

Note

A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts

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Amidst a series of plangent marches, union members staged a mock funeral procession outside a Florida hospital in March 2004.¹ Through this bit of ambulatory street theater, the union was not protesting the treatment of hospital employees nor the quality or cost of medical care.² Rather, it was objecting to the labor practices of two subcontractors retained by the hospital to perform construction and staffing work.³ The union hoped that by inducing hospital clients to withhold their patronage they could persuade the hospital to sever commercial ties with the subcontractors.⁴ In the parlance of labor law, this type of protest is referred to as a “secondary boycott” and it is regulated under provisions of the National Labor Relations Act (NLRA), which prohibits unions from “coercing” secondary parties into terminating economic relations with any other person or entity.⁵

Two federal appellate courts were charged with determining whether the mock funeral could be enjoined under the sec-

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1. *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 432–33 (D.C. Cir. 2007).

2. *See Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259, 1261, 1266 (11th Cir. 2005) (detailing how the union had a primary labor dispute with two nonunion contractors, rather than the hospital itself).

3. *Id.* at 1261.

4. *Id.* at 1263, 1266.

5. *See* National Labor Relations Act § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (2000).

ondary boycott provision as coercive activity.⁶ In deciding the issue, the two circuits arrived at wildly inconsistent conclusions. For the Eleventh Circuit, the boycott was tantamount to an illegal and constitutionally unprotected labor picket.⁷ For the D.C. Circuit, however, the activity was a protected form of expression that could not be deemed illicitly coercive.⁸ Beyond the narrow confines of the dispute, this division encapsulates the vacillating history of judicial approaches to secondary labor boycotts. Specifically, it reflects two issues that have persistently plagued courts: how do we understand the ban on secondary coercion, and how does this understanding comport with free speech guarantees?

Once accorded full First Amendment protection,⁹ peaceful secondary labor picketing is now subject to virtual, if not absolute, prohibition.¹⁰ Conversely, “public issue” picketing has received robust constitutional protection as an exalted exercise of political speech.¹¹ Although several justifications have been given for the disparity in treatment, none adequately account for the selective exclusion of labor picketing. In a subtle and possibly inadvertent way, the D.C. Circuit acknowledged the indefensibility of affording labor protests diminished constitutional protection.¹² Taking these latent insights as a focal point, this Note argues that the constitutional asymmetry between labor and political speech, especially with regard to picketing, amounts to impermissible content-based regulation. To avoid this quandary, this Note proposes a new methodology for inter-

6. See *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 438–39; *Kentov*, 418 F.3d at 1263–64.

7. *Kentov*, 418 F.3d at 1265–66.

8. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 439.

9. See *Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 325–26 (1941) (“A state cannot exclude workingmen from peacefully exercising the right of free communication”); *Thornhill v. Alabama*, 310 U.S. 88, 103–05 (1940) (“[T]he State in dealing with the evils arising from industrial disputes may [not] impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.”).

10. See, e.g., *Kentov*, 418 F.3d at 1265 (noting the “longstanding Supreme Court precedent” that secondary labor picketing can be prohibited “without implicating the First Amendment”).

11. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–11, 913–15 (1982) (“This Court has recognized that expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

12. See *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 436–39 (conceding that a secondary labor boycott must be evaluated in a manner consistent with general First Amendment principles and precedent).

preting the ban on secondary coercion to ensure that labor protests are not subject to unwarranted, disproportionate, and ultimately unconstitutional restriction.

Part I of this Note examines the historical treatment of labor picketing under both the First Amendment and the NLRA, the emergence of a constitutional double standard between labor and political protests, and the conflicting judicial approaches to the concept of coercion. Part II discusses the radical import of the D.C. Circuit's decision in *Sheet Metal Workers' International Ass'n, Local 15 v. NLRB*,¹³ why it may herald a significant change in the protection and analysis of labor speech, and why it should be followed regardless of any speculative historical impact. Part III then proposes a new methodology for interpreting coercion to ensure that it remains within First Amendment bounds. To this end, this Note advocates an objective reasonable person test, limited by a principle of formal equality between labor and political protests, to determine whether labor picketing is truly coercive and, thus, subject to constitutional interdiction.

I. CYCLES AND RUPTURES IN THE CONSTITUTIONAL HISTORY OF SECONDARY LABOR BOYCOTTS

A. SECONDARY LABOR BOYCOTTS AND THE NATIONAL LABOR RELATIONS ACT

Labor protests are conventionally categorized into two general types: primary boycotts and secondary boycotts.¹⁴ As a definitional matter, both species of dissent entail the withholding of social or economic relations to express disfavor or exert economic pressure.¹⁵ Implementing these measures may involve an array of tactics, including picketing, speech, dissemination of literature, or a combination thereof.¹⁶ What differentiates

13. *See id.*

14. *See, e.g.*, JOHN W. WHITEHEAD, THE RIGHT TO PICKET AND THE FREEDOM OF PUBLIC DISCOURSE 140–41 n.24 (1984) (defining primary and secondary boycotts).

15. *See* BUREAU OF NAT'L AFFAIRS, INC., THE LABOR REFORM LAW 84 (1959) [hereinafter LABOR REFORM LAW] (defining boycott as a refusal to deal with or patronize a business); Brian K. Beard, Comment, *Secondary Boycotts After DeBartolo: Has the Supreme Court Handed Unions a Powerful New Weapon?*, 75 IOWA L. REV. 217, 218 (1989) (defining boycott as a "withholding of business relations by expressing disapproval or by coercion").

16. Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811, 814 (1984).

the two types of protest, however, is the immediate target or site of the advocacy. In a primary boycott, pressure is directly applied to an employer or business with whom there is a principal labor dispute.¹⁷ In a secondary boycott, however, pressure is brought to bear on a “neutral” party with the aim of inducing alliance against the primary target—typically through the severance of business relations.¹⁸ Under the rubric of secondary boycotts, a union may directly apply pressure to a neutral or secondary business, it may urge a secondary’s employees to restrict their labor, or it may seek to influence consumers to curtail their patronage of a secondary business.¹⁹ The latter form of protest is commonly referred to as a secondary consumer boycott.²⁰

Secondary labor activity is regulated under the provisions of the NLRA.²¹ Specifically, section 8(b)(4)(ii)(B) makes it an unfair labor practice for unions “to threaten, coerce, or restrain any person” with the object of compelling that person “to cease doing business with any other person.”²² As the statutory text indicates, section 8(b)(4)(ii)(B) does not categorically proscribe all labor boycotts.²³ Rather, it regulates the means through

17. WHITEHEAD, *supra* note 14, at 140–41 n.24; Anderson, *supra* note 16, at 813.

18. 48A AM. JUR. 2D *Labor and Labor Relations* § 1768 (2005); James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transactional Labor Solidarity*, 52 BUFF. L. REV. 85, 96 (2004). The paradigmatic example of a secondary boycott is when a union with a dispute against A pressures A indirectly by targeting its clients, suppliers, or other affiliates. Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 908 (2005).

19. Anderson, *supra* note 16, at 813–14; *see also* Atleson, *supra* note 18, at 141 (noting the distinction between secondary activities aimed at consumers and those aimed at secondary employees).

20. Atleson, *supra* note 18, at 96, 141 (distinguishing between a secondary labor boycott and a secondary consumer boycott); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938 n.2 (1982) (defining a secondary consumer boycott as “inform[ing] consumers of a strike or other labor dispute involving the employees of the picketed business”).

21. *See* National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (2000).

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

23. *See id.* (prohibiting threatening or coercive labor activity); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 578 (1988) (arguing that a violation of NLRA section 8(b)(4)(ii)(B) requires a showing of threats, restraints, or coercion).

which such measures may be effectuated.²⁴ Two limiting provisos are relevant in this regard. First, the provision expressly excludes primary picketing from its ambit.²⁵ Second, the provision does not encompass “publicity, other than picketing” for apprising the public of the existence of a producer-distributor relationship between primary and secondary parties.²⁶

In interpreting the “vague” and “nonspecific” language of the secondary boycott provision,²⁷ courts have encountered two intertwined difficulties. First, they have struggled to determine when a secondary boycott is coercive and, thus, prohibited under the NLRA.²⁸ Second, courts have grappled with the constitutional implications of designating certain activities unlawfully coercive. In recent times, the attempt to answer this question has engendered divergent levels of constitutional protection for labor and nonlabor speech, particularly with regard to picketing. This two-tiered constitutional approach, however, has not always predominated.

1. From Illegality to Constitutional Protection: An Early History of Labor Boycotts

Throughout the nineteenth and early twentieth centuries, secondary labor boycotts were per se illegal and, thus, unprotected from governmental encroachment.²⁹ The common law view of illegality rested upon the presumption that secondary pressure was inherently and categorically coercive.³⁰ According-

24. Anderson, *supra* note 16, at 819; Tzvi Mackson-Landsberg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1532 (2006).

25. See 29 U.S.C. § 158(b)(4)(ii)(B) (“[N]othing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing . . .”).

26. *Id.* § 158(b)(4) (“[N]othing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . .”).

27. See *DeBartolo II*, 485 U.S. at 578 (internal quotation marks omitted).

28. See, e.g., Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1629–30 (2007) (observing the difficulties that courts have encountered in articulating the concept of coercion).

29. See WHITEHEAD, *supra* note 14, at 69; Mackson-Landsberg, *supra* note 24, at 1527.

30. WHITEHEAD, *supra* note 14, at 70–71; see Beard, *supra* note 15, at

ly, all picketing, no matter how innocuous, was considered intimidating, unruly, and especially prone to violence.³¹

The common law conception of secondary pressure gradually eroded as courts began to distinguish boycotts as means of placid persuasion from boycotts as crusades of intimidation.³² Simultaneously, legislative enactments also began to acknowledge the legitimacy of secondary boycotts.³³ It would, however, take nearly a decade before labor boycotts would receive salient constitutional protection.

Constitutional protection was first extended to peaceful labor picketing in 1940.³⁴ In *Thornhill v. Alabama*, the Supreme Court invalidated a state antipicketing statute on First Amendment grounds,³⁵ proclaiming that “labor relations are not matters of mere local or private concern” and “must be regarded as within that area of free discussion that is guaranteed by the Constitution.”³⁶ In so doing, the Court rejected the common law conceit that violence was a necessary concomitant of picketing.³⁷ Moreover, the Court repudiated any suggestion that picketing was not entitled to First Amendment protection because it might induce action inconsistent with the economic interests of a targeted business.³⁸ Since “[e]very expression of opinion” on important matters of public concern may potentially incite “action in the interests of one rather than another” social group, the Court concluded that those in power could not penalize peaceful discussion “merely on a showing that others

218–19.

31. WHITEHEAD, *supra* note 14, at 70–71; Mackson-Landsberg, *supra* note 24, at 1527. Under traditional common law, the idea of peaceful picketing was considered as absurdly improbable as “chaste vulgarity.” Edgar A. Jones, Jr., *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023, 1024 (1953).

32. WHITEHEAD, *supra* note 14, at 71.

33. For example, in 1932 Congress passed the Norris-LaGuardia Act effectively halting the use of injunctive relief to quell union activity, including secondary boycotts. *See* Bock, *supra* note 18, at 910; Jeff Vlasek, Note, *Hold up the Sign and Lie Like a Rug: How Secondary Boycotts Received Another Lease on Life*, 32 J. CORP. L. 179, 182 (2006).

34. *See* *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940); WHITEHEAD, *supra* note 14, at 72–73.

35. *Thornhill*, 310 U.S. at 91–92, 101, 106.

36. *Id.* at 102–03.

37. *See id.* at 105 (“[N]o clear and present danger of destruction of life or property . . . or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute . . .”).

