therefore implicates First Amendment interests of the highest rung, whereas intervention to protect consumers or otherwise regulate the market simply does not.

Moreover, as Piety has argued, to the extent that *Citizens United* and its progeny are based on the claim of corporate personhood, they rest on a false metaphor.²⁰² For-profit corporations are not people, nor are they voluntary associations

200. See, e.g., Coca-Cola, *I'd Like to Teach the World to Sing (In Perfect Harmony)*, YOUTUBE, <https://www.youtube.com/watch?v=ib-Qiyklq-Q> (last visited Jan. 30, 2017) (reproducing 1970s Coca-Cola advertisement adapting song about social harmony).

201. See, e.g., Sarah Banet-Weiser, *Nike, Colin Kaepernick, and the history of "commodity activism"*, VOX (Sept. 7, 2018, 12:30 PM), <https://www.vox.com/first-person/2018/9/7/17831334/nike-colin-kaepernick-ad> [<https://perma.cc/7YYQ-9HE4>] (critiquing Nike's commodifying of politics); Brian Lewis, *Absurd and Offensive – The Strategy Behind Benetton's Marketing Campaign*, ISENBERG MARKETING (Nov. 18, 2013), <https://isenbergmarketing.wordpress.com/2013/11/18/absurd-and-offensive-the-strategy-behind-benettons-marketing-campaign-by-brian-lewis/> [<https://perma.cc/M6FH-6JHV>] (critiquing Benetton's strategy of using political topics in its advertisements).

202. Piety, *Why Personhood Matters*, *supra* note 25. I would generally distinguish here between for-profit and not-for-profit corporations, unless the not-for-profit is functionally controlled by a for-profit entity. Regulation of the speech of not-for-profit corporations that are independent of for-profit corporations implicates the same First Amendment interests as regulation of the speech of

of people, unlike unions.²⁰³ Corporations are not simply associations that have “taken on the corporate form.”²⁰⁴ They are legal fictions established by the state to facilitate profit-seeking investment and commercial transactions without exposure to a wide range of types of liability. Investors, therefore, have protections, but they do not normally have meaningful voice.²⁰⁵ They do not speak through the corporation, unlike picketing workers who have chosen to join the union and who are expressing their collective position through picketing.²⁰⁶ Therefore, corporations cannot claim the same interest in speaker dignity and freedom that unions can justifiably invoke in challenging restrictions on their ability to express the will of their leaders and members by picketing.

Garden has argued that even after *Citizens United*, there are still ways to distinguish between commercial speech, that is, speech that “does no more than propose a commercial transaction,” and other types of speech. Even without being able to consider speaker identity or motive, it does not foreclose considering certain categories of speech or structural issues. In particular, she noted the *Citizens United* Court’s emphasis on the interest of listeners in being able to receive information. For example, she contrasted union speech that seeks public support for a boycott with Wal-Mart’s private communications with suppliers to get them to lower their prices.²⁰⁷ But *Sorrell* deploys the interests of the listeners in support of activity that is commercial, even when that activity is at least one step away from speech, such as the sale of data to marketers who are seeking to use that data themselves and not disseminate it to the public, and where the information at issue was being sought for entirely private profit-seeking purposes. And as Piety has argued, *Citizens United* and *Sorrell* represent a shift from solicitude for commercial listeners to solicitude for commercial speakers.²⁰⁸

other voluntary civil society organizations.

203. See Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015). Estlund explores whether and to what extent the state-conferred special status that unions enjoy as the exclusive bargaining representatives of workers in a bargaining unit affects the First Amendment rights of unions and workers, including whether the union’s ability to discipline members who cross picket lines raises any First Amendment concerns. She concludes that nothing in a union’s state-conferred status justifies the sweeping limitations Congress placed on a union’s right to picket. *Id.* at 225–28.

204. *Citizens United v. FEC*, 558 U.S. 310, 349 (2010).

205. Piety, *Why Personhood Matters*, *supra* note 25, at 372–78; Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOY. L.A. L. REV. 181, 198–99 (2007). See also Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 COLUM. L. REV. 800 (2012) (detailing the asymmetry between opt-out rights of union members and those of corporate shareholders and arguing that corporate rules should be changed to create greater symmetry).

