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Zoran Tasić
Washington University School of Law

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THE SPEAKER THE COURT FORGOT: RE-EVALUATING NLRA SECTION 8(b)(4)(B)'S SECONDARY BOYCOTT RESTRICTIONS IN LIGHT OF *CITIZENS UNITED* AND *SORRELL*

“[C]ommercial speech doctrine is the last vigorous remnant of the attempt in the mid-twentieth century to incorporate a hierarchy of values into the First Amendment.”¹

“On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a ‘black hole’ beneath the ladder.”²

INTRODUCTION

In the staggeringly unpopular³ *Citizens United v. Federal Election Commission*⁴ decision, the Supreme Court overruled precedent⁵ and struck down a federal law that placed restrictions on campaign spending by corporations and unions.⁶ Justice Stevens, writing for the dissent, observed that “[t]he basic premise underlying the Court’s ruling is . . . the proposition that the First Amendment bars regulatory distinction based on a speaker’s identity, including its ‘identity’ as a corporation.”⁷ Several commentators have argued that this basic premise will lead to the erosion or even the complete abandonment of the commercial speech doctrine,⁸

1. Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying and Love Citizens United*, 38 HASTINGS CONST. L.Q. 131, 133 (2011).

2. James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984).

3. See Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, 4:38 pm, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html> (“Eight in 10 poll respondents say they oppose the high court’s . . . decision to allow unfettered corporate political spending, with 65 percent ‘strongly’ opposed. Nearly as many backed congressional action to curb the ruling, with 72 percent in favor of reinstating limits.”).

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

5. See *infra* note 208 and accompanying text.

6. See *infra* note 209 and accompanying text.

7. *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part). Justice Stevens’s characterization of the majority’s reasoning is not a caricature. See *infra* text accompanying note 210.

8. See Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 16 (2010) (“The majority of the Court is sympathetic to the argument for more protection for commercial speech and *Citizens United* reflects that sympathy. It suggests that with the proper case, there is an increased likelihood the Supreme Court will either do away with the

which holds that commercial speech⁹—“speech which does no more than propose a commercial transaction”¹⁰—is a less protected form of speech under the First Amendment.¹¹ As Tamara Piety, a fierce opponent of the deregulation of corporate and commercial speech,¹² put it: “[i]f a for-profit corporation is entitled to full First Amendment protection when it engages in political speech—speech which is in some sense peripheral to its existence—then it would seem [that] full protection for [commercial speech,] its *core* expressive activity[,] should follow.”¹³ Piety’s observation was prescient: in *Sorrell v. IMS Health Inc.*,¹⁴ decided barely a year and a half after *Citizens United*, the Supreme Court appears to have begun reformulating the commercial speech doctrine, reasoning that a Vermont statute regulating commercial speech warranted “heightened judicial scrutiny” because the law “impose[d] a content- and speaker-based burden on . . . speech.”¹⁵

commercial speech doctrine altogether and declare that commercial speech should be treated as fully protected speech, or it will nominally retain the doctrine but apply strict scrutiny review.”); Menthe, *supra* note 1, at 162 (“The *Citizens United* decision should finally break the back of commercial speech doctrine, which will be a reason to rejoice.”).

9. “There is not a very clear working definition of what commercial speech is.” Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2592 (2008). In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Rights Counsel (Virginia Pharmacy)*, 425 U.S. 748 (1975), the Supreme Court stated that “speech which does no more than propose a commercial transaction” was commercial speech. *Id.* at 762 (citations omitted) (internal quotation marks omitted). But in *Central Hudson Gas & Electric Corp. v. Public Service Commission (Central Hudson)*, 447 U.S. 557 (1980), the Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” *Id.* at 561. Later, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court relied on three characteristics—the fact that the speech was an advertisement, the fact that it referred to a specific product, and the fact that the speaker had an economic motivation for the speech—to conclude that informational pamphlets were commercial speech. *Id.* at 66–67; see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1125 (4th ed. 2011) (listing the three characteristics of commercial speech relied on by the Court in *Bolger*). “No one . . . disagree[s] that advertising of prices for products is a form of commercial speech. The [unsettled] issue . . . [is] what other speech, besides price advertising, should be regarded as commercial speech.” CHERMERINSKY, *supra*, at 1125; cf. Piety, *supra*, at 2602 (“[T]he Court has never clearly articulated an alternative [to the *Virginia Pharmacy*] definition [of commercial speech], so many continue to allude to the ‘speech which does no more than propose a commercial transaction.’”).

10. *Virginia Pharmacy*, 425 U.S. at 762 (citation omitted) (internal quotation marks omitted).

11. For a more thorough discussion of the commercial speech doctrine, see *infra* notes 227–31 and accompanying text.

12. Cf. Piety, *supra* note 9, at 2588 (“[N]one of the proposed theoretical justifications for protecting freedom of expression support application of its most robust incarnation to for-profit corporations. To the contrary, a review of those theories leads to the conclusion that the interests the First Amendment was meant to protect are unlikely to be advanced by broad protection for the speech of for-profit corporations.” (footnote omitted)).

13. Piety, *supra* note 8, at 19.

14. 131 S. Ct. 2653 (2011).

15. *Id.* at 2666 (emphasis added). As Justice Breyer pointed out in his dissent, “[the] Court

Sorrell suggests that the Court intends to adhere to *Citizens United*'s basic premise and increasingly scrutinize—and strike down—restrictions on *all* forms of corporate speech.¹⁶ This leads to an obvious question without an obvious answer: if the First Amendment bars all regulatory distinction based on a speaker's identity, including its identity as a corporation, does it also bar all regulatory distinctions based on the speaker's identity as a labor union? If the *Citizens United* and *Sorrell* decisions existed in a legal, historical, and political vacuum, the answer to this question would surely be *yes*. After all, the law that the Court so vehemently struck down in *Citizens United* regulated the political expenditures of both corporations and unions.¹⁷ If the Court is now (albeit tacitly)¹⁸ applying *Citizens United*'s rationale to commercial speech—speech that is quintessentially an economic activity,¹⁹ *not* a form of self-expression²⁰—it follows that union speech, whether on political or

[has] . . . previously [never] applied any form of 'heightened' scrutiny in any even roughly similar case." *Id.* at 2677 (Breyer, J., dissenting). Rather, the Court had "applied a less than strict, 'intermediate' First Amendment test when the government directly restricts commercial speech. Under that test, government laws and regulations may significantly restrict speech, as long as they also 'directly advance' a 'substantial' government interest that could not 'be served as well by a more limited restriction.'" *Id.* at 2674 (Breyer, J., dissenting) (quoting *Central Hudson*, 447 U.S. 557, 564 (1980)); *see also infra* notes 227–31 and accompanying text.