38. *See id.* at 103–04.

may thereby be persuaded to take action inconsistent with [their] interests.”³⁹

Thus, rather than focusing its inquiry on the effect of the protected activity on a picketed employer, the Court focused on the relationship between the union as speaker and its intended audience—targeted workers or consumers. Based on the foregoing, the Court stated that labor picketing could only be regulated where a “clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas”⁴⁰

Although *Thornhill* ultimately confronted a primary picket,⁴¹ subsequent Supreme Court decisions upheld and expanded First Amendment protection to secondary labor picketing. In *American Federation of Labor v. Swing*, the Court held that a state could not enjoin a union picket on the grounds that there was no immediate employer-employee relationship between the boycotters and their target.⁴² The Court also reaffirmed the precept that picketing may not be restricted simply because it might engender fiscal harm or loss of patronage.⁴³ Likewise, in *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, the Supreme Court held that constitutional protection for peaceful picketing is not lost merely because the immediate targets of a protest are secondary suppliers or customers of a primary employer.⁴⁴

Wohl would, however, presage a retreat from the expansive constitutional protection lavished upon labor picketing. In a concurring opinion, Justice William Douglas seminally charac-

39. *Id.* at 104.

40. *Id.* at 104–05. The Court was invoking Justice Oliver Wendell Holmes’s famous formulation of the clear and present danger test for determining when speech is constitutionally unprotected. *See Schenck v. United States*, 249 U.S. 47, 52 (1919).

41. Since *Thornhill* and his compatriots were picketing their own employer—the entity with whom they had a dispute—the boycott was clearly primary. *See Thornhill*, 310 U.S. at 94. Regardless, the Court’s emphasis on the public importance of labor speech suggests an expansive principle encompassing secondary picketing as well. *Id.* at 102–03.

42. 312 U.S. 321, 325–26 (1941) (“A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.”).

43. *Id.* at 326 (“Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, [cannot] be barred because of concern for the economic interests against which they are seeking to enlist [the] public . . .”).

44. 315 U.S. 769, 772–75 (1942).

terized picketing as an instance of “speech-plus,”⁴⁵ or an amalgam of speech and nonspeech elements.⁴⁶ For Douglas, it was precisely the nonspeech elements of picketing (i.e., patrolling) that could justify restriction.⁴⁷

Less than a decade after *Thornhill*'s declaration that picketing was a form of protected speech involving matters of public concern, however, courts and legislatures were granted substantial latitude in regulating labor picketing.⁴⁸ The retraction would reach its apogee with the inclusion of an anti-secondary boycott provision in the NLRA.⁴⁹

2. Taft-Hartley and Landrum-Griffin: Circumscribing Secondary Boycotts

First enacted in 1935,⁵⁰ the NLRA—commonly known as the Wagner Act⁵¹—contained a sweeping enunciation of employee rights without corresponding strictures on union activity.⁵² In 1947, amidst a wave of antiunion sentiment, Congress

45. Activity that combines speech and nonspeech elements has been termed “speech-plus,” which is used to distinguish it from “pure speech.” See WHITEHEAD, *supra* note 14, at 73–75 (emphasis omitted); Atleson, *supra* note 18, at 143–44 n.179. The “plus” refers to the conduct element of the activity that may trigger a response independent of the ideas conveyed. WHITEHEAD, *supra* note 14, at 75 (emphasis omitted).

46. See *Wohl*, 315 U.S. at 776–77 (Douglas, J., concurring) (“Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action . . . irrespective of the nature of the ideas which are being disseminated.”).

47. *Id.* Nevertheless, Douglas ultimately maintained the propriety of robust protection for labor speech. *Id.* at 777. Somewhat ironically, his remarks would later be invoked to curtail this very right. See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (invoking the speech-conduct distinction to justify barring labor picketing consistent with the First Amendment).

48. See LABOR REFORM LAW, *supra* note 15, at 99 (noting the pronounced Supreme Court departure from *Thornhill* within fifteen years); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 12–16 (1984) (describing how post-*Thornhill* decisions reflected a steady retreat from the notion of picketing as a form of protected speech); Note, *supra* note 20, at 941–43 (noting that within a decade of *Thornhill* an extremely lenient constitutional standard for picketing restrictions was adopted).

49. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b)(4) (2000).

50. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2000)).

51. Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 146 n.3 (2003).

52. See Bock, *supra* note 18, at 912–13 (discussing how the NLRA did not include unfair labor practices by unions until it was amended in 1947); Get-

amended the Act to prohibit unfair labor practices.⁵³ Section 8(b)(4)(A) of the Taft-Hartley Act, the precursor to the current secondary boycott provision, made it unlawful for a union to “encourage the employees of any employer” to strike with the aim of forcing that employer to terminate business dealings with another.⁵⁴ Although the term “secondary boycott” did not appear in the provision,⁵⁵ legislative history clearly indicates an intent to prevent “wholly unconcerned” parties from becoming ensnared in labor disputes not of their own making.⁵⁶

Notwithstanding the congressional purpose underlying section 8(b)(4), the statutory language proved inept at circumscribing union activity directed at neutral parties.⁵⁷ For example, since the prohibition was confined to inducements directed at “employees,” it left unions free to apply pressure directly upon secondary employers or their customers.⁵⁸ To eliminate this and other perceived loopholes,⁵⁹ Congress passed the Landrum-Griffin Act in 1959.⁶⁰

One major change wrought by the Landrum-Griffin Act was the addition of section 8(b)(4)(ii), which made it an unfair labor practice “to threaten, coerce, or restrain any person” with the object of compelling that person to cease doing business with any other.⁶¹ The added provision facially reached both

man, *supra* note 51, at 125–26 (observing that the Wagner Act contained an expansive articulation of employee rights).

53. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, tit. I, sec. 101, § 8(b)(4)(A), 61 Stat. 136, 141 (1947) (codified as amended at 29 U.S.C. § 158(b)(4) (2000)); *see* Bock, *supra* note 18, at 912–13; Vlasek, *supra* note 33, at 183.

54. Labor Management Relations (Taft-Hartley) Act § 8(b)(4)(A).

55. *See id.*

56. *See, e.g.*, 93 CONG. REC. 4182, 4198 (1947) (statement of Sen. Taft) (“This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.”).

57. *See* LABOR RELATIONS & LEGAL DEP’T, CHAMBER OF COMMERCE OF THE UNITED STATES, LABOR REFORM LAW 1959: THE LANDRUM-GRIFFIN ACT 30–31 (1960); *see also* NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 64–65 (1964) (detailing the numerous loopholes that became apparent in the Taft-Hartley Act).

58. *E.g.*, Bock, *supra* note 18, at 913–14.

59. LABOR REFORM LAW, *supra* note 15, at 85–88; Bock, *supra* note 18, at 913–16.

60. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, tit. VII, section 704, 73 Stat. 519, 542–43 (codified as amended at 29 U.S.C. § 158(b)(4) (2000)).

61. Labor-Management Reporting and Disclosure Act of 1959 § 8(b)(4)(ii); *see* LABOR REFORM LAW, *supra* note 15, at 9.

secondary employers and their patrons and tightened the ban on secondary boycotts by prohibiting consumer picketing at retail sites distributing goods produced by a manufacturer with whom the union has a dispute.⁶²

Although the expansive language of section 8(b)(4)(ii) effectively closed the Taft-Hartley loopholes, some found its sheer breadth disquieting.⁶³ Due to concerns that a broad ban on labor publicity would encroach upon otherwise legitimate and constitutionally protected activity, the Act was adopted with two clarifications.⁶⁴ First, a clause was inserted to safeguard the legality of primary picketing.⁶⁵ Second, the Act's scope was limited by a "publicity proviso"⁶⁶ protecting informational activity, other than picketing, for advertising the existence of a producer-distributor relationship between a primary employer and a secondary business.⁶⁷ In an oft-quoted statement explaining the import of the publicity proviso, Senator Edward Kennedy declared that unions could "carry on all publicity short of having ambulatory picketing in front of a secondary site."⁶⁸

3. Secondary Labor Picketing in the Wake of Landrum-Griffin

The Supreme Court did not address the NLRA's antiboycott provision until 1964.⁶⁹ In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, a union struck fruit packing companies that sold Washington state apples to Safeway supermarkets.⁷⁰ To further the strike, the union instituted secondary pickets outside several Safeway stores to persuade patrons not to consume the "struck" product. Although union members marched before customer entrances, they did not impede deliveries or obstruct the ingress of patrons.⁷¹ The

62. See 29 U.S.C. § 158(b)(4); see also LABOR REFORM LAW, *supra* note 15, at 9.

63. See 105 CONG. REC. 17,818, 17,898–99 (1959) (statement of Sen. Kennedy) (arguing that the provision would curtail legitimate activity); *id.* at 6231–32 (statement of Sen. Humphrey) (voicing concerns that the secondary boycott provision would invade free speech guarantees).

64. LABOR REFORM LAW, *supra* note 15, at 85.

65. See 29 U.S.C. § 158(b)(4)(ii)(B).

66. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 69 (1964) (discussing the publicity proviso).

67. 29 U.S.C. § 158(b)(4); see also Anderson, *supra* note 16, at 819 (discussing the two statutory provisos).

68. 105 CONG. REC. 17,899 (1959) (statement of Sen. Kennedy).

69. Mackson-Landsberg, *supra* note 24, at 1531.

70. *Tree Fruits*, 377 U.S. at 59–60.

71. *Id.* at 60–61.

Court was charged with determining whether the activity was coercive under section 8(b)(4)(ii)(B).⁷²

Concerned that a “broad ban against peaceful picketing” might conflict with free speech guarantees, the Court demanded a clear legislative intent to prohibit the type of picketing at issue.⁷³ Scrutinizing the statutory language and legislative history of Landrum-Griffin, the Court rejected the view that Congress intended to prohibit all secondary picketing, particularly when limited to persuading patrons not to purchase a struck product.⁷⁴ Consequently, the Court drew a polar distinction between picketing aimed at a struck product and picketing exhorting a total cessation of patronage.⁷⁵ With regard to the former, the Court held such picketing to be noncoercive.⁷⁶ Echoing *Thornhill*,⁷⁷ it rejected the claim that coercion was a function of economic loss incurred by a secondary business.⁷⁸

Although the Court’s analysis was framed by constitutional concerns, the constitutional legacy of *Tree Fruits* is indeterminate. Because the majority found the picketing noncoercive, they failed to address the First Amendment issue.⁷⁹ In a concurring opinion, however, Justice Hugo Black confronted the constitutional question, declaring the statutory provision invalid.⁸⁰ For Black, not only was the provision an unconstitutional abridgement of protected speech,⁸¹ but it was also an impermissible content-based restriction that only banned picketing “when the picketers express particular views.”⁸²

Black’s First Amendment apprehensions were addressed sixteen years later in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*.⁸³ In *Safeco*, a union embroiled in a dispute against an insurance underwriter peacefully picketed several title companies that derived over ninety percent of their revenue from the “struck” firm’s policies.⁸⁴ Holding the boycott to be

72. *See id.* at 59.

73. *Id.* at 63.

74. *Id.* at 63–69, 71–73.

75. *Id.* at 63–64.

76. *Id.* at 71–72.

77. *Thornhill v. Alabama*, 310 U.S. 88, 103–05 (1940).

78. *Tree Fruits*, 377 U.S. at 72–73.

79. *See id.* at 63–73.

80. *Id.* at 76 (Black, J., concurring).

81. *Id.*

82. *Id.* at 79.

83. 447 U.S. 607 (1980).