206. Estlund, *supra* note 203, at 225 n.277 and accompanying text. With respect to peaceful labor picketing, Estlund concludes that a union’s use of discipline to enforce picket-line solidarity among its members should be a matter between the union and its members, arguing that once union membership could no longer be made a condition of employment, a worker’s decision to join a union fairly subjects the worker to collective discipline.

207. Garden, *supra* note 14, at 26–30.

208. See Piety, *‘A Necessary Cost of Freedom?’*, *supra* note 25. Ironically, these later com-

Moreover, as we have seen from decisions excluding labor picketing from the First Amendment protections accorded to other picketers, there is no guarantee of logical consistency in the Court's treatment of labor unions or the equality principle articulated in *Citizens United*.²⁰⁹ *Citizens United* and *Sorrell*, particularly when combined with *Reed*'s expansive application of strict scrutiny to any content-based distinctions, for example, to distinctions between commercial and other types of speech, signal that the Court has been moving toward using the First Amendment to vastly expand protections against regulation for profit-driven commercial activity, against the interests of potential listeners.²¹⁰ It would be unduly optimistic to predict that the Court will draw the line using the principle that Garden has articulated.

2. Regulation of Commercial and Corporate Speech Serves Compelling Societal Interests that Unions Should Defend.

The distinction between the speech of for-profit corporations and commercial speech on the one hand, and other speech, whether about economic interests or other issues of public concern, on the other hand, is critical to defending governmental regulation that unions rely on and call for.²¹¹ As Estlund warned long before *Sorrell*, the Court's use of the First Amendment to justify a creeping solicitude for commercial activity echoes its deployment of substantive due process to strike labor standards legislation under *Lochner*.²¹² Protecting even the sale of

mercial speech decisions cast for-profit corporations and commercial speakers generally as disfavored groups requiring protection from the suppression of their speech. See WEINRIB, *supra* note 26 (critically detailing the judiciary's historical use of the Bill of Rights to protect commercial interests against regulation and against labor). In striking down a law that merely requires the provision of uncontroverted facts about the availability of health services to consumers, the *NIFLA* decision highlights the shift that Piety criticizes. In that decision, the Court found that requiring the provision of such information to the public was too "controversial" for the speaker to fall within an exception allowing certain limited types of regulation of professional speech. Thus, the state's concern to ensure that the public be informed of straightforward information about the availability of services was outweighed by the speaker's preference not to provide that information. 138 S. Ct. at 2372.

209. For a recent example, see *Harris v. Quinn*, 134 S. Ct. 2618, 2641 (2014) (chiding a public employee union for using campaign donations to influence public policy, in sharp contrast to *Citizens United*'s treatment of corporate spending on elections with a profit motive).

210. The Supreme Court's recent *NIFLA* decision is not encouraging. In deploying the First Amendment to limit consumer access to uncontroverted factual information about available services and the regulatory status of certain service providers, the Court displayed a deregulatory propensity and a solicitude for views it wishes to protect over consumer interests. Further, in limiting compelled speech requirements to "noncontroversial" communications, the Court granted potentially broad and highly discretionary deregulatory powers to the courts under the First Amendment. See *supra* note 196.

211. See Piety, *Citizens United and the Threat to the Regulatory State*, *supra* note 25.

212. Estlund, *supra* note 14, at 960. See also Shanor, *supra* note 25 (characterizing the use of the First Amendment for deregulatory purposes as "the new *Lochner*"). Justice Kagan's dissent in *Janus* echoed this warning. 138 S. Ct. at 2501 ("And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."). In her dissent in *Janus*, Justice Sotomayor declared that although she joined the majority in *Sorrell*, she disagrees with how that decision has been applied. *Janus*, 138 S. Ct. at 2487 ("Having seen the troubling development in First Amendment jurisprudence over the years,

information for purely commercial purposes from regulation, as in *Sorrell*, questions the foundation of a regulatory state that unions have relied on since at least the New Deal.²¹³

Citizens United and *Sorrell*'s invocation of the need to protect disfavored speech²¹⁴ misuses the counter-majoritarian principles behind First Amendment jurisprudence. Democratic control of market transactions, including those by powerful corporate interests, cannot reasonably be compared to protests by disfavored groups.²¹⁵ There are compelling reasons to protect the exercise of democratic control over the marketplace which do not apply to regulation of protest speech.