16. Cf. Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court Is Using the First Amendment to Craft a Radical, Free-Market Jurisprudence*, 23 DEMOCRACY: A JOURNAL OF IDEAS 46, 51 (2011), available at http://www.democracyjournal.org/pdf/23/the_roberts_court_v_america.pdf (discussing *Sorrell* and concluding that "the reasoning of *Sorrell* puts [the] constitutionality [of many corporate regulations] in doubt").

17. *Infra* note 199 and accompanying text.

18. Neither *Sorrell*'s majority nor dissenting opinion mentions *Citizens United*, even though the parties in favor of striking down the Vermont law—and their supporters—relied on *Citizens United* in their briefs. *See, e.g.*, Brief for Respondent Pharm. Research and Mfrs. of Am. at 23, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779), 2011 WL 1149047 at *23 (citing *Citizens United* to support the argument that the Vermont law is presumptively invalid because it disfavors speakers and viewpoints); Brief Amicus Curiae of Pac. Legal Found. and Cato Inst. in Support of Respondents at 20, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) (citing *Citizens United* in support of the proposition that "[r]elegating speech by those who have commercial interests to second-class status silences one side of a debate"). Those who argued in favor of upholding the Vermont law also cited *Citizens United*, but relied on the political implications of the decision to advance their argument:

In the wake of *Citizens United*, which confirms that corporations have a First Amendment right to political speech, there is no justification for specially protecting commercial speech too. If the pharmaceutical industry—one of the most politically active of all industries—does not like the Vermont statute, then it can spend money in the next election cycle to disseminate its side of the story. That is real First Amendment speech, not the commercial activity at issue in this case.

Brief for Ass'n of Am. Physicians & Surgeons as Amicus Curiae in Support of Petitioners at 3–4, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) (citations omitted).

19. *See supra* note 9.

20. While it is beyond dispute that commercial speech is a form of expression, even the current Court would likely agree that *corporate* commercial speech it is not a form of *self-expression*.

economic matters, should be treated no differently by the Court than similar speech by corporations, non-corporate institutions, and individuals.

But case law does not exist in a vacuum. For over half a century, the Supreme Court has evidenced a bias against union speech.²¹ The scope of this bias was eloquently conveyed by James Pope nearly three decades ago:

[W]hile secondary boycott picketing by a civil rights organization demanding economic justice for blacks has been protected under the First Amendment, secondary boycott picketing by unions demanding economic justice for workers and protesting the Soviet invasion of Afghanistan has not. . . . Corporate speech may not be restricted solely on the ground that the speaker is a corporation, but labor picketing may be restricted under statutes that apply only to labor unions, leaving other groups free to engage in precisely the same activities. . . . Civil rights organizations have been accorded First Amendment protection against anti-communist affidavit requirements; labor unions have not. Civil rights organizations have been permitted to conduct sit-in protests against private business practices on private property, labor unions have not.²²

As noted by Pope, the double standard that the Court has applied to union speech is well illustrated in the context of secondary boycotts, which are

Compare Self-Expression Definition, DICTIONARY.COM, <http://dictionary.reference.com/browse/self-expression> (last visited Oct. 8, 2011) (defining “self-expression” as “the expression or assertion of one’s own personality, as in conversation, behavior, poetry, or painting”) (emphasis added), *with FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (“We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities. This is not to say that corporations do not have correspondence, influence, or tragedies of their own, only that we do not use the word ‘personal’ to describe them.”).

21. *Cf.*, e.g., James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1074 (1987) (observing that, since the 1950s, “the Supreme Court has, in effect, relegated labor protest to a black hole, not by casting it down, but by building up a body of [F]irst [A]mendment protections outside the labor area while leaving labor to the doctrines of the past” (footnotes omitted)); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 4 (1984) (“Labor relations is the one area of law in which the policies of the [F]irst [A]mendment have been consistently ignored, reduced, and held to be outweighed by other interests. A ‘policy of limited expression’ has been applied to pure speech and symbolic speech, to consumer picketing and employee boycotts, to political action and to the organizational activities of both labor and management. It has been woodenly applied by the National Labor Relations Board . . . , routinely enforced by the courts of appeals, and given its major impetus by the Supreme Court in a series of opinions notable for their failure to explain, rationalize, distinguish, or articulate useful standards.” (footnotes omitted)). For a thorough analysis and critique of the Supreme Court’s labor speech jurisprudence, see generally Pope, *supra* note 2.

22. Pope, *supra* note 2, at 190–91 (footnotes omitted).

restricted by section 8(b)(4)(B) of the National Labor Relations Act.²³ The term *secondary boycott* has been succinctly defined “as a combination to influence A by exerting economic or social pressure against persons with whom A deals.”²⁴ The employer with which a union has a dispute is known as the “primary” employer. During secondary boycotts, unions employ handbilling, picketing, or striking to put pressure on a “secondary” employer—an employer “with which the primary employer has a business relationship”; “the object of such pressure usually is to alter that business relationship to the detriment of the primary employer and thereby to raise the cost to the primary employer of continuing the labor dispute.”²⁵ The following example helps to illustrate how section 8(b)(4)(B) restricts unions’ ability to engage in a secondary boycott.