84. *Id.* at 609–10.

coercive in violation of the NLRA,⁸⁵ the Court blurred the sharply delineated distinction drawn in *Tree Fruits* between picketing a struck product and picketing calculated to induce a general loss of patronage.⁸⁶

Distinguishing *Tree Fruits*, where the struck product was one of many sold,⁸⁷ *Safeco* held that secondary picketing directed solely at a struck product nonetheless violates section 8(b)(4)(ii)(B) where it threatens a neutral party with “ruin or substantial loss.”⁸⁸ Additionally, the decision modified the analytical framework for construing the concept of coercion. Although there was no suggestion that patrons were coerced into capitulating to union demands, the Court evinced little regard for the effect on the immediate recipients of the message.⁸⁹ Rather, the Court exclusively focused on the potential fiscal harm attending a secondary business.⁹⁰

Upon finding the picketing coercive, the Court held that the secondary picketing ban did not impermissibly restrict a union’s right to free speech.⁹¹ While the plurality summarily dispensed with the issue,⁹² Justices Harry Blackmun and John Paul Stevens adduced more substantive rationales for the legislative interdiction. Cognizant of the constitutional concerns raised by Justice Black in *Tree Fruits*, Blackmun admonished the plurality for failing to consider whether the “content-based ban” was constitutional.⁹³ Despite his reproach, Blackmun reluctantly deemed the regulation permissible as an instance of Congress “striking [a] delicate balance between union freedom of expression and the ability of neutral [parties] . . . to remain free from coerced participation in industrial strife.”⁹⁴

Unlike Blackmun’s special balancing rationale, Justice Stevens advanced a “speech-plus” argument redolent of Wil-

85. *Id.* at 614–15.

86. *See Tree Fruits*, 377 U.S. at 63–64.

87. *Id.* at 60.

88. *Safeco*, 447 U.S. at 614–15.

89. *See id.*

90. *See id.* (holding that product picketing that can be expected to threaten neutral parties with significant financial loss “plainly violates the statutory ban on the coercion of neutrals”).

91. *Id.* at 616.

92. The plurality’s First Amendment analysis was essentially limited to the following laconic observation: “As applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech.” *Id.* at 616.

93. *See id.* at 616–17 (Blackmun, J., concurring).

94. *Id.* at 617–18.

liam Douglas's concurrence in *Wohl*.⁹⁵ Over a decade before *Safeco*, the Court dismissed the proposition that the First Amendment bestows "the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing" as it affords "those who communicate ideas by pure speech."⁹⁶ Invoking this speech-conduct dichotomy, Stevens opined that "[i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment."⁹⁷ On this basis, Stevens found the statutory ban permissible because it affected "that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea."⁹⁸ Under the speech-plus doctrine, then, labor protests lose their First Amendment protection when they persuade by force of conduct rather than cogency of ideas. However, under Stevens's formulation, labor picketing, by triggering a reflexive response, always appears to fall outside constitutional preserves.⁹⁹ In the end, it was these concurrences that would provide enduring justifications for constitutionally barring labor picketing.¹⁰⁰

4. Antidiscrimination Picketing and the Rise of a First Amendment Double Standard

In 1972, a paladin for racial equality in public education challenged the constitutionality of an ordinance banning all but labor picketing outside public schools.¹⁰¹ In *Police Department of Chicago v. Mosley*, the Supreme Court held that the ordinance violated First Amendment guarantees because it drew "an impermissible distinction between labor picketing and other peaceful picketing."¹⁰² For the *Mosley* Court, not only was pick-

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

96. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

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

98. *Id.*

99. See *id.* (indicating that in the labor context, picketing calls for an automatic response and, thus, is not protected speech).

100. See, e.g., *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1210 (9th Cir. 2005) (observing that Justice Steven's *Safeco* concurrence provided the justification for prohibiting picketing within constitutional bounds that a Supreme Court majority would eventually adopt).

101. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 93–94 (1972).

102. *Id.* at 94.

eting a form of constitutionally protected communication,¹⁰³ but the First Amendment demanded that government not restrict expression because of its content.¹⁰⁴ Accordingly, the Court established that content-based restrictions on protected speech, including picketing, were constitutionally impermissible.¹⁰⁵

On the same day the *Safeco* decision was rendered,¹⁰⁶ the Supreme Court reaffirmed the content-based principle articulated in *Mosley*.¹⁰⁷ In *Carey v. Brown*, the Court invalidated an ordinance proscribing all picketing, except for labor picketing, as a violation of the First Amendment.¹⁰⁸ As in *Mosley*, the Court found that the ordinance illegitimately discriminated amongst protected speech on the basis of content.¹⁰⁹ Rejecting the government's claim that labor picketing was more deserving of constitutional protection than "public protests over other issues," the Court declared that public-issue picketing "has always rested on the highest rung of the hierarchy of First Amendment values."¹¹⁰ In a somewhat incongruous turn, however, the Court transcended the bare assertion that content-based discriminations are invalid. Rather, the Court insinuated that public-issue picketing is more deserving of constitutional protection than labor picketing.¹¹¹

The distinction between public and private picketing first articulated in *Carey* was fully explicated and endorsed in

103. *Id.* at 95.

104. *Id.* at 95–96.

105. *See id.* at 96 ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

106. Both *Safeco* and *Carey v. Brown*, 447 U.S. 455 (1980), were decided on June 20, 1980. Compare *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607 (1980), with *Carey*, 447 U.S. 455.

107. *See Carey*, 447 U.S. at 460, 462–63 (invoking *Mosley's* content-based principle to invalidate a residential antipicketing ordinance indistinguishable from the former's public forum antipicketing ordinance); *see also* WHITEHEAD, *supra* note 14, at 89–90.

108. *Carey*, 447 U.S. at 461–63.

109. *Id.*

110. *Id.* at 466–67.

111. The insinuation stems from the Court's citation to an academic tract "suggesting that nonlabor picketing is more akin to pure expression than labor picketing and thus should be subject to fewer restrictions." *Id.* at 466 (citing THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 444–49 (1970)); *see also* Beard, *supra* note 15, at 231 n.132 (noting the suggestion that labor picketing is less deserving of constitutional protection than political protests).

*NAACP v. Claiborne Hardware Co.*¹¹² *Claiborne Hardware* involved a civil rights boycott of white merchants to secure compliance with a litany of demands for racial equality, including desegregation of public facilities and the hiring of black employees.¹¹³ Although primarily supported by speeches and non-violent picketing, violence, threats, and coercive acts were used to bolster boycott participation.¹¹⁴ Nevertheless, a unanimous Court held that the nonviolent elements of the boycott, including threats of social ostracism and other “coercive” pressure, were constitutionally protected.¹¹⁵ Unless the speech involved “fighting words,” created a “clear and present danger,” or was directed at inciting imminent lawlessness, advocacy of force did not remove speech from the purview of the First Amendment.¹¹⁶ Thus, what would have been an illegal and unprotected secondary labor boycott, was accorded full protection in the civil rights context.

Perhaps realizing the potential discrepancy in constitutional protection, the Court was quick to limit its holding to nonlabor boycotts.¹¹⁷ The Court attempted to distinguish labor and nonlabor picketing on two grounds. First, resurrecting Justice Blackmun’s special balancing rationale from *Safeco*,¹¹⁸ the Court argued that secondary labor boycotts could be prohibited as part of striking a delicate balance between union expression and protecting neutral parties from “coerced participation” in economic discord.¹¹⁹ Second, citing *Carey*, the Court announced

112. 458 U.S. 886, 913–15 (1982); *see also* Note, *supra* note 20, at 947–49 (discussing the incorporation of *Carey*’s public-private distinction into Court doctrine via *Claiborne Hardware*).

113. *Claiborne Hardware*, 458 U.S. at 889, 899.

114. *Id.* at 895, 902, 907–10.

115. *Id.* at 909–11.

116. *Id.* at 927–28 (internal quotation marks omitted); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that a state cannot forbid advocacy of illegal action except where it is directed at inciting imminent lawlessness and is likely to produce such a result); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (establishing that “fighting words”—words that provoke imminent violence—are not constitutionally protected (internal quotation marks omitted)); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (proclaiming that words that “create a clear and present danger” are not constitutionally protected). The *Claiborne Hardware* Court explicitly relied on these cases in determining whether the boycott activity was constitutionally protected. *See Claiborne Hardware*, 458 U.S. at 927–28.

117. *See Claiborne Hardware*, 458 U.S. at 912–13.

118. *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring).

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

a constitutionally relevant distinction between labor and public-issue speech.¹²⁰ Whereas the former was emblematic of “parochial economic interests,” the latter was “essential political speech lying at the core of the First Amendment.”¹²¹ *Claiborne Hardware* thus indicated that labor picketing should be regarded as a form of commercial speech¹²² meriting less constitutional protection than political speech.¹²³

Claiborne Hardware’s significance, however, exceeds the tenet that labor boycotts merit diminished protection because they do not involve fundamental public concerns. The Court’s decision also differed significantly from its erstwhile analysis of labor boycotts. In contrast to *Safeco*, coercion was not treated with respect to the boycotted merchants;¹²⁴ rather, it was a function of the relationship between the boycott advocates and their intended audience.¹²⁵ Additionally, the Court rejected any claim that the occurrence of violence was sufficient to condemn the entire boycott unless “fear rather than protected conduct was the dominant force” behind the enterprise.¹²⁶

Interestingly, the political/commercial distinction employed in *Claiborne Hardware*¹²⁷ had been nearly eviscerated several months earlier. In *International Longshoremen’s Ass’n v. Allied International, Inc.*, a union refused to handle cargo arriving from or destined for the Soviet Union in protest of the Russian invasion of Afghanistan.¹²⁸ The labor abstention, which was unaccompanied by picketing, significantly disrupted the busi-

120. *Id.* at 913 (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

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

122. *See id.* at 912–13. Commercial speech has been defined as speech that merely “propose[s] a commercial transaction.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)), or speech “related solely to the economic interests of the speaker and its audience,” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980). Its paradigmatic example is “advertising the price of a product or arguing its merits.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 576 (1988).

123. *See, e.g.*, *Beard*, *supra* note 15, at 232.

124. *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 614–15 (1980).

125. *See Getman*, *supra* note 48, at 18 (explaining how *Claiborne Hardware*’s conception of coercion, which refers to the manner in which people are enlisted, differs from the concept as employed in labor boycott cases).

126. *Claiborne Hardware*, 458 U.S. at 933–34.

127. *Id.* at 913–15.

128. 456 U.S. 212, 214 (1982).

ness of a domestic importer.¹²⁹ Although the importer's complaint was initially dismissed as a primary and political boycott beyond the ambit of section 8(b)(4),¹³⁰ the Court found no exception for politically based disputes with foreign nations.¹³¹ Because "[t]he distinction between labor and political objectives would be difficult to draw in many cases," the Court refused to create a political exemption from the secondary boycott ban.¹³² Thus, despite the union's "understandable and even commendable" objective, its actions placed a heavy burden on neutral businesses and, accordingly, could be restrained.¹³³

Moreover, in its most spartan First Amendment analysis to date, the Court distilled an epoch of labor jurisprudence into one terse proclamation: "We have consistently rejected the claim that secondary picketing by labor unions in violation of section 8(b)(4) is protected activity under the First Amendment."¹³⁴ The withholding of labor, without even a trace of picketing, was thus treated as "conduct designed not to communicate but to coerce."¹³⁵ With these perfunctory remarks, the status of secondary labor boycotts appeared to revert to its common law roots. Not only were they inherently coercive, but the sole criterion of coercion lay in the economic effects attending a targeted business.

5. *DeBartolo II* and Its Progeny: Eroding the Free Speech Double Standard

In *Safeco*, the Supreme Court "left no doubt that Congress may prohibit secondary picketing" directed at consumers.¹³⁶ It did, however, leave open the question of whether a boycott advanced through other means could be prohibited.¹³⁷ The ques-

129. *Id.* at 214–16.