Unions might want to be wary of relying too much on the *Citizens United*, *Sorrell* line of cases since, taken to their logical conclusion, they might provide a basis for invalidating the laws protecting the existence of labor unions.²¹⁶ The Supreme Court has commented that Section 8(c) of the NLRA,²¹⁷ protecting employer speech that does not threaten or promise benefit, implements employers' First Amendment right to communicate with their employees.²¹⁸ Commentators have criticized this rule and the Board and the courts' application of it for permitting inherently coercive employer speech, particularly with regard to union organizing campaigns.²¹⁹ But even the insufficiently protective and confusing Board rules that currently restrict employer speech to a limited degree depend on an analysis of what behavior is coercive in the context of the workplace that could not be applied to political speech outside the workplace. The Board's analysis of coercion assumes that the state has a right to regulate employer speech differently from other kinds of speech because of the risk of coercion that derives from the employer-employee relationship. For example, even under today's inadequate rules,

both in this Court and in lower courts, I agree fully . . . that *Sorrell*—in the way it has been read by this Court—has allowed courts to “wiel[d] the First Amendment in . . . an aggressive way.” (Sotomayor, J., dissenting) (citing *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting)).

213. Garden has noted that *Citizens United* threatens the basis of antitrust law. Garden, *supra* note 14, at 27.

214. See also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (“If the First Amendment protects flag burning, funeral protests, and Nazi parades – despite the profound offense such spectacles cause – it surely protects political campaign speech despite popular opposition.”).

215. See Piety, *Why Personhood Matters*, *supra* note 25; Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, *supra* note 205.

216. See, e.g., *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956–60 (D.C. Cir. 2013) (striking down NLRB rule requiring employers to post notice of National Labor Relations Act rights, citing, inter alia, *Sorrell* for the proposition that the right to disseminate messages is as protected as the right to create them, and concluding that the right not to disseminate messages is equally protected), *overruled by Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

217. 29 U.S.C. §158(c) (protecting the expression or dissemination of employers' and unions' views, arguments, or opinions as long as there is no threat of reprisal or force or promise of benefit, in other words, as long as the speech is not regarded as coercive in the context of the workplace).

218. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

219. See, e.g., Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); see also Story, *supra* note 28.

employers cannot threaten to close down a worksite if a union wins a representation election.²²⁰ In contrast, a political candidate or protester could threaten economic reprisals against opponents with constitutional impunity. That commonsense distinction between employer speech and other kinds of speech is threatened by the neoliberal approach of the Court in *Citizens United* and *Sorrell*. That approach seeks to deny the constitutional validity of distinctions based on actual situational power.²²¹

As significant, the prospects for obtaining more protective rules concerning employer speech within the Act's limitations or by legislative amendment would be seriously undermined by an interpretation of the First Amendment that rejects the constitutional validity of distinctions between speakers based on differences in power.²²² It is precisely the sort of contextual distinction between employer statements at the workplace and other speech that Board critics have articulated. Even Craig Becker's judicious proposal simply to treat employers as non-parties to elections and thereby to deny them special access to workers during representation election campaigns would face a threat from the Court's neoliberal turn. Becker's proposal would curtail some speech rights that an employer normally enjoys at the workplace, and the curtailment would be based on the subject matter of the speech. For example, Becker's proposal would require distinguishing between permissible and impermissible captive-audience meetings based on their subject matter, such as mandatory health and safety meetings versus anti-union meetings. Under *Citizens United*, *Sorrell*, and *Reed*, a distinction based on the identity of the speaker, the commercial interests promoted in the speech, or the subject matter of the speech could be subjected to strict scrutiny.²²³ The need to insulate employees from the inherently coercive context of employer speech at the workplace might very well not be sufficient to justify the distinction constitutionally. Under the neoliberal approach, a type of formal equality among speech acts prevails, rejecting consideration of the impact of property rights and resulting situational power when determining whether or not speech is coercive and thus whether or not it is entitled to protection. In short, the Court's neoliberal turn poses a direct threat to enhanced regulation of union elections to address speech that is actually coercive because of power relations in that context.