Imagine the following scenario²⁶: two people stand in front of a Best Buy store, each carrying a sign. One of the two people is a unionist; her sign asks consumers to boycott the store because it sells iPads that are produced by non-union child labor in China.²⁷ The second sign is carried by a Best Buy employee; her sign advertises that iPads are currently on sale in the store at a bargain price. While the store’s advertising activity in this scenario is legal, the unionist’s activity—known as secondary consumer picketing²⁸—is barred by section 8(b)(4)(ii)(B) of the NLRA because it is a form of secondary boycott.²⁹ Even though this restriction is

23. 29 U.S.C. § 158(b)(4)(B) (2006).

24. 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, 907 (2005) (citing FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 43 (1930)).

25. 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1741 (John E. Higgins, Jr. et al. eds., 5th ed. 2006) [hereinafter DEVELOPING LABOR LAW].

26. This hypothetical is based on the scenario presented in James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950–51 (1999). I have substituted iPads for the Furbys used in Pope’s example but have not altered the substance of Pope’s hypothetical.

27. See Charles Duhigg & David Barboza, *In China, Human Costs Are Built Into an iPad*, N.Y. TIMES, Jan. 25, 2012, <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html> (“[T]he workers assembling iPhones, iPads and other devices often labor in harsh conditions, according to employees inside those plants, worker advocates and documents published by companies themselves. . . . Under-age workers have helped build Apple’s products, and the company’s suppliers have improperly disposed of hazardous waste and falsified records, according to company reports and advocacy groups that, within China, are often considered reliable, independent monitors.”).

28. “‘Secondary consumer picketing’ takes place at the consumer entrances of a business legally neutral in the labor dispute publicized by the picket.” Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 944 n.33 (1982); see also *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 80 (1964) (Harlan, J., dissenting) (defining secondary consumer picketing).

29. Pope, *supra* note 26, at 950.

“a textbook example of viewpoint discrimination,”³⁰ section 8(b)(4)(ii)(B) has been upheld by the Court for over fifty years.³¹

Now picture a third person in front of the store, also holding a sign. This person is a human rights activist; her sign instructs consumers to boycott Best Buy because it sells iPads, which are manufactured by Apple, a company that exploits Chinese workers. “Like the unionist, the human rights activist is urging a secondary boycott of the store. However, her activity is not illegal under the [NLRA] because section 8(b)(4)(ii) applies only to unionists, leaving others to engage in precisely the same activities.”³² Even under pre-*Citizens United* jurisprudence, labor scholars argued that—because section 8(b)(4)(ii)(B) applies only to unions—it “violates the First Amendment principle of neutrality among speakers.”³³ But this argument was slightly off the mark because the neutrality principle that served as the argument’s foundation—the principle that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual”³⁴—was not consistently applied by the Court, even in the context of corporate political speech.³⁵ And before *Sorrell*, the neutrality principle had never been invoked to justify heightened scrutiny in a commercial speech case.³⁶ *Citizens United*’s re-affirmation of the neutrality principle in the context of corporate political speech and the *Sorrell* Court’s prompt extension of that principle to corporate commercial speech indicates a sea change.

But will the ripples of that change reach the shores of labor law? In light of the Supreme Court’s historical anti-union bent, will the Court be willing to consistently apply the neutrality principle and re-evaluate its

30. *Id.* “The unionist’s message is illegal because it criticizes the store’s policy of selling [iPads] and urges consumers to express their disapproval by taking their patronage elsewhere, while the store’s message is legal because it approves the sale of [iPads] and urges consumers to patronize the store and take advantage of the low price” *Id.*

31. *See infra* Part I.C.

32. Pope, *supra* note 26, at 951.

33. *Id.* (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776–77 (1978)). “In short, the First Amendment principle of neutrality does not apply in the labor sphere.” *Id.*

34. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978).

35. *Cf., e.g., Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (holding that independent expenditures by corporations can be restricted because of “the unique state-conferred corporate structure that facilitates the amassing of large treasuries” and the State’s interest in “ensur[ing] that expenditures reflect actual public support for the political ideas espoused by corporations”), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

36. *See supra* note 15; *cf. infra* notes 228–31 and accompanying text. For a description of the varying levels of scrutiny—rational basis test, intermediate scrutiny, and strict scrutiny—used by courts to evaluate constitutional claims, see CHEMERINSKY, *supra* note 9, at 552–54.

jurisprudence in the area of union speech? If the answer is *no*, this would indicate that the Court's rhetoric denouncing speaker-based restrictions is nothing more than a façade. When the Court deals with speech by labor unions, it will continue to find ways to uphold speaker-based restrictions on the union's expression by stating that the restrictions must be read so as to avoid Constitutional questions,³⁷ or by labeling the expression as conduct rather than speech,³⁸ or by asserting that the expression in question is *too effective*.³⁹ But when the Court analyzes a restriction of corporate speech, it will conclude that the facial validity of the restriction simply *must* be considered,⁴⁰ or proclaim that "[t]he Government may not. . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration,"⁴¹ or announce that the speech is subject to heightened scrutiny because it is content- and speaker-based.⁴² On the other hand, maybe the Court is prepared to harshly scrutinize *all* identity-based restrictions of speech—even restrictions that target labor unions. Indeed, the current Court has been praised for its "almost aggressive, pervasive and nearly unanimous protection of fairly basic First Amendment Principles" during the 2010 term.⁴³

Because further speculation on this point is likely fruitless, this Note will assume that there is at least a possibility that the Court is willing to seriously reconsider its First Amendment jurisprudence in the area of union speech. Given this optimistic assumption, this Note will argue that *Citizen United's* basic premise should lead the Court to strike down the restrictions on unions' use of secondary boycotts that are imposed by section 8(b)(4)(B) of the NLRA.⁴⁴ The argument that section 8(b)(4)(B)

37. See *infra* notes 119–21 and accompanying text.

38. See *infra* notes 148–49 and accompanying text.

39. Cf. *infra* note 143 and accompanying text.

40. Compare *Citizens United v. FEC*, 130 S. Ct. 876, 894 ("Citizens United's narrower arguments are not sustainable under a fair reading of the statute. In the exercise of its judicial responsibility, it is necessary then for the Court to consider the [statute's] facial validity . . ."); *with id.* at 932–33 (Stevens, J., concurring in part and dissenting in part) ("The [majority's] unnecessary resort to a facial inquiry 'run[s] contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (citation omitted)).