130. *Id.* at 217.

131. *See id.* at 223–25.

132. *Id.* at 225–26.

133. *Id.* at 223.

134. *Id.* at 226.

135. *Id.*

136. *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 616 (1980).

137. *Safeco* merely addressed the status of secondary picketing under the NLRA and the First Amendment. *See id.* at 610, 614–16. The Court did not tackle the question of whether Congress had, or could have prohibited other means of appealing to secondary consumers. *See id.* at 610 n.3 ("The distribution of handbills has not been an issue in this case."); *see also* *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 437 (D.C. Cir. 2007) (observing that *Safeco* "had not spoken to the question" of whether Congress

tion was resolved in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*, which held that section 8(b)(4)(ii)(B) does not reach peaceful handbilling unaccompanied by picketing or patrolling.¹³⁸

In *DeBartolo II*, a union dispensed handbills outside mall entrances to protest the retention of a construction contractor by one of the mall's tenants.¹³⁹ Although the union's dispute was with the construction company over substandard wages, it urged a consumer boycott of *all* mall stores until the mall owner vowed to only use contractors paying fair wages.¹⁴⁰ The National Labor Relations Board (NLRB) deemed the handbilling a form of illicit economic coercion, but the Court disagreed.¹⁴¹

In the Court's view, the NLRB's interpretation raised grave constitutional concerns.¹⁴² On the one hand, peaceful handbilling urging a "wholly legal course of action" was expressive activity.¹⁴³ On the other hand, the Court abandoned the conclusion that labor communications were necessarily a form of commercial speech meriting diminished constitutional protection.¹⁴⁴ Rather, the handbills at issue, "press[ing] the benefits of unionism to the community and the dangers of inadequate wages to the economy," were more than typical commercial speech advertising product prices or quality.¹⁴⁵ Assessing coercion from a consumer perspective, the Court found that "[t]he loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion."¹⁴⁶ On this basis, the Court held that the handbilling, bereft of picketing, was not coercive under the secondary boycott ban.¹⁴⁷ The Court also found support for this decision in Sena-

could have prohibited "other means of appealing to the customers of the secondary employer").

138. 485 U.S. 568, 588 (1988).

139. *Id.* at 570–71.

140. *Id.*

141. *Id.* at 572–74.

142. *Id.* at 574–77.

143. *Id.* at 575–76.

144. *See id.* at 576 ("We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection."). Although the sentiment was cast in negative terms, the Court's assertion implies that labor communications are not categorically commercial.

145. *Id.*

146. *Id.* at 580.

147. *Id.* at 588.

tor Kennedy's illustrious statement that unions could engage in informational activity "short of . . . ambulatory picketing."¹⁴⁸ For the Court, this remark indicated that the only activity Congress clearly intended to proscribe was ambulatory picketing.¹⁴⁹

As in *Tree Fruits*,¹⁵⁰ the Court obviated the First Amendment question by construing the provision as not reaching the challenged activity.¹⁵¹ Nevertheless, the opinion does suggest that, if the Court were forced to decide the issue, it would have protected the handbilling as political speech.¹⁵² In this, and other respects, *DeBartolo II* seemed to revive the principles articulated in *Thornhill*.¹⁵³ By repudiating the notion that labor speech is inherently commercial, by shifting the coercion analysis back to the impact on the direct recipients of speech, and by reinstating the idea that not every secondary boycotts is ipso facto coercive,¹⁵⁴ the decision seemed to herald a return to a bygone era.

That is, however, except for its manifest ambivalence towards picketing. While the Court dismissed the notion that "any kind of handbilling, *picketing*, or other appeal[]" is coercive,¹⁵⁵ it also embraced Justice Stevens's *Safeco* postulate that "picketing is qualitatively different" than handbilling because it is "a mixture of conduct and communication" and, thus, subject to restrictive regulation.¹⁵⁶ Due to this seeming inconsistency, commentators have split over whether the case exempts all labor picketing from constitutional protection or merely coercive

148. *Id.* at 587 (quoting 105 CONG. REC. 17,818, 17,899 (1959) (statement of Sen. Kennedy)) (internal quotation marks omitted).

149. *See id.* at 582–84, 588.

150. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 63–73 (1964) (failing to address the First Amendment issue because the Court found that the picketing was noncoercive).

151. *See DeBartolo II*, 485 U.S. at 578 (declaring that the statutory construction obviates the need to decide whether a prohibition on handbilling would violate the First Amendment).

152. *See id.* at 576 (refusing to relegate handbilling to the status of mere commercial speech).

153. *Thornhill v. Alabama*, 310 U.S. 88, 103–05 (1940) (holding that the relevant inquiry is the relationship between the union and the intended listeners).

154. *DeBartolo II*, 485 U.S. at 576, 580, 588.

155. *Id.* at 579–80 (emphasis added).

156. *Id.* (quoting *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)) (internal quotation marks omitted).

picketing.¹⁵⁷ Thus, *DeBartolo II* raised the question of whether the germane distinction is between picketing and nonpicketing, or between persuasion and coercion.

B. SHEET METAL WORKERS' INTERNATIONAL ASS'N

In the wake of *DeBartolo II*, courts have largely adopted the picketing/nonpicketing distinction as the key criterion for appraising the legality of secondary labor boycotts.¹⁵⁸ As such, decisions often hinge on labeling.¹⁵⁹ Where a union can cogently analogize an activity to handbilling, it will be deemed permissible; where it can be characterized as tantamount to picketing, it can be enjoined without concern.¹⁶⁰ Regardless of result, the picketing test ultimately perpetuates the constitutional differential so vividly illustrated in *Claiborne Hardware*. As long as secondary labor picketing is absolutely prohibited under the NLRA, labor speech will continue to occupy a subaltern space in the sphere of public protests. A potentially radical reconsideration of this view may be underway.

1. A Divisive Mock Funeral

On March 15, 2004, union members staged a mock funeral procession outside a medical center in Brandon, Florida.¹⁶¹ As four "pallbearers" carried an ersatz coffin, one union member donned a grotesquely large Grim Reaper costume complete with a plastic scythe.¹⁶² Over the course of two hours, the "mourners," accompanied by somber funeral dirges, intermittently traversed a loop one hundred feet from the hospital entrance.¹⁶³ Concurrently, several other union members distributed leaflets entitled "Going to Brandon Hospital Should Not Be a Grave Decision," accurately detailing malpractice suits pending against the hospital.¹⁶⁴ Despite the theatrics, the pro-

157. See, e.g., Mackson-Landsberg, *supra* note 24, at 1540–54 (detailing the divergent and conflicting interpretations of *DeBartolo II*).

158. See *id.* at 1522–23.

159. *Id.* at 1523.

160. *Id.*

161. Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB, 491 F.3d 429, 431–32 (D.C. Cir. 2007); *Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259, 1261 (11th Cir. 2005).

162. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 432; *Kentov*, 418 F.3d at 1261, 1265 (internal quotation marks omitted).

163. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 432–33.

164. *Id.* at 432 (internal quotation marks omitted).

cession was orderly and unobtrusive.¹⁶⁵ The marchers did not interfere with pedestrian or vehicular traffic, nor did they impede the ingress of hospital patrons.¹⁶⁶ Like all secondary boycotts, the union was not directly involved in a dispute with the hospital.¹⁶⁷ Its primary targets were a staffing agency and contractor employing nonunion labor for a hospital construction project.¹⁶⁸ The union hoped that by pressuring hospital patrons it would induce the hospital to terminate its relationship with the subcontractors.¹⁶⁹

2. The Eleventh Circuit's Approach

Two days after the procession, the hospital filed a complaint with the NLRB.¹⁷⁰ While pending before an administrative law judge (ALJ), the regional director for the NLRB sought an interim injunction against the activity.¹⁷¹ Although the district court found the procession orderly and placid, it issued a temporary injunction barring the union from picketing and "staging street theater."¹⁷²

On appeal, the Court of Appeals for the Eleventh Circuit upheld the injunction.¹⁷³ Construing *DeBartolo II* as reaffirming the longstanding principle that secondary labor picketing can be regulated without implicating the First Amendment, the court attempted to determine whether the procession was closer to unlawful picketing or lawful handbilling.¹⁷⁴ Ultimately, the court concluded that there was reasonable cause to believe that the funeral procession was the "functional equivalent" of picketing and, thus, could be constitutionally enjoined under the NLRA.¹⁷⁵ The court based this assessment on the finding that the union's activity was calculated to induce the hospital to sever business relations and, moreover, that it could be expected to dissuade patronage.¹⁷⁶

165. *Id.* at 433.

166. *Id.*; *Kentov*, 418 F.3d at 1261–62.

167. *Kentov*, 418 F.3d at 1261.

168. *Id.*

169. *Id.* at 1263, 1266.

170. *Id.* at 1262.

171. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 433.

172. *Kentov*, 418 F.3d at 1261–62, 1262 n.4.

173. *Id.* at 1267.

174. *Id.* at 1264–65.

175. *Id.* at 1265–66.

176. *Id.*

3. The District of Columbia Circuit's Approach

Around the time of the Eleventh Circuit's decision, the ALJ concluded that the union violated section 8(b)(4)(ii)(B) because the procession constituted an illicit picket that forced bystanders to "cross a death march."¹⁷⁷ Accordingly, the NLRB ordered the union to desist from further picketing.¹⁷⁸

The union appealed the NLRB's order, petitioning the Court of Appeals for the District of Columbia for review.¹⁷⁹ In *Sheet Metal Workers' International Ass'n, Local 15 v. NLRB*, the union advanced two intertwined arguments for dissolving the injunction. First, it argued that the procession was a form of noncoercive expression entitled to full First Amendment protection.¹⁸⁰ Second, it claimed that the injunction constituted a repugnant content-based restriction on that right.¹⁸¹ Since the mock funeral "could never have been prohibited if it had expressed opposition to the Hospital's practices, environmental policy, or any other grievance," applying a different rule in the labor context "would be unconstitutional viewpoint discrimination."¹⁸² Predicated on this theoretical basis, the union argued that its activity was consistent with two recent Supreme Court abortion protest cases and, thus, should be constitutionally protected and deemed noncoercive.¹⁸³

The District of Columbia Circuit largely agreed.¹⁸⁴ The court rejected the claim that it should distinguish the abortion protest cases because there is a uniquely strong governmental interest in regulating labor picketing.¹⁸⁵ The NLRB, relying on *Claiborne Hardware*, claimed that secondary labor boycotts

177. *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 433 (D.C. Cir. 2007) (internal quotation marks omitted).

178. *Id.* at 433–34.

179. *Id.* at 431.

180. *See id.* at 436.

181. *See id.*

182. *Id.* (internal quotation marks omitted).

183. *Id.* The union relied on *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *Hill v. Colorado*, 530 U.S. 703 (2000). In *Madsen*, the Court held that an injunction creating a three hundred foot buffer around an abortion clinic was an unconstitutional burden on protestors' First Amendment rights. *Madsen*, 512 U.S. at 773–74. Simultaneously, however, the Court upheld the injunction's thirty-six-foot buffer around clinic entrances. *Id.* at 770. In *Hill*, the Court affirmed the legitimacy of a statute declaring that, when within one hundred feet of an abortion clinic, protestors could not come within eight feet of their intended target. *Hill*, 530 U.S. at 729–30.

184. *See Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 436–37.