220. *Gissel*, 395 U.S. at 618–19 (citations omitted). Of course, the distinction between an impermissible threat and a general economic prediction can be the subject of dispute.

221. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 349–51 (2010) (holding the arguably distorted influence of corporate spending on elections to be an illegitimate basis to enact spending restrictions on corporations).

222. *See Becker, supra* note 219; *Story, supra* note 28, at 390–400 (relying explicitly on the commercial speech doctrine to argue that employer speech is entitled to less protection than other types of speech).

223. The Court's recent *NIFLA* decision does not bode well for regulation of employer speech either. The decision's insistence that only "noncontroversial" professional speech can be regulated for content, 138 S. Ct. at 2372, suggests that the Court may be unlikely to permit regulation of employer speech in labor disputes, which, by definition involve controversy.

At the same time, the distinction between commercial and other kinds of speech is critical to protecting unions' members and other constituents as consumers. As Piety argues, distinguishing between commercial and other types of speech serves valid public interests, particularly for consumers.²²⁴ From the point of view of the listener, usually the consumer, there are valid First Amendment reasons to treat commercial speech differently from other speech, including protest speech, regardless of whether the protest is political, economic, or some mix of the two, as in *Claiborne Hardware*. Commercial or profit motives create incentives to mislead, and corporate resources create the means to do so effectively in a systemic way that is simply not analogous to any group of people engaged in protest activity.²²⁵ That is not to say that protesters do not ever have incentives or resources to mislead. But the public is much more likely to approach their claims with skepticism and with access to competing sources of information than they are claims about products they might wish to buy.

Indeed, it is precisely because labor picketing is confrontational, as discussed above, that the listeners do not require protection from it as possibly misleading speech. Speech promoting a commercial transaction seeks to make the listener feel good about meeting some perceived need. It plays on consumers' personal desires to be happy, by becoming better looking, healthier, well fed, and so forth. It speaks to feelings and loose, unexamined associations.

In contrast, confrontational speech, such as labor picketing, presents an argument, albeit a highly emotional or even irrational one. It asks its potential listeners to break daily routine and to consider honoring a demand that takes them outside their personal desires and even inconveniences them. Even though it exerts emotional pressure to comply with the demand, it does so in a way that is much more likely to elicit a critical response from listeners than an advertisement for a product or service or a marketing or public relations campaign by a for-profit company that depends on unconscious messages that are not readily apparent to the listener. That is not to say that slick union or other political campaigns cannot or do not use unconscious messages or clever associational tactics. But they are presented to the listener in a context that is much more likely to allow for questioning of the unions' claims than are similarly slick advertising or marketing campaigns for consumer products.

While Justice Stevens made much of the claim that picketing is a form of signaling to others to engage in boycott activity without any thought or reason,²²⁶ the reality is that even in the now rare instances where union picketing might have the moral force of a signal to some members of a community, that force can only be the result of long hard organizing work convincing those people to stand in

224. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, *supra* note 205.

225. *Id.*

226. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 619 (1980) (Stevens, J., concurring).

moral solidarity with others. That organizing and that sense of solidarity are themselves the products of the kind of value-laden speech that must be protected from government intervention by the First Amendment.²²⁷

The government should not decide what moral or political values individuals or communities can hear, even, or especially, when those values are repugnant to many of us, as was the picketing of soldiers' funerals.²²⁸ In contrast, speech designed to induce purchases of commodities for profit simply does not implicate those concerns for protection of expression of values. We need not have the same concern about government preventing consumers from hearing sales pitches that might be misleading.