41. *Id.* at 899.

42. Cf. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011) ("Vermont's law imposes a content- and speaker-based burden on respondents' . . . speech. That consideration . . . requires heightened judicial scrutiny.").

43. David L. Hudson Jr., *Center Stage for the First Amendment: Protecting Controversial Speech Shows a Libertarian Bent*, A.B.A. J., Sept. 2011, at 20 (quoting Robert M. O'Neil, founder of the Thomas Jefferson Center for the Protection of Free Expression in Charlottesville, Va.).

44. See Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech*

violates the First Amendment is not a novel one.⁴⁵ But it is an argument that needs to be reformulated in light of *Citizens United* and *Sorrell* because the Court's recent, seemingly unconditional embrace of the neutrality principle of the First Amendment provides union advocates with a powerful modern doctrine that makes section 8(b)(4)(B)'s demise a distinct possibility.

This Note argues (1) that *Citizen United's* neutrality principle in the context of corporate political speech should lead the Court to strike down the ban on political secondary boycotts and (2) that *Sorrell's* use of the neutrality principle in the context of corporate commercial speech should lead the Court to strike down restrictions on economic secondary boycotts or—at the very least—to apply heightened scrutiny to such boycotts. After providing a brief background on the history that led to the adoption of section 8(b)(4)(B), Part I of this Note examines the Supreme Court's interpretation of 8(b)(4)(B), focusing primarily on how the section has been applied in the context of secondary consumer picketing and political secondary boycotts. Part II discusses *Citizens United*, *Sorrell*, and the neutrality principle that is at the core of both decisions. Part III argues that, given the Court's invocation of the neutrality principle in the context of corporate political and commercial speech, there is no principled

Rights?, 53 WM. & MARY L. REV. 1, 18–24 (2011). This Note makes a similar—though narrower—argument: while Garden's article only briefly discusses the implications of *Citizens United* on secondary boycotts and picketing, these implications are the focus of this Note. In addition, this Note goes beyond the Court's holding in *Citizens United* by incorporating the Court's recent commercial speech jurisprudence such as *Sorrell*, to buttress the argument that the Court's section 8(b)(4)(B) case law is anachronistic. See *infra* Part II.B. A recent comment by Joseph L. Guza does specifically focus section 8(b)(4)(B) and argues that, “[g]iven the Court’s reasoning in *Citizens United*, and given the fundamental political nature of labor speech, statutes that restrict labor speech because it is labor speech violate the First Amendment. Based on this line of reasoning, section 8(b)(4)(ii)(B) is unconstitutional.” Joseph L. Guza, Comment, *A Cure for Laryngitis: A First Amendment Challenge to the NLRA’s Ban on Secondary Picketing*, 59 BUFF. L. REV. 1267, 1302 (2011). (Guza also argues that section 8(b)(4)(ii) is unconstitutionally vague. See *id.* at 1306–11.) But Guza’s argument is markedly different from the one advanced by this Note, because it relies on the premise that labor speech is political speech, and thus “should be afforded the same protection as other types of political speech under the First Amendment.” *Id.* at 1294–99 (footnote omitted). While Guza’s historical argument may be a strong one, it seems inconceivable that the Court will ever take the step of classifying *all* labor speech—or even all secondary labor picketing—as political. Even when the Court has acknowledged that a secondary boycott was politically motivated, it has held that such a political boycott was not entitled to First Amendment protection. See *infra* Part I.D.

45. See, e.g., Pope, *supra* note 2 (arguing, among other things, that restrictions on labor protests would not withstand the kind of First Amendment scrutiny that the Court applies to other forms of expression and proposing an alternative theory of the First Amendment and the expressive value of labor protests); Note, *supra* note 28 (arguing that non-coercive consumer picketing by labor unions is entitled to full First Amendment protection).

justification for upholding section 8(b)(4)(B)'s secondary boycott restrictions.

I. UNION SECONDARY BOYCOTTS AND SECTION 8(b)(4)(B)⁴⁶

A. *The Long and Winding Road (to Section 8(b)(4)(B))*

To understand section 8(b)(4)(B), it is necessary to appreciate the secondary boycott's utility to labor organizations. The secondary boycott gives labor unions the ability to exert indirect pressure on an employer: "instead of merely pressuring [the employer] directly with a strike, picket, handbill or other action, the labor organization pressures [the employer] indirectly, by making [the employer's] clients, suppliers, or other persons with whom [the employer] conducts business the target of such activity."⁴⁷ Because an effective secondary boycott places pressure on an employer from sources that would otherwise not be involved in the labor dispute, the secondary boycott is a powerful force multiplier.⁴⁸

The secondary boycott has been used by labor organizations throughout American history but was illegal⁴⁹ until 1932, when the

46. For similar background sections on section 8(b)(4)(B), see, e.g., Guza, *supra* note 43, at 1271–87; Dan Ganin, Note, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539, 1541–58 (2008); 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, 1531–40 (2007).

47. Bock, *supra* note 24, at 908.

48. *Cf.* DEVELOPING LABOR LAW, *supra* note 25, at 1746 ("The secondary boycott has long been one of the most effective weapons in labor's economic arsenal.").

49.

Even before 1900, courts routinely held secondary boycotts unlawful as criminal conspiracies. Later, they were enjoined by courts of equity through broad application of antitrust law, part of a sweeping wave of anti-union sentiment culminating with the imposition of the Sherman Antitrust Act upon the activities of organized labor. Some of the earliest injunctions against union activities involved secondary components, and these cases played a major role in the doctrinal development of antitrust applicability to the right to strike, picket, and boycott.