185. *Id.*

could be enjoined as part of striking a balance between union freedom and the ability of neutral parties to “remain free from coerced participation” in economic discord.¹⁸⁶ The court, however, saw the proclamation as providing little guidance for construing the meaning or scope of coercion.¹⁸⁷

The court also rejected its sister circuit’s conclusion that the procession was the functional analog of unlawful and unprotected picketing.¹⁸⁸ Admonishing the Eleventh Circuit for conflating means and ends, the court noted that it was clearly the union’s aim to dissuade patronage.¹⁸⁹ As a mechanism for achieving this end, however, the court found that the “combination of street theater and handbilling” lacked all the coercive hallmarks of picketing.¹⁹⁰ Namely, the procession was nonconfrontational and it failed to create a physical or symbolic barrier to entry.¹⁹¹

With the question of coercion lingering, the court conceded that the impugned activity, as well as the concept of coercion, must be assessed in a manner consistent with general First Amendment jurisprudence.¹⁹² Applying the Supreme Court’s abortion protest decisions, the court concluded that the procession was consistent with activity held to be constitutionally protected.¹⁹³ Thus, to ensure that coercion was not defined in conflict with free speech guarantees, the court declared that “nothing [the union] did can realistically be deemed coercive, threatening, restraining, or intimidating.”¹⁹⁴

186. *Id.*

187. *See id.* at 437 (“That statement . . . leaves open the question of what constitutes ‘coerced participation’ in a labor dispute and, of course, does nothing to suggest coercion may be defined so broadly as to crimp the free speech guarantee of the First Amendment.”).

188. *See id.* at 437–38.

189. *Id.*

190. *Id.*

191. *Id.* at 438.

192. *Id.* at 438–39.

193. *Id.* at 439.

194. *Id.*

II. REEVALUATING CONSTITUTIONAL PROTECTION FOR LABOR PICKETS

A. THE LATENT AND LAUDABLE RADICALISM OF *SHEET METAL WORKERS' INTERNATIONAL ASS'N*

In many respects, *Sheet Metal Workers' International Ass'n* simply adhered to the substantive principles and methodological framework articulated in *DeBartolo II*. Like the Supreme Court, the D.C. Circuit adopted a consumer-based, rather than business-based, view of coercion¹⁹⁵ and denounced the contention that every effort at facilitating a secondary consumer boycott is inherently coercive.¹⁹⁶ Based on its own reading of *DeBartolo II*, however, the court also maintained that picketing, unlike other secondary tactics, is categorically coercive, unlawful, and constitutionally unprotected.¹⁹⁷

Notwithstanding the similarities, the circuit court's opinion does mark a relatively radical expansion on precedent—albeit inconspicuously and inadvertently so. First, the decision augmented the range of permissible and protected union efforts to ambulatory activity (i.e., a mock funeral procession).¹⁹⁸ Unlike *DeBartolo II* and its progeny, which declined to prohibit largely stationary activity such as handbilling or immobile banner-ing,¹⁹⁹ *Sheet Metal Workers' International Ass'n* afforded protection to a fundamentally itinerant activity. Recalling Senator Kennedy's assertion that section 8(b)(4)(ii)(B) would permit “publicity short of having *ambulatory* picketing,”²⁰⁰ the court appears to push the permissible bounds of secondary activity

195. Compare *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 578, 580 (1988) (assessing the coercive impact of a secondary labor boycott from the perspective of customers), with *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 438 (assessing the coerciveness of a labor boycott from the vantage point of potential patrons).

196. Compare *DeBartolo II*, 485 U.S. at 578–79 (arguing that it is untenable to categorically equate boycott activity with coercion), with *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 437 (arguing that not every secondary boycott is coercive and illegal under the NLRA).

197. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 437–38.

198. See *id.* at 439.

199. See *DeBartolo II*, 485 U.S. at 571, 588 (refusing to prohibit union handbilling unaccompanied by picketing or patrolling); *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1201–02, 1216 (9th Cir. 2005) (refusing to enjoin “generally stationary . . . banner-ing activity”).

200. 105 CONG. REC. 17,818, 17,899 (1959) (statement of Sen. Kennedy) (emphasis added).

closer to this asserted limit. As such, it extends the gamut of permissible forms of secondary labor activity.

Second, unlike its predecessors, *Sheet Metal Workers' International Ass'n* did not exclusively nor predominately rely on precepts and precedent from the labor context.²⁰¹ Rather, the court imported First Amendment principles from a nonlabor and patently political context (i.e., abortion protests) to determine the categories of union activity constitutionally immune from the NLRA's secondary boycott ban.²⁰² In so doing, the court subtly—though absolutely—denied any distinction between labor and political speech, implicitly indicating that unions must possess the same First Amendment rights as other social groups. In this respect, the decision represents a significant and radical departure from recent precedent.

As previously discussed, *DeBartolo II* indicated that certain forms of union communication are not commercial speech entitled to diminished constitutional protection, particularly where they expressly emphasize the salutary impact of unions on the welfare of the general populace.²⁰³ Accordingly, where union communication presses “the benefits of unionism to the community,” then it transcends mere commercial speech.²⁰⁴ *DeBartolo II*, thus, eroded the strict equivalence between labor and commercial speech.

While *DeBartolo II* eroded the nexus between labor and commercial speech, *Sheet Metal Workers' International Ass'n* appears to completely implode the equation. By applying First Amendment principles gleaned from a nonlabor and political context,²⁰⁵ the D.C. Circuit tacitly denied the political-economic distinction altogether as applied to labor speech. Consequently, in contrast with *DeBartolo II*,²⁰⁶ the particular message emblazoned on a placard became immaterial to the adjudicative cal-

201. See *DeBartolo II*, 485 U.S. at 577–80 (relying predominately on principles set forth in *Tree Fruits* and *Safeco*); *Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259, 1264–65 (11th Cir. 2005) (relying predominately on *DeBartolo II* and *Safeco*); *Overstreet*, 409 F.3d at 1210–14 (relying extensively on *DeBartolo II* and *Safeco*).

202. See *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 436, 438–39.

203. *DeBartolo II*, 485 U.S. at 576.

204. *Id.*

205. See *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 436, 438–39 (applying abortion protest decisions to determine whether labor activity could be prohibited without violating the First Amendment).

206. See *DeBartolo II*, 485 U.S. at 578 (stating that it is necessary to determine whether the handbilling was threatening or coercive).

culus. Finally, and again quite significantly, the court also took the unprecedented step—at least in modern times—of acknowledging that different rules or levels of constitutional protection for labor and political protests would constitute impermissible viewpoint or content-based regulation.²⁰⁷

Paradoxically, although *Sheet Metal Workers' International Ass'n* ostensibly applied the picketing-handbilling distinction it discerned in *DeBartolo II*,²⁰⁸ its very reasoning belies the proposition that picketing is a necessarily coercive act that can be regulated without constitutional concern. If labor speech is political speech entitled to full constitutional protection, and if any other standard would constitute unconstitutional content-based regulation, then it follows that labor unions ought to receive the same level of protection for peaceful picketing afforded to other groups. The D.C. Circuit's own analysis, then, implies that union protestors must be accorded the same rights to peacefully picket that were bestowed upon the civil rights protestors in *Claiborne Hardware*.²⁰⁹ The decision thus exerts pressure on the persistent juridical and legislative double-standard that effectively states that anyone, except for union members, can peacefully picket any target.

If *Sheet Metal Workers International Ass'n* is a harbinger of things to come, it may herald a significant change in First Amendment protection for labor-related activity, as well as an expansion of permissible secondary tactics. However, even if the opinion ultimately fails to portend a significant change, its approach to secondary labor activity is preferable to the existing paradigm. Since the historically espoused rationales for affording labor speech lessened protection are unprincipled and unpersuasive, and since that leaves nothing but illegitimate restriction based on the content of speech, labor unions ought to receive the same constitutional rights to peacefully picket as other public protestors.

B. THE PROBLEM OF SELECTIVE EXCLUSION: A SERIES OF UNPERSUASIVE RATIONALES

Historically, domestic courts have adduced four main rationales for prohibiting picketing in general, and selectively prohibiting labor picketing in particular. These justifications

207. See *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 436, 438–39.

208. *Id.* at 438.

209. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889, 909–11 (1982).

can be labeled as follows: (1) the inherently coercive argument, (2) the speech-plus argument, (3) the special congressional balancing rationale, and (4) the labor-speech-as-commercial-speech argument. None of these traditionally proffered reasons, however, adequately or cogently justify drawing a constitutional discrepancy between labor and nonlabor communicative conduct.

1. The Inadequacy of the Inherently Coercive Rationale

The inherently coercive argument asserts that picketing is beyond constitutional protection because it is necessarily and categorically coercive.²¹⁰ Although the view originally stems from traditional common law,²¹¹ it was explicitly reaffirmed in *International Longshoremen's Ass'n*²¹² and is implicitly assumed in the picketing/nonpicketing distinction currently employed.²¹³ Despite its historical tenacity, the argument ultimately fails to justify either the general or selective exclusion of otherwise peaceful picketing from constitutional protection.

There are two cardinal reasons why the inherently coercive argument does not support a general exclusion of picketing from constitutional protection. First, the view is based on a dubious ontological assumption—unsupported by experience or empirical evidence—that picketing is always and intrinsically coercive.²¹⁴ It seems highly improbable that pure and abstract ratiocination on the inherent attributes or effects of picketing is sufficient to establish its categorical coerciveness. Rather, as *Tree Fruits* and *Thornhill* acknowledged, picketing is not necessarily a coercive act.²¹⁵ Certainly, it has the potential to

210. See WHITEHEAD, *supra* note 14, at 70–71; Anderson, *supra* note 16, at 830; Beard, *supra* note 15, at 218–19.

211. See WHITEHEAD, *supra* note 14, at 69–71.

212. See *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) (treating a secondary labor boycott as inherently coercive conduct).

213. *Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259, 1264–66 (11th Cir. 2005) (analyzing whether a mock funeral procession was more analogous to unlawful picketing or lawful handbilling); see also *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 438 (determining whether secondary activity amounts to lawful handbilling or coercive and illicit picketing).

214. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 438 (noting that if the behavior in question was the “functional equivalent of picketing” . . . [it was] therefore coercive and unlawful”).

215. See *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 71–72 (1964) (refusing to find that all consumer picketing is coercive and prohibited under the NLRA); *Thornhill v. Alabama*,

coerce listeners, whether through violence, serious threats, confrontational conduct, obstruction of entryways, or other accompanying activity.²¹⁶ However, like in *Safeco*, much labor picketing may be wholly peaceful, orderly, and unthreatening.²¹⁷ Second, the presupposition of coerciveness is undermined by *Claiborne Hardware's* extension of constitutional protection to public-issue picketing.²¹⁸ If all picketing, no matter how benign, is inherently coercive, then it would be difficult to justify First Amendment protection for conduct that necessarily precludes reasoned and voluntary discourse.

Not only does the inherently coercive argument fail to justify a categorical ban on peaceful picketing, it also cannot account for the selective prohibition of secondary labor picketing. Essentially, if all picketing is inherently coercive, then all picketing should be subject to regulation on the same terms as labor picketing. However, *Claiborne Hardware's* hierarchical distinction between public-issue and labor picketing clearly repudiates this notion.²¹⁹ Moreover, if this were the case, why should we permit primary labor picketing, as the NLRA expressly does?²²⁰

2. The Inadequacy of the Speech-Plus Rationale

In a certain sense, the speech-plus argument attempts to evade the problem of selectively excluding or prohibiting labor picketing. As advanced by Justice Stevens in *Safeco*, the speech-plus argument contends that labor picketing can be enjoined because it calls for a reflexive and unthinking “response to a signal, rather than a reasoned response to an idea.”²²¹ Thus, in the labor context, picketing can be barred without implicating free speech guarantees because it elicits automatic effects irrespective of the ideas disseminated.²²² There are two

310 U.S. 88, 105–06 (1940) (rejecting the argument that violence, breaches of the peace, or invasion of privacy rights are inherent attributes of picketing).