Moreover, the risk of politically-motivated viewpoint discrimination is far greater in the context of government regulation of protest activity than government regulations of commercial activity, since protest activity stands in opposition to the status quo that the government presides over. The risk of the government using coercive power to take sides in disputes is much more threatening to freedom of speech than government ensuring that the public does not buy unsafe products.²²⁹

Unions should not seek to undermine these distinctions between what speech government should and should not be permitted to regulate, for their own sake and for the sake of their members and constituents. To rely on decisions that reject those distinctions threatens the regulatory state that protects unions and their members and constituents from a host of dangers and also denies recognition of the distinct character of unions as something other than yet another salesperson trying to push a product on unsuspecting consumers. To rely on the Court's neoliberal turn requires asking courts to base their decisions on those precedents, lending both union and further judicial legitimacy to them. If unions were to win on those grounds, they would have a strong disincentive to attack them later on in other disputes over issues of critical importance to working people, including union members.

3. Unions Do Not Need to Rely on the Neoliberal First Amendment.

Finally, labor does not need to rely on these neoliberal arguments to justify striking the Section 8(b)(4)(ii)(B) ban on secondary labor picketing. The picketing and protest cases cited above, including civil rights, buffer zone, and hate speech cases, give unions ample ground to undo the ban. The circuit court and Board decisions discussed above further highlight the arbitrariness of the line that has

227. See Fisk & Rutter, *supra* note 20, at 318.

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

229. Commentators have noted that the federal government's crackdown on the protests against Donald Trump's inauguration as president have been very harsh, whereas the government has taken a very hands-off approach to racist demonstrations in Charlottesville that actually included violent assaults on counter-demonstrators. See, e.g., *From J20 to Charlottesville*, CRIMETHINC., <https://crimethinc.com/2017/08/18/from-j20-to-charlottesville-repressing-dissent-from-above-and-below> [https://perma.cc/26Y9-FZT7] (last visited November 26, 2017).

been drawn between picketing and non-confrontational activity in support of secondary consumer boycotts. That distinction is clearly unsupportable at this point without violating basic First Amendment principles of content and viewpoint neutrality. *Thornhill* has been used to establish First Amendment protection for non-labor protest activities. Unions should work to restore the original promise of *Thornhill* and thereby reclaim their own pride of place under the First Amendment. Winning on those grounds reinforces a tradition of using the First Amendment to protect vigorous, if peaceful, collective expressions of dissent.

V. CONCLUSION

The Supreme Court's decisions from the late 1930s and early to mid-1940s concerning First Amendment protections for labor picketing recognized that picketing is a form of public expression that is critical to workers' ability to express themselves collectively. As the Court recognized in those years, the fact that picketing has consequences in the real world should not detract from its privileged status as "the workingman's means of communication."²³⁰ As the Court stated in 1945, the protection sought by the drafters of the Bill of Rights "was not solely for persons in intellectual pursuits. It extends to more than abstract discussion unrelated to action."²³¹ Like other forms of contentious speech on issues of public importance, labor picketing can induce other people to take action, including action that has a serious adverse impact on the interests of antagonists to the speakers. Like other forms of contentious speech that enjoy First Amendment protection, peaceful labor picketing is only effective if others voluntarily heed its call.

As we have seen, the justifications for treating labor picketing differently under the First Amendment from other forms of collective picketing and protest do not hold up under scrutiny. It is simply untenable content and viewpoint discrimination. The Section 8(b)(4)(ii)(B) ban on picketing should be stricken. Under the First Amendment, only neutral and reasonable time, place, and manner restrictions are available to restrict peaceful labor picketing, like any other form of picketing, and those restrictions cannot substantially burden unions' expressive conduct.

At the same time, labor should not defend itself by invoking the neoliberal turn toward protecting corporate and commercial speech. Identity of speaker and motive should matter and unions will likely regret resting their own freedoms on those of corporate and commercial actors. Unions should draw on a proud tradition of protected collective protest that stands on the foundation of the law's recognition of labor picketing. Unions have the tools in that tradition to pull labor picketing out of its "black hole" and to restore their own rights and traditions of confrontational calls for public solidarity.

230. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Diaries, Inc.*, 312 U.S. 287, 293 (1941).

231. *Thomas v. Collins*, 323 U.S. 516, 537 (1945).