Bock, *supra* note 24, at 908 (footnotes omitted); *see also* Note, *supra* note 28, at 940 n.12 (describing the legal status of picketing in the nineteenth century as, "at best, . . . a legitimate means of economic coercion, the legality of which depended on the economic objective of the union" (citations omitted) (internal quotation marks omitted)); DEVELOPING LABOR LAW, *supra* note 25, at 1746–49 (describing the regulation of secondary activity before passage of the Taft-Hartley Act). Primary boycott activity was likewise considered illegal activity by many courts in the 19th and early 20th centuries. *See* Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255, 273 (2006) ("In the constitutional law of the late nineteenth and early twentieth centuries, labor boycotts, strikes, and pickets were simply understood not as speech but rather as conduct. At the beginning of the nineteenth century, labor unions seeking what would today be considered routine objectives would have been considered criminal conspirators." (footnote omitted)); GEORGE GORHAM GROAT, ATTITUDE OF

passage of the Norris-LaGuardia Act⁵⁰ “put a statutory end to the use of injunctive relief [by federal courts] to stop a wide array of union activity, including the secondary boycott.”⁵¹ The following year, seeking to “stimulate employment and promote changes which would make . . . another depression [unlikely],”⁵² Congress enacted the National Industrial Recovery Act (NIRA).⁵³ While the NIRA was promptly struck down by the Supreme Court,⁵⁴ the National Labor Relations Act⁵⁵ (NLRA or “Wagner Act”) of 1935—containing several provisions that were nearly identical to the NIRA⁵⁶—was upheld by the Court,⁵⁷ “bec[oming] the first piece of New Deal legislation to pass constitutional muster”⁵⁸ and “inaugurat[ing] the modern era of American labor law.”⁵⁹ The Wagner Act (1) granted employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the

AMERICAN COURTS IN LABOR CASES: A STUDY IN SOCIAL LEGISLATION 85 (Faculty of Political Sci. of Colum. Univ. ed., Lawbook Exchange 2003) (1911) (“That the weight of opinion is on the side of the illegality of the boycott seems not to be open to question.”). It should be noted that “secondary boycotts were not uniformly condemned.” DEVELOPING LABOR LAW, *supra* note 25, at 1747. For example, “[i]n New York the courts allowed pressure that did not ‘extend beyond a point where . . . the union’s direct interests cease.’” *Id.*

50. Norris-LaGuardia (Labor Disputes) Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-110, 113-115).

51. Bock, *supra* note 24, at 910 (citing RALPH M. DERESHINSKY ET AL., THE NLRB AND SECONDARY BOYCOTTS 2 (1981)); *see also* PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 415 (1964) (“The [Norris-LaGuardia Act] limited the issuance of injunctions in labor disputes by the federal courts, prohibited court injunctions against certain otherwise legal activities of unions, granted a jury trial to defendants in contempt cases committed outside of the court room, and compelled a change of venue when requested.”).

52. TAFT, *supra* note 51, at 417.

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

54. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding the NIRA unconstitutional).

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

56. *See* Bock, *supra* note 24, at 911 (“The [Wagner Act] . . . contain[ed] essentially the same safeguards as those set forth in NIRA’s section 7(a) . . .”). *Compare* Wagner Act § 7 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection”), *with* NIRA § 7(a)(1) (“Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”).

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

58. Bock, *supra* note 24, at 911.

59. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533 (2002).

purpose of collective bargaining or other mutual aid or protection”;⁶⁰ (2) banned “unfair labor practices” by employers;⁶¹ (3) “established a mechanism for the election and certification of representative labor organizations, based on the principle of majority rule”;⁶² and (4) created the National Labor Relations Board (NLRB or “Board”) “to administer representation proceedings and to enforce the Act, subject to judicial review in the federal courts of appeals.”⁶³

But the labor victory that the Wagner Act represented was short-lived. The rapid increase in union membership in the decade following the Act’s passage resulted in a host of problems.⁶⁴ The growing labor movement “was widely regarded as having ‘abused’ its newfound power.”⁶⁵ “In particular, critics pointed to unions’ use of *secondary boycotts* and disruptive strikes, their insistence on closed-shop agreements, their involvement in jurisdictional disputes between unions, and, in some cases, their corruption.”⁶⁶ To deal with these abuses, Congress amended the NLRA by passing the Labor Management Relations Act⁶⁷ (LMRA or “Taft-Hartley Act”) in 1947. The Taft-Hartley amendments had a profound impact on labor law in general⁶⁸ and a destructive long-term impact on collective bargaining in particular.⁶⁹

Among the Taft-Hartley amendments to the NLRA was the prohibition of unfair labor practices by *labor unions*.⁷⁰ Restrictions on unions’ use of

60. National Labor Relations (Wagner) Act § 7, 29 U.S.C. 157 (2006).

61. *See id.* § 8 (defining five types of unfair labor practices by employers); *id.* § 10(a) (empowering the National Labor Relations Board “to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce”).

62. Estlund, *supra* note 59, at 1533 (citing Wagner Act § 9).

63. *Id.* (citing Wagner Act §§ 3, 10).

64. TAFT, *supra* note 51, at 579 (“[A]buses of stewardship, jurisdictional strikes and the use of the secondary boycott, refusal of some unions to bargain in good faith, as well as the sharp rise in labor disputes in the immediate postwar period, created a widespread public demand for remedial action.”).

65. Estlund, *supra* note 59, at 1534.

66. *Id.* at 1534 n.25 (emphasis added) (citing Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 763–65 (1998). *See also* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 105–12 (2002)); *supra* note 64.

67. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.).

68. *See* Estlund, *supra* note 59, at 1534 (“Taft-Hartley turned away from the forthright endorsement of collective bargaining and reframed the basic policy of the [NLRA] as favoring employee ‘free choice’ with respect to unionization and collective bargaining.”).

69. *Cf.* Lichtenstein, *supra* note 66, at 789 (1998) (“Industry-wide bargaining . . . collapsed in the early 1980s . . . One cannot directly link the concession bargaining of those years to passage of the Taft-Hartley Act, but, taken as a whole, the 1947 labor statute established the structural framework which made such a bargaining debacle possible.”).