216. See Note, *supra* note 20, at 952.

217. See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 609–10 (1980) (describing how picketers merely carried signs and distributed handbills); see also Note, *supra* note 20, at 952–53 (“[M]uch consumer picketing . . . is wholly peaceful.”).

218. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 913 (1982).

219. See *id.* at 913, 915.

220. National Labor Relations Act § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (2000) (excluding primary labor picketing from the statutory ban).

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

222. See *id.*

crucial facets to note about the rationale. First, it assumes that labor picketing is more than speech because Americans tend to respond sympathetically to union protests. Second, it is fundamentally a cunning, though narrower, reiteration of the inherently coercive argument. That is, in the labor context, there presumably exists a unique and insidious mechanism by which even peaceful picketing elicits automatic responses independent of any message conveyed. As such, it can be said to “coercively” trigger involuntary and thoughtless reactions.

Given its affinity with the inherently coercive argument, the speech-plus argument is vulnerable to similar criticism. Like its intellectual kin, it rests on the specious premise that labor picketing coerces its listeners into thoughtlessly capitulating to union demands. Experience, however, does not appear to vindicate such a supposition. Moreover, even assuming that union picketing precipitates reflexive responses based on general attitudes towards labor, it is not unique in harboring the potential for inducing action irrespective of ideas. Other forms of constitutionally protected expression, such as civil rights or abortion protests, may also elicit reflexive responses based on an individual’s general attitude or deeply ingrained beliefs.²²³ Yet, if Stevens’s argument were to stand, it would militate towards diminished protection for any public appeal to deeply entrenched beliefs of any kind. Since many public protests—whether championing racial equality or deriding abortion rights—may elicit automatic responses, they would also be vulnerable to attack and lessened protection on speech-plus grounds. Ultimately, since the inducement of automatic responses is not an idiosyncratic attribute of labor picketing, the speech-plus argument fails to account for the disparate treatment of labor and nonlabor speech.

223. For example, although Americans have shown deep and inveterate respect for religious values and the sanctity of life, this has not been grounds to subject abortion protests to diminished or nonexistent First Amendment protection. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 773–74 (1994) (affirming the First Amendment right of abortion protestors to carry offensive placards and convey unpalatable messages); *see also Rakoczy, supra* note 28, at 1640 (discussing the *Claiborne Hardware* Court’s approval of picketing to encourage the boycotting of stores that refused to support racial integration as constitutionally protected).

3. The Inadequacy of the Special Congressional Balancing Rationale

A third approach to the selective exclusion of secondary labor picketing from constitutional protection is the special congressional balancing argument. Inaugurated by Justice Blackmun's concurrence in *Safeco*,²²⁴ the argument was resurrected in *Claiborne Hardware* to differentiate labor picketing from "public-issue" picketing.²²⁵ As formulated by Justice Blackmun, prohibition of secondary labor picketing is permissible as an instance of Congress striking a balance between union freedom of speech and the ability of neutral parties "to remain free from coerced participation in industrial strife."²²⁶ Accordingly, differential treatment of labor and nonlabor picketing is justified because Congress holds a uniquely robust interest in preventing coerced participation in economic discord.

Although the special balancing rationale eschews the problem of general prohibition, it fails to cogently justify a selective prohibition on labor picketing. First, as trenchantly observed in *Sheet Metal Workers' International Ass'n*, the proposition does nothing to clarify the meaning or scope of coercion.²²⁷ It merely begs the question of what activity constitutes coercion and, correlatively, can be prohibited under the NLRA. Consequently, if labor picketing is not necessarily coercive, then it can be implemented without triggering Congress's interest in preventing coerced participation in industrial strife. Second, it is not altogether clear why the government possesses, or should possess, a greater interest in preventing coerced participation in industrial strife as opposed to racial strife, political strife, ideological strife, or religious strife.²²⁸ As such, the view does not adequately account for the distinction between labor and nonlabor protests over potentially polarizing social issues. Additionally, as *International Longshoremen's Ass'n* explicitly observed, it is

224. See *Safeco*, 447 U.S. at 617–18 (Blackmun, J., concurring).

225. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–13 (1982).

226. *Safeco*, 447 U.S. at 617–18 (Blackmun, J., concurring).

227. See *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 437 (D.C. Cir. 2007).

228. Justice Blackmun's articulation of the balancing rationale simply invoked Congress's interest in preventing industrial strife. See *Safeco*, 447 U.S. at 617–18 (Blackmun, J., concurring). Likewise, in *Claiborne Hardware*, the Court merely invoked the strong governmental interest in economic regulation; it did not provide any detailed rationale as to why there is a greater interest in preventing economic discord over sociopolitical strife. See *Claiborne Hardware*, 458 U.S. at 912.

often difficult to distinguish pickets aimed solely at political change and those seeking purely economic aims.²²⁹ A boycott, as in *Claiborne Hardware*, may integrate both objectives.²³⁰ In such circumstances, it becomes quite difficult to determine whether Congress maintains a superlative regulatory interest since speech may facilitate both industrial and political strife.

4. The Inadequacy of the Commercial Speech Rationale

The labor-speech-as-commercial-speech argument is the final commonly espoused rationale for singling out union activity for diminished constitutional protection. The view rests on the premise that there exists a hierarchy of First Amendment values, with political or public-issue speech at its apex and commercial or economic speech occupying a subordinate echelon.²³¹ Due to its comparatively low hierarchical position, commercial speech is subject to both decreased constitutional protection and increased governmental regulation.²³² Within this conceptual framework, the rationale posits an equivalence between labor and commercial speech because the former purportedly concerns parochial economic interests, rather than matters of important public concern.²³³ Thus, in contrast to public-issue or political speech, labor speech is said to be subject to selective exclusion or prohibition.²³⁴

Since its delineation in *Claiborne Hardware*, the distinction between labor and political speech was significantly weakened by *DeBartolo II*'s suggestion that certain forms of union activity might constitute political speech of public concern.²³⁵

229. See *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982) ("The distinction between labor and political objectives would be difficult to draw in many cases.").

230. The civil rights boycott in *Claiborne Hardware* included demands for racial desegregation as well as jobs for African Americans. *Claiborne Hardware*, 458 U.S. at 899–900.

231. See *Carey v. Brown*, 447 U.S. 455, 466–67 (1980) (declaring that public-issue picketing "has always rested on the highest rung of the hierarchy of First Amendment values"); see also *Claiborne Hardware*, 458 U.S. at 913 (quoting *Carey*'s declaration that public-issue speech rests on the highest tier of First Amendment values).

232. See *Claiborne Hardware*, 458 U.S. at 913, 915.

233. See *id.* (distinguishing public-issue boycotts from boycotts with merely economic interests).

234. See *id.* at 914–15 (implying that boycotts with merely economic interests would be subject to regulation or prohibition).

235. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 576 (1988) ("We do not suggest that communications by labor unions are never of the commercial speech va-

Nevertheless, the distinction remains intact as a potential, if not actual, impediment to comparable First Amendment guarantees for labor and public-issue communication. Unfortunately, like the other rationales assessed, the labor-speech-as-commercial-speech argument fails to provide a principled justification for differential protection.

There are at least two salient reasons why the commercial speech rationale fails to justify asymmetric protection for labor and political speech. First, as declared in *International Longshoremen's Ass'n*, it is often difficult to distinguish pickets embodying purely political objectives from those advocating mere economic change.²³⁶ Even the civil rights boycott in *Claiborne Hardware* involved appeals to achieve economic gains for a specific social group, not simply demands for political or racial equality.²³⁷ In fact, of all the Supreme Court cases involving secondary protests, the boycott in *International Longshoremen's Ass'n* was arguably the most manifestly political since it lacked the intermediate or ancillary aim of economic gain.²³⁸ Nevertheless, the boycott's political and moral objection to the Soviet invasion of Afghanistan presented no obstacle to its ultimate prohibition.²³⁹ The point, however, is that in our post-laissez-faire society, where government intervention in most spheres of social and economic life is a quotidian affair, it is impossible to delineate an objective distinction between political and economic speech.²⁴⁰ This is because both spheres of activity significantly and mutually impact one another.²⁴¹ Under such circumstances, the labor-political distinction does not offer a coherent or consistent framework for determining the requisite level of constitutional protection for a given protest.

More importantly, it is analytically unsound, historically myopic, and fundamentally biased to equate labor speech with

riety and thereby entitled to a lesser degree of constitutional protection. The handbills involved here, however, do not appear to be typical commercial speech . . . for they pressed the benefits of unionism to the community . . .").

236. See *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982).

237. One of the goals sought in *Claiborne Hardware* was to provide jobs for African Americans, surely an economic or labor-related aim. See *Claiborne Hardware*, 458 U.S. at 899–900.

238. Getman, *supra* note 48, at 17; see *Int'l Longshoremen's Ass'n*, 456 U.S. at 222–23 (detailing how the withholding of union labor was strictly motivated by the objection to Soviet military policy).

239. See *Int'l Longshoremen's Ass'n*, 456 U.S. at 223–26.

240. Atleson, *supra* note 18, at 165, 167.

241. See *id.*

commercial speech that simply proposes a commercial transaction or is solely related to economic self-interest.²⁴² Rather, the premises of *Thornhill* and *Swing* remain valid; peaceful labor picketing extends beyond mere matters of private economic concern to issues of fundamental public interest.²⁴³ As articulated in *Thornhill*, the welfare of present and future generations depends on labor matters—whether satisfactory hours, fair wages, or hospitable working conditions—and their widespread repercussions.²⁴⁴ Additionally, the panoply of labor-related legislation attests to the fact that labor relations are not matters of mere parochial concern, but of great interest to the general polity.²⁴⁵ Absent the potential for such interest and concomitant support, there would seem to be little reason for the bevy of economic and labor-related legislation.

Not only do labor protests implicate matters of public concern, there is also no persuasive argument for why union activity cannot and should not be deemed political action. Both labor and nonlabor boycotts may reflect a broader goal of redistributing economic benefits, whether to minorities or workers.²⁴⁶ Just as race or gender discrimination may highlight a broader phenomenon of social inequity, a labor dispute signifies the position of workers in an economic system based on private and limited ownership of the means of production.²⁴⁷ Yet we do not characterize women's appeals for higher wages and equality of remuneration as reflecting parochial commercial interests bereft of public or political concern. Why then should we charac-

242. Commercial speech has been defined as speech that merely proposes a commercial transaction or is solely related to narrow economic interests. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

243. *See Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 326 (1941) ("The interdependence of economic interest of all engaged in the same industry has become a commonplace. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." (citation omitted)); *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940) ("[L]abor relations are not matters of mere local or private concern. Free discussion concerning . . . labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

244. *Thornhill*, 310 U.S. at 103.

245. *Id.* ("The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern.").

246. *See Getman, supra* note 48, at 17.

247. Note, *supra* note 20, at 955.

terize labor protests in such a way? After all, in a social system where health care and higher education are largely privatized and quite expensive, labor speech aimed at immediate economic gains signals broader, more fundamental concerns. That is, this speech marks an attempt to secure a better life for oneself, one's family, one's descendants, and for other workers facing unsatisfactory wages and prohibitive costs. Given this reality, it is inaccurate and belittling to equate labor protests with mere profit-making activity such as product advertising.²⁴⁸ Moreover, to do so seems to reflect nothing more than a prejudicial vestige of Cold War antipathy to union activity and labor demands. How else do we account for the refusal in *International Longshoremen's Ass'n* to establish an exception to the secondary boycott ban for politically based disputes with foreign nations?²⁴⁹ If even political and morally righteous union activity can be blithely proscribed, then the distinction between labor and political speech seems to reflect nothing more than class bias.

C. THE REPUGNANT RESIDUE OF CONTENT-BASED REGULATION

Given the inadequacy of the articulated rationales for meaningfully differentiating labor and nonlabor picketing, we are left with nothing but unconstitutional content-based discrimination. As *Mosley* made clear, selective exclusion from public fora may not be based on content alone and may not be justified by reference to content alone.²⁵⁰ Yet, without a persuasive rationale for selectively restricting secondary labor picketing, what is left but the content of speech itself? Consequently, since the subject matter of the speech—labor or nonlabor—appears to be the determinative factor in applicable levels of protection and regulation, the asymmetrical treatment of labor and nonlabor boycotts constitutes an impermissible content-based restriction.²⁵¹ To avoid this constitutional quandary, it is necessary to interpret the NLRA's secondary boycott ban as

248. As noted, the exemplar of commercial speech is advertising the price or merits of commodities. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 576 (1988).

249. See *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 224–25 (1982).

250. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 94–96 (1972).

251. See *Carey v. Brown*, 447 U.S. 455, 461–65 (1980) (invalidating a picketing ordinance that discriminated on the basis of subject matter); *Mosley*, 408 U.S. at 95–96 (abrogating a picketing ordinance whose “operative distinction is the message on a picket sign”).

prohibiting only those types of protest activity not protected by generally applicable First Amendment precepts and precedent. Accordingly, we must construct a new methodological framework for interpreting section 8(b)(4)(ii)(B)'s ban on coercive secondary activity to ensure it remains within constitutional limits.

III. A NEW MODEL OF COERCION

A. TOWARD A CONSTITUTIONAL CONCEPTION OF COERCION

To bring the NLRA's ban on coercive secondary labor boycotts back within First Amendment bounds, it is necessary to interpret section 8(b)(4)(ii)'s prohibition on coercion in a way that does not conflict with comparable activity protected when undertaken by other social groups. As a practical matter, this means constructing a new definition and methodology for understanding the meaning and scope of coercion. A conventional definition of coercion is conduct that "overwhelm[s the] will" of another.²⁵² As the definition indicates, the concept of coercion involves two facets: a relational component (i.e., the other whose will is overcome) and a substantive component (i.e., the conduct that overwhelms). Thus, we must determine both the substantive content of "coercion," as well as the perspective from which it is to be assessed.

1. The Customer Is King: The Relational Component of Coercion

Coercion is clearly a relational concept. One neither coerces in the abstract nor coerces oneself; coercion is always coercion of another. Thus, a preliminary inquiry is from whose perspective do we assess the coerciveness of conduct? In the context of secondary consumer boycotts, there are two possible perspectives—that of the consumer and that of the secondary business. As the case law reveals, there has been ambiguity and inconsistency in whether coercion is a function of potential economic harm to a secondary business or a function of the effects on targeted consumers.²⁵³ The distinction between the two, how-

252. Jones, *supra* note 31, at 1028.

253. Coercion was judged from the perspective of the immediate consumer audience in *DeBartolo II*, *Tree Fruits*, and *Thornhill*. See *DeBartolo II*, 485 U.S. at 578–80; *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 72–73 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). In contrast, coercion was assessed in relation to the economic

ever, is critical. We must not confuse coercion of immediate listeners with economic pressure exerted as a result of those freely complying with union appeals.²⁵⁴ In other words, it is analytically unsound to equate speech that persuades listeners to exert economic pressure by freely withholding patronage with speech that is itself coercive.

Given the need to specify the perspective from which coercion is assessed, there are several reasons for analyzing it from the vantage point of the consumer. First, and probably the least persuasive argument, is precedent. As both *DeBartolo II* and *Claiborne Hardware* suggest, coercion should be understood as a function of the impact exerted upon consumers or immediate listeners.²⁵⁵ Consequently, labor picketing should not be devoid of constitutional protection because it may induce others to take action inconsistent with the economic interests of a secondary business. As *Claiborne Hardware* indicated, the fact that a boycott has a substantial impact on merchants does not render it subject to proscription absent a finding that “fear rather than protected conduct” was the dominant force behind its public support.²⁵⁶

A second reason for analyzing coercion from a consumer perspective emerges when one considers that every expression of opinion may potentially induce action unfavorable to one social group.²⁵⁷ As such, the mere presence of action inconsistent with one’s interests should not be grounds for prohibiting oth-

repercussions attending a secondary business in *International Longshoremen’s Ass’n* and *Safeco*. See *Int’l Longshoremen’s Ass’n*, 456 U.S. at 223; *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 613–14 (1980). The inconsistent approach to analyzing coercion is also evident in the recent circuit split over the status of a mock funeral procession. Compare *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 437–38 (D.C. Cir. 2007) (focusing on the effects of coercion on potential patrons), with *Kentov v. Sheet Metal Workers’ Int’l Ass’n Local 15*, 418 F.3d 1259, 1265–66 (11th Cir. 2005) (concentrating on the fact that a secondary boycott was aimed at exerting pressure on a secondary business by dissuading patronage).

254. See Anderson, *supra* note 16, at 830–31.

255. See *DeBartolo II*, 485 U.S. at 578 (noting the lack of any suggestion that the labor activity had a coercive impact on “customers”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–10 (1982) (focusing on the manner in which listeners or patrons were enlisted in the boycott).

256. See *Claiborne Hardware*, 458 U.S. at 934.

257. *Thornhill*, 310 U.S. at 104 (“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 . . . may not impose penal sanctions on peaceful and truthful discussion . . . [by] showing that others may thereby be persuaded to take action inconsistent with its interests.”).

erwise protected and peaceful expression. Just because a political organization may persuade a considerable portion of the electorate to “boycott” an incumbent candidate or a particular piece of legislation does not mean that the incumbent was “coerced” into leaving office or abandoning the legislation. Under our democratic and republican system of governance, such advocacy is a legitimate and prized exercise of liberty, not a coercive tactic to be decried and forbidden.²⁵⁸ Our free market economy is similarly premised on the notion that individual consumers possess economic freedom for which businesses compete.²⁵⁹ If a union peacefully persuades consumers to exercise this freedom in a manner inconsistent with the economic interests of a business, it is inaccurate to claim that the business was unlawfully coerced.²⁶⁰ Yet, if coercion were premised on economic harm, any consumer appeal to undertake a “wholly legal course of action”²⁶¹ could be prohibited as coercive activity.

The foregoing discussion suggests yet another difficulty in analyzing coercion pursuant to the economic harm attending a secondary business. Essentially, to do so would proscribe other authorized and protected inducements to boycott such as leaflets, newspaper ads, or public speeches.²⁶² Since these constitutionally protected activities can exert economic consequences comparable to peacefully persuasive picketing, judging coercion

258. Cf. BRUCE MIROFF ET AL., *DEBATING DEMOCRACY* 2–3 (1997) (discussing how free and fair debate, including the freedom to persuade and deliberate, is the “lifblood of democracy”).

259. See Milton Friedman, *Capitalism and Freedom*, in MIROFF ET AL., *supra* note 258, at 56, 60–61 (discussing the relationship between the free market system and economic freedom: “free to enter or not enter into any particular [economic] exchange”).

260. See *DeBartolo II*, 485 U.S. at 580 (“The loss of customers because they read a handbill urging them not to patronize a business . . . is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.”).

261. See *id.* at 575.

262. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 909–11 (1982) (observing that speeches, newspaper articles, and pamphleteering are forms of communication generally protected under the First Amendment); see also *DeBartolo II*, 485 U.S. at 576 (indicating that a prohibition on leafleting the general public would “pose a substantial issue of validity under the First Amendment”); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 69 (1964) (suggesting that a prohibition on leafleting, radio broadcasts, and newspaper advertisements would pose serious First Amendment implications); 105 CONG. REC. 17,818, 17,898–99 (1959) (statement of Sen. Kennedy) (explaining that the secondary boycott ban was not meant to prohibit handbilling, newspaper ads, or radio broadcasts).

from the perspective of a secondary business would necessitate that they be enjoined as coercive activity. Thus, a business-based conception of coercion does not allow for drawing a meaningful distinction between activities such as handbilling and barricading an entryway, since both could exert grave economic harm. Coercion would therefore be converted into an overinclusive concept covering both protected and unprotected conduct. To avoid such a scenario, coercion should be limited to the effects on an intended and immediate audience: the consumers themselves.

The perspectival problem of coercion can also be approached from a slightly different angle, analogizing it to another constitutional dilemma—that of the heckler’s veto.²⁶³ The heckler’s veto presents the following problem: what if the danger of speech arises from the reactions of a hostile crowd, rather than from a sympathetic and immediate audience?²⁶⁴ Several Supreme Court cases confronting the issue reject the proposition that the reaction of a hostile audience justifies the suppression of otherwise permissible First Amendment activity.²⁶⁵ For example, in *Terminiello v. Chicago*, a racist demagogue addressing a sympathetic audience sparked agitation and violence amongst a hostile crowd situated outside the speaking forum.²⁶⁶ The speaker was subsequently arrested and convicted of violating a statute that prohibited stirring the public to anger, inviting dispute, or fomenting unrest.²⁶⁷ Reversing the conviction, the Supreme Court suggested that any danger or disorder arising from a hostile crowd reaction cannot justify suppression of speech unless it is likely “to produce a clear and present danger . . . that rises far above public inconvenience,

263. For a general discussion of the heckler’s veto or hostile audience problem, see JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW* 80–83 (2d ed. 2000).

264. *Id.* at 80.

265. See *Gregory v. City of Chi.*, 394 U.S. 111, 111–13 (1969) (rejecting the claim that the unruly acts of onlookers could justify the suppression of an otherwise peaceful civil rights march); *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949) (overturning the conviction of a speaker who stirred a hostile crowd to anger and unrest); see also *Vill. of Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 25 (Ill. 1978) (“[I]t has become patent that a hostile audience is not a basis for restraining otherwise legal First Amendment activity.” (quoting *Collin v. Chi. Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972))).

266. *Terminiello*, 337 U.S. at 2–3; see *id.* at 16, 20–22 (Jackson, J., dissenting).

267. *Id.* at 2–3 (majority opinion).

annoyance, or unrest.”²⁶⁸ Of course, such a position makes intuitive sense. If a heckler’s veto could be used to censor speech, then hostile crowds could simply feign offense or threaten disorder in order to suppress unpopular sentiments.

The position of secondary businesses can be compared to hostile crowds on two grounds. First, both entities are relatively remote; that is, they are not the immediately intended addressees of the expression. In a secondary consumer boycott, the consumer is the immediately intended recipient of the message.²⁶⁹ Similarly, in a case like *Terminiello*, the individuals in the auditorium—not the hostile crowd outside—are the immediately intended addressees.²⁷⁰ Second, both entities are predisposed to resent the expression because it conflicts with their interests—social, political, economic, or otherwise. To complete the analogy, if the potentially dangerous effects of speech on a hostile crowd cannot justify its suppression, then the possible harmful effects on a secondary business should likewise be insufficient grounds to censor labor expression. Of course, this assumes that the speech in question does not coerce its intended and potentially sympathetic audience. But this is the point—coercion should be assessed from the vantage point of its principally intended audience. Moreover, if we are bound to apply similar standards to labor and nonlabor speech, then the Court’s rejection of a heckler’s veto provides a final basis for construing coercion from the perspective of consumers.