70. *See* Taft-Hartley Act § 8(b) (defining *union* unfair labor practices).

the secondary boycott—described in section 8(b)(4)(B) of Taft-Hartley—were among the newly formulated unfair labor practices. In 1959, Congress passed the Landrum-Griffin Act,⁷¹ closing various “loopholes” left by Taft-Hartley⁷² and resulting in the present-day form of section 8(b)(4)(B). Landrum-Griffin was the last substantial revision of the NLRA.⁷³

B. A Primer on Section 8(b)(4)(B)

Section 8(b)(4) has been described as “one of the most complex provisions” of the Taft-Hartley Act;⁷⁴ this complexity is hidden within the fairly straightforward structure of the NLRA. Under section 10(a) of the NLRA, the National Labor Relations Board is empowered “to prevent any person from engaging in any unfair labor practice . . . affecting commerce.”⁷⁵ Unfair labor practices by employers are defined in section 8(a) of the Act,⁷⁶ while unfair labor practices by labor organizations or their agents are defined in section 8(b).⁷⁷

The structure of 8(b)(4) is somewhat quirky; it contains four subsections ((A), (B), (C), and (D)) and two clauses ((i) and (ii)). The two clauses specify *conduct* which becomes an unfair labor practice if the union engaging in the conduct has one of the goals or *objects* specified in subsections (A) through (D).⁷⁸ Section 8(b)(4)(B) can therefore be broken up into two clauses, each of which defines a conduct that becomes an unfair practice if combined with the object in subsection (B): “[c]ause (i) prohibits a union from engaging in a strike or inducing an *employee* to

71. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

72. Bock, *supra* note 24, at 914; *see* DEVELOPING LABOR LAW, *supra* note 25, at 1751–53 (discussing the “loopholes” that employers and members of Congress felt were weakening the Taft-Hartley boycott provisions).

73. Estlund, *supra* note 59, at 1535.

74. BRUCE FELDACKER, LABOR GUIDE TO LABOR LAW 296 (2000).

75. 29 U.S.C. § 160(a) (2006).

76. 29 U.S.C. § 158(a) (2006).

77. 29 U.S.C. § 158(b) (2006).

78. In addition to the objects in subsection (B), these “unlawful” objects include “forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by [section 8(e)],” *id.* § 158(b)(4)(A), “forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees,” *id.* § 158(b)(4)(C), and “forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class . . . unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work,” *id.* § 158(b)(4)(D).

strike or otherwise refuse to work,” and “[c]ause (ii) prohibits a union from threatening, restraining or coercing *any person* to engage in conduct”⁷⁹ *if*—in either case—an object of the union’s conduct is to “forc[e] or requir[e] *any person* to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person,” *or* to “forc[e] or require[e] any other *employer* to recognize or bargain with a labor organization as the representative of his employees [if] such labor organization has [not] been certified as the representative of such employees.”⁸⁰ Note the distinction between the clauses: clause (ii) “prohibits threats, et cetera, against *any person*, not just employees. This section thus prohibits union threats *directly* against an employer In contrast, clause (i) prohibits a union even from *peacefully* inducing or encouraging an employee to engage in a strike or other refusal to work, et cetera”⁸¹ The NLRA provides for remedial measures if section 8(b)(4)(B) is violated.⁸²

If read literally, section 8(b)(4)(B) could prevent all picketing by unions,⁸³ “[h]owever, the last sentence of [s]ection 8(b)(4)(B) contains a proviso protecting the right to engage in primary picketing or a primary strike ‘not otherwise unlawful.’”⁸⁴ Secondary activity in the form of publicity such as handbilling is also partially protected by the “publicity proviso” contained in section 8(b)(4).⁸⁵ Since section 8(b)(4) applies only

79. FELDACKER, *supra* note 74, at 297 (emphasis added); 29 U.S.C. § 158(b)(4).

80. 29 U.S.C. § 158(b)(4)(B) (2006) (emphasis added).

81. FELDACKER, *supra* note 74, at 297.

82. The NLRA “provides that the Board’s investigating officer must petition the federal court for an injunction if there are reasonable grounds for believing” that section 8(b)(4)(B) has been violated. DEVELOPING LABOR LAW, *supra* note 25, at 1750. In addition, the NLRA specifies that section 8(b)(4) conduct by labor unions is unlawful. 29 U.S.C. § 187(a) (2006). “An aggrieved party [is entitled] to sue for damages resulting from [such] activity.” DEVELOPING LABOR LAW, *supra* note 25, at 1750 (paraphrasing 29 U.S.C. § 187(b)).

83. FELDACKER, *supra* note 74, at 297; *cf.* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 82 (1983) (“Supreme Court decisions in the 1960s . . . recognized that certain of the Taft-Hartley amendments of 1947 could not possibly given their literal scope. The result was a narrowing, for instance, of the secondary boycott prohibitions.”).

84. FELDACKER, *supra* note 74, at 298; 29 U.S.C. § 158(b)(4)(B).

85. The publicity proviso states that nothing in section 8(b)(4)

shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution

29 U.S.C. § 158(b)(4) (2006).

to secondary activity,⁸⁶ the Supreme Court has had to struggle with the fact that “the distinction between legitimate ‘primary activity’ and banned ‘secondary activity’ . . . does not present a glaringly bright line.”⁸⁷ Not surprisingly, this struggle has produced a complex body of case law as both the Court and the NLRB have been forced to draw lines between permissible primary activity and prohibited secondary activity.⁸⁸

C. Secondary Consumer Picketing Under Section 8(b)(4)(ii)(B)

To understand the Court’s section 8(b)(4)(B) jurisprudence, it is helpful to begin—as many commentators do⁸⁹—with a case that pre-dates the section’s enactment: *Thornhill v. Alabama*.⁹⁰ In *Thornhill*, the Supreme Court struck down a state statute that prohibited the picketing of businesses.⁹¹ The case came before the Court after Thornhill, a worker who had peacefully picketed his employer’s plant in accordance with his union’s strike order,⁹² was convicted of violating the statute’s prohibition.⁹³

86. “Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike . . .” *Local 761, Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB (Local 761)*, 366 U.S. 667, 672 (1961) (quoting *NLRB v. Int’l Rice Milling Co.*, 341 U. S. 665, 672 (1951)). “The impact of the section was directed toward what is known as the secondary boycott whose ‘sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.’” *Id.* at 672 (quoting *Int’l Bhd. of Elec. Workers v. NLRB*, 181 F. 2d 34, 37 (1950)).