2. Formal Equality and Objectively Reasonable People: The Substance of Coercion

Having dispensed with the relational component of coercion, it remains to articulate its substance. In the context of secondary consumer boycotts, the inquiry can be framed as follows: from the perspective of a potential patron, what types of union activity would or should be deemed coercive? The query can be answered at two complementary levels of analysis or generality: a macrolevel and a microlevel. At the macrolevel, union activity protected under general First Amendment precepts and precedent must not be prohibited as coercive conduct, lest we resurrect the specter of content-based discrimination. At the microlevel, we can employ an objective reasonable per-

268. *Id.* at 4.

269. See Vlasek, *supra* note 33, at 181 (describing how secondary boycotts target otherwise neutral parties, such as customers).

270. *Terminiello*, 337 U.S. at 2–3.

son standard to determine whether the conduct truly exerts a coercive impact on consumers.

a. *The Macrolevel of Analysis*

To evade the constitutional quandary of content-based restrictions, we must understand the content of coercion in a manner that does not conflict with general First Amendment guarantees. On a formal level, this proposition entails that conduct protected in nonlabor contexts should not be characterized as coercive or unlawful when undertaken by a labor union. Although this principle of formal equality does nothing to delineate the specific content of protected conduct, it is meant to provide a limit to governmental regulation of union activity. To delineate the specific content of coercion, however, we can look to First Amendment decisions within and without the labor context.

Without embarking upon the abstract and amorphous terrain of constitutional scrutiny levels, there are two general First Amendment doctrines that help to sketch the content and contours of coercion. First, the Supreme Court has long held that there is a narrow set of speech categories that cannot claim First Amendment protection and, therefore, are subject to complete regulation.²⁷¹ These categories of unprotected speech include fighting words, true threats, obscenity, speech that presents a clear and present danger, and speech that is likely to incite imminent lawlessness.²⁷² Of course, picketing is more than speech, combining both speech and nonspeech elements.²⁷³ Consequently, a second First Amendment doctrine is relevant to the issue of picketing—labor or otherwise.

Under the speech-plus doctrine, or expression-action dichotomy, the First Amendment does not protect those nonspeech elements that may induce action irrespective of the ideas communicated.²⁷⁴ In other words, public protests lose

271. Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 844–45 (2005); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–28 (1982) (outlining the few categories of speech that are not protected by the First Amendment).

272. See Kitrosser, *supra* note 271, at 844–45; Mackson-Landsberg, *supra* note 24, at 1529–30.

273. See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring); WHITEHEAD, *supra* note 14, at 73.

274. See *Safeco*, 447 U.S. at 619 (Stevens, J., concurring) (invoking the speech-conduct distinction to justify barring labor picketing that does not call

their First Amendment protection when they induce action through force of conduct rather than the strength of ideas.²⁷⁵ Protests may thus be regulated where they achieve their ends through “intimidat[ion] by a line of picketers”²⁷⁶ or where “fear rather than protected conduct [is] the dominant force” behind their public support.²⁷⁷

Combining the two doctrines, we can formulate a preliminary test for determining whether boycott activity is constitutionally protected and, thus, immune from prohibition under section 8(b)(4)(ii)(B). Essentially, as long as a union does not engage in activity that consists of fighting words, true threats, a call to imminent illegal action, or conduct that induces action independent of ideas, it should not be deemed coercive under the NLRA.

b. The Microlevel of Analysis

The preliminary formulation of the coercion test leaves one fundamental question unresolved. Namely, how do we determine what conduct coercively induces action irrespective of the strength of the ideas communicated? The answer is actually somewhat implicit in the foregoing First Amendment analysis. Take, for example, the definition of fighting words as speech “likely to provoke the average person to retaliation.”²⁷⁸ Somewhat similarly, obscenity has been defined, *inter alia*, as material that “the average person” would view as appealing to prurient interests²⁷⁹ and for which no reasonable person would find serious value.²⁸⁰ These categories of unprotected conduct, thus, include an objective reasonable or ordinary person standard for determining whether or not an activity is entitled to constitutional protection. Conjoining this latent standard with the traditional definition of coercion as conduct that “over-

for a reasoned response to an idea).

275. *See id.*

276. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 580 (1988).

277. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982).

278. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942); *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (reiterating the “average person” standard).

279. *See* *Miller v. California*, 413 U.S. 15, 24 (1973) (promulgating a tripartite obscenity test that includes an average person standard).

280. *See* *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (declaring that the third prong of the *Miller* obscenity test should rest on a reasonable person standard).

whelm[s the] will,"²⁸¹ we can employ an objective reasonable person test to answer the lingering question of coercion.²⁸²

When union activity does not fall within a category of unprotected speech, it can only be prohibited when it is so substantial that no reasonable person, no person of ordinary fortitude, would feel at liberty to ignore the union's demands. This is what may be termed the microlevel of analysis. The appellation is meant to emphasize that the proposed reasonable person test is not distinct from the general First Amendment inquiry. Rather, it merely serves to underscore what is arguably already implicit in the latter. The hope is that the reasonable person standard will provide greater guidance in identifying coercion, while ensuring that regulated conduct does not fall within First Amendment bounds. As such, it remains imperative that the standard abide by the principle of formal equality—that labor and nonlabor protests receive comparable constitutional protection.

Under the proposed reasonable person test, the following activities—all of which have been noted by courts—are likely to constitute coercion under the NLRA: violence, serious threats, physical and symbolic obstruction of entryways, interference with the ingress or egress of consumers, or other confrontational or intimidating conduct.²⁸³ The reason for this is quite simple: the enumerated activities are likely to overcome the will of a person of ordinary fortitude, leaving her unable to freely disregard union pressure and patronize a secondary business. The

281. Jones, *supra* note 31, at 1028.

282. Interestingly, an ordinary person standard was invoked in *Sheet Metal Workers' International Ass'n* to bolster its protection of a mock funeral procession. See *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2007) (rejecting the claim of coercion on the grounds that the protest was not "one by which a person of ordinary fortitude would be intimidated").

283. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 578–80 (1988) (protecting a labor boycott that did not involve intimidation by a line of picketers, violence, or patrolling); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 60–61, 71–73 (1964) (upholding the legitimacy of a peaceful picket that did not interfere with the ingress of consumers or obstruct deliveries); *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 437–38 (protecting a boycott that was orderly, did not physically interfere with or confront patrons, and did not create a symbolic barrier to entry via patrolling); *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1202, 1211–12 (9th Cir. 2005) (upholding a boycott that did not involve confrontational conduct or the creation of a physical or symbolic barrier to consumer entry).

foregoing list, however, is not an exhaustive account of coercive labor activity. Rather, it illustrates the types of conduct likely to satisfy the reasonable person standard for coercion. Nevertheless, absent truly coercive activity, unions should be free to engage in peaceful picketing.

Synthesizing the macrolevel and microlevels of analysis, we can define coercive activity, for purposes of section 8(b)(4)(ii)(B), as including unprotected speech and conduct so substantial that it would overcome the will of a reasonable and ordinary person. Essentially, so long as the boycott does not consist of fighting words, present a clear and present danger, incite imminent lawless conduct, or contain activity likely to overcome the will of a reasonable person of ordinary fortitude, the union should not be held to have committed an unfair labor practice under section 8(b)(4)(ii)(B). Obviously, under the proposed test of coercion, certain forms of peaceful picketing, as well as other boycott measures, can and should be considered legitimate exercises of First Amendment rights. Accordingly, the D.C. Circuit was correct in holding that the mock funeral procession was not coercive in violation of section 8(b)(4)(ii)(B).²⁸⁴ Given that the procession was orderly, nonconfrontational, and occurred a hundred feet from the hospital entrance²⁸⁵—creating neither a physical or symbolic barrier to entry—it was not sufficient to prevent an ordinary person from patronizing the hospital. Although some may have found the spectacle distasteful, unnerving, and even offensive, it could not be considered coercive.

B. IMPLICATIONS: VAGUENESS, THWARTED INTENT, OR ECONOMIC RUIN?

There are at least three objections that the proposed coercion test may confront. First, some may argue that the complementary First Amendment and reasonable person analyses are still too general or vague. Since the primary concern of this Note is symmetrical protection for labor and nonlabor picketing, such a general standard seems sufficient. Additionally, the proposed test might be advantageous insofar as it anticipates change and permits flexibility in First Amendment jurisprudence. All that it requires is uniformity of treatment for labor and nonlabor activities.

284. *Sheet Metal Workers' Int'l Ass'n*, 491 F.3d at 439.

285. *Id.* at 432–33, 438.

Second, some may argue that the test, by permitting certain forms of secondary picketing, undercuts the purpose of the secondary boycott ban. To the extent that this objection is accurate, this is the proverbial price of living in an open and democratic society that values plurality of opinion and freedom of expression. Under such a system, Congress does not have the right to rescind or curtail free expression, nor to “grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”²⁸⁶ Moreover, if the unequivocal purpose behind the legislative ban is to protect “wholly neutral parties” from compelled participation in labor disputes, the proposed test does not, as a practical matter, contravene that intent. Boycotts are presumably onerous, expensive, and time-consuming affairs. Accordingly, it seems unlikely that they would be employed against wholly neutral parties who have not economically supported or interacted with a primary target in some significant way.

Third, some may claim that affording greater protection and latitude to labor boycott activities may exert a serious or calamitous impact on the economy. Although it is theoretically possible, it seems unlikely that secondary labor picketing will have grave economic repercussions. Again, given the onus of conducting such activity, it seems likely that unions would rarely institute such measures, especially where the secondary target is genuinely neutral *vis-à-vis* a labor dispute.

CONCLUSION

Several recurring rationales have been espoused for exempting secondary labor picketing from the robust First Amendment protection bestowed upon its public-issue analog. It has been argued that labor picketing is inherently coercive,²⁸⁷ that it uniquely elicits reflexive responses independent of any ideas conveyed,²⁸⁸ that Congress maintains an incomparable interest in preventing “coerced participation in indus-

286. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

287. See *WHITEHEAD*, *supra* note 14, at 70–71; *Jones*, *supra* note 31, at 1024; *Mackson-Landsberg*, *supra* note 24, at 1527.

288. See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

trial strife,”²⁸⁹ and that labor speech is simply a form of low-value commercial speech that merely implicates parochial economic interests.²⁹⁰ For various, though occasionally overlapping reasons, none of these rationales justify drawing a meaningful distinction between labor and political picketing. In the absence of a sufficient rationale, the disparity of treatment seems to rest on the very content of speech—whether it is labor-related or not. As *Sheet Metal Workers* acknowledged in its own limited way, the disparity in treatment thereby amounts to impermissible content-based discrimination.²⁹¹

To avoid the specter of content-based restriction, the NLRA’s ban on coercive secondary activity must be construed in a manner that conforms to general First Amendment precepts and precedent—those applicable to other public-issue pickets. In terms of perspective, this principle of equality necessitates that coercion be judged from the vantage point of the immediately intended recipients of the appeal. In secondary consumer boycotts, the relevant frame of reference is that of potential patrons, not the secondary businesses subject to potential economic harm. Extending comparable protection also has an impact on our substantive understanding of coercion. At a macrolevel, it entails that activity protected under general First Amendment principles and case law must not be deemed unlawfully coercive when undertaken by a union. At a microlevel, this Note has proposed an objective reasonable person standard for determining whether labor conduct truly coerces consumers and, thus, can be constitutionally enjoined. Ultimately, the concept of coercion should be limited to the narrow categories of unprotected speech and conduct so substantial that it would overcome the will of a reasonable person of ordinary fortitude. Under this formulation, certain forms of secondary labor picketing can and should be considered legitimate exercises of First Amendment rights.

289. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (quoting *Safeco*, 447 U.S. at 617–18 (Blackmun, J., concurring)) (internal quotation marks omitted).

290. See *id.* at 915.

291. See, e.g., *Mosley*, 408 U.S. at 94–95 (holding that the First Amendment demands that the government not restrict speech because of its content).