87. *Local 761*, 366 U.S. at 673.

88. As explained in the Introduction, this Note is primarily concerned with only two of the ways that section 8(b)(4)(B) has been applied: as a restriction on secondary consumer picketing and as a ban on political boycotts. For a thorough discussion of secondary activity falling under 8(b)(4), see DEVELOPING LABOR LAW, *supra* note 25, at 1741–1868 and FELDBACKER, *supra* note 74, at 296–341. For a thorough treatment of how the Board interprets and applies section 8(b)(4), see Bock, *supra* note 24.

89. See, e.g., Note, *supra* note 28, at 941–44 (discussing and analyzing section 8(b)(4)(B) case law); Pope, *supra* note 2, at 219 (same).

90. *Thornhill v. Alabama*, 310 U.S. 88 (1940). While *Thornhill* was not a case involving secondary picketing, the decision could certainly have been interpreted to apply to secondary picketing. Cf. Note, *supra* note 28, at 941 (“Although its holding was on the narrow ground of overbreadth, *Thornhill* established that restrictions on picketing were subject to the constraints of the First Amendment.”). Justice Murphy—the author of the majority opinion in *Thornhill*—“hoped that *Thornhill* would serve as ‘Labor’s Magna Carta.’” Pope, *supra* note 21, at 1092.

91. *Thornhill*, 310 U.S. 88. The statute in *Thornhill* also prohibited any person from go[ing] near to or loiter[ing] about the premise or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association.

Id. at 91.

92. *Id.* at 93–94.

93. *Id.* at 91.

The Court noted that freedom of speech is “among the fundamental personal rights and liberties,”⁹⁴ and observed that, when there is a claimed abridgement of that right, “the courts should ‘weigh the circumstances’ and ‘appraise the substantiality of the reasons advanced’ in support of the challenged regulations.”⁹⁵ With this tenet of statutory construction in mind, the Court concluded that the statute was “invalid on its face.”⁹⁶ This conclusion was explicitly premised on the belief that speech regarding a labor dispute is speech regarding a matter of public concern:

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. . . . [But] [i]t does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely *industrial relations* which are *matters of public concern*. A contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society.⁹⁷

The Court stated that its conclusion may have been different if the case had involved a “narrowly drawn” statute that was meant to address “clear and present danger of destruction of life or property, or [an] invasion of the right of privacy, or [a] breach of the peace.”⁹⁸

Unfortunately for labor, *Thornhill*’s impact on the Court’s labor picketing jurisprudence was short-lived: even before the Landrum-Griffin amendments created the present-day form of section 8(b)(4)(B), the Court “effectively withdrew protection for labor picketing associated with boycott activities.”⁹⁹ The Court frequently justified this by invoking—among other things—the “speech-plus” doctrine: picketing, which “is a *combination* of speech and conduct, . . . is not ‘pure speech,’” and is therefore not entitled “to the same level of protection as . . . ‘pure speech.’”¹⁰⁰ Rather than tracing these post-*Thornhill* developments in

94. *Id.* at 95.

95. *Id.* at 96 (quoting *Schneider v. State*, 308 U.S. 147, 161, 162 (1939)).

96. *Id.* at 101.

97. *Id.* at 103–04 (emphasis added).

98. *Id.* at 105.

99. Pope, *supra* note 2, at 219. “Within ten years, the Court had adopted an extremely lenient standard of constitutionality for restrictions on labor picketing: any picketing having an ‘illegal objective’ was not protected by the First Amendment.” Note, *supra* note 28, at 942. For a discussion of this development, see *id.* at 942–44; see also Pope, *supra* note 2, at 219–20.

100. JOHN J. WHITEHEAD, THE RIGHT TO PICKET AND THE FREEDOM OF PUBLIC DISCOURSE 75

detail, this Note will next examine the Court's application of section 8(b)(4)(B) to secondary consumer boycotts; while the Court repeatedly refused to read section 8(b)(4)(B) in a way that would prohibit all secondary consumer picketing,¹⁰¹ the Court's approach was nonetheless a far cry from the lofty rhetoric of *Thornhill*.

In 1964, the specific issue of the scope of the amended section 8(b)(4)(ii)(B)'s prohibition on secondary consumer boycotts came before the Court in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*.¹⁰² In *Tree Fruits*, the primary employers were firms that sold Washington State apples to Safeway, a chain of retail stores.¹⁰³ A union representing the fruit and vegetable packers and warehouse workers called a strike¹⁰⁴ “in a dispute over the terms of the renewal of a collective bargaining agreement”¹⁰⁵ and—with the backing of other unions¹⁰⁶—“instituted a consumer boycott against the apples in support of the strike.”¹⁰⁷ This consumer boycott consisted of picketers who paraded in front of the entrances of forty-six Safeway stores while wearing placards and distributing handbills.¹⁰⁸ The union's message was narrowly targeted at the struck product—the Washington State apples sold by the primary employers.¹⁰⁹ Rather than asking the consumers not to shop at Safeway, the placards and handbills merely requested that the public not buy the Washington State apples, which were only one of many products sold at the stores.¹¹⁰

(1984). For a discussion of the origins and development of the speech-plus doctrine, see *id.* at 75–81.

101. See *supra* note 83 and accompanying text.

102. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964). Section 8(b)(4)(i)(B) was not implicated in this case, since the secondary picketing “was directed at consumers only, and was not intended to ‘induce or encourage’ employees . . . to engage in any kind of action . . .” *Id.* at 61 n.5.

103. *Id.* at 59–60.

104. *Id.* at 59.

105. *Id.* at 59 n.2.

106. *Id.* at 60.

107. *Id.*

108. *Id.* There were only two picketers at each of forty-five stores and three picketers at the forty-sixth store. *Id.*

109. *Id.*

110. *Id.* Indeed, the manager of each Safeway store received a letter informing him that the picketing was only an appeal to his customers not to buy Washington State apples, and that the pickets were being expressly instructed “to patrol peacefully in front of the consumer entrances of the store, to stay away from the delivery entrances and not to interfere with the work of [the store's] employees, or with deliveries to or pickups from [the] store.”

Id. at 61. The picketers received written instructions “forbidd[ing] [them from] request[ing] that the customers not patronize the score,” and a copy of these instructions was also given to the store managers. *Id.*

Even though the picketing in this case was completely peaceful and did not hinder store employees' work, obstruct deliveries or pickups, or interfere with "[i]ngress and egress by customers,"¹¹¹ the Court had no doubt that it would have been prohibited by section 8(b)(4)(ii)(B) if the purpose of the picketing had been to persuade customers to stop *all trade with Safeway*.¹¹² The issue before the Supreme Court was instead whether the unions violated section 8(b)(4)(ii)(B) when their secondary picketing was not aimed at *all* of the products handled by the secondary employer, but was "limited . . . to an appeal to the customers of the stores *not to buy the products of [the primary employers]* against which one of the [unions] was on strike."¹¹³ Based on its interpretation of the legislative history and the publicity proviso to section 8(b)(4)¹¹⁴—which allows certain types of "publicity, *other than picketing*" during *secondary boycotts*¹¹⁵—the NLRB had held that section 8(b)(4)(ii)(B) prohibited *all* secondary consumer picketing.¹¹⁶ The court of appeals had rejected the Board's conclusions "and held that the statutory requirement of a showing that respondent's conduct would 'threaten, coerce, or restrain' Safeway could only be satisfied by affirmative proof that a substantial economic impact on Safeway had occurred, or was likely to occur as a result of the conduct."¹¹⁷

Writing for the majority, Justice Brennan rejected both the Board's and the appellate court's interpretations of section 8(b)(4)(ii)(B) and held that secondary consumer picketing that is "confined . . . to persuading customers to cease buying the product of the primary employer" is not prohibited by the statute.¹¹⁸ Justice Brennan pointed out "that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment,"¹¹⁹ but side-stepped the need to address the constitutionality

111. *Id.*

112. *See id.* at 63. The Court described how the legislative history of the Taft-Hartley amendments indicated that they were intended to "proscri[be] . . . peaceful consumer picketing at secondary sites [when it was] use[d] to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." *Id.* *See also id.* at 81 (Harlan, J., dissenting) ("[The majority] holds that although § 8(b)(4)(ii)(B) does automatically outlaw peaceful secondary consumer picketing aimed at *all* products handled by a secondary employer, Congress has not, with the 'requisite clarity,' evinced a purpose to prohibit such picketing when directed *only* at the products of the primary employer." (citations omitted)).

113. *Id.* at 59 (emphasis added).

114. *See supra* note 85 and accompanying text.

115. 29 U.S.C. § 158(b)(4) (2006) (emphasis added).

116. *Tree Fruits*, 377 U.S. at 62. As the Court pointed out, the Board's interpretation of the statute "necessarily rested on the finding that Congress determined that [secondary consumer] picketing *always* threatens, coerces or restrains the secondary employer." *Id.* (emphasis added).

117. *Id.*

118. *Id.* at 71.

119. *Id.* at 63.

of section 8(b)(4)(ii)(B) by stating that—regardless of plain language¹²⁰—the Court could not read a statute to “outlaw peaceful picketing unless there is the clearest indication in the legislative history that Congress intended to do so as regards the particular ends of the picketing under review.”¹²¹ Surveying the legislative history of the Landrum-Griffin amendments to section 8(b)(4),¹²² the Court concluded that “the history shows that Congress was following its usual practice of legislating against peaceful picketing only to curb ‘isolated evils’”;¹²³ according to Brennan, the “isolated evil” in the case of secondary consumer picketing was “its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer.”¹²⁴ Without citing any legislative history or case law, the Court then made a distinction between consumer picketing that “is employed only to persuade customers not to buy the struck product” and consumer picketing that “is employed to persuade customers not to trade at all with the secondary employer.”¹²⁵ According to the Court, the former type of picketing is “closely confined to the primary dispute” and “[decreases] the secondary employer’s purchases from the struck firms . . . only because the public has diminished its purchase of the struck product,” while the latter type of picketing “creates a separate dispute with the secondary employer” because the secondary employer “stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business *generally*.”¹²⁶

Agreeing with the dissent’s conclusion that section 8(b)(4)(ii)(B) prohibits all secondary consumer picketing,¹²⁷ Justice Black was the only

120. *See id.* at 71–72 (“While any diminution in Safeway’s purchases of apples due to a drop in consumer demand might be said to be a result which causes respondents’ picketing to fall literally within the statutory prohibition, ‘it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.’” (citations omitted)); *cf. id.* at 82 (Harlan, J., dissenting) (“The Union’s activities are plainly within the letter of [section 8(b)(4)(ii)(B)], and indeed the Court’s opinion virtually concedes that much. . . . [But] [n]othing in the statute lends support to the fine distinction which the Court draws between general and limited product picketing.” (citation omitted)).

121. *Id.* at 63 (internal quotation marks omitted) (citations omitted).

122. *See id.* at 64–71.

123. *Id.* at 71.

124. *Id.* at 68.

125. *Id.* at 72.

126. *Id.* (emphasis added).

127. Writing for the dissent, Justice Harlan argued that the distinction between “general and limited product picketing” established by the Court “is surely too refined in the context of reality,” and that nothing in the statute, or the legislative history supported the distinction. *Id.* at 82 (Harlan, J., dissenting). Concluding that section 8(b)(4)(ii)(B) does prohibit *all* secondary consumer picketing, Justice Harlan proceeded to address the constitutionality of such a prohibition. He dismissed the idea

member of the Court who argued “that the section abridges freedom of speech and press in violation of the First Amendment.”¹²⁸ Quoting *Thornhill*, Black observed that “the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”¹²⁹ Acknowledging that “patrolling is . . . conduct, not speech, and therefore is not directly protected by the First Amendment,” Black reasoned that when non-protected conduct such as patrolling “is intertwined . . . with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press”¹³⁰ and that “it is the duty of courts, before upholding regulations of patrolling, to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights of speech and press.”¹³¹ Justice Black pointed out that this was “neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned,” but rather “a case in which picketing, otherwise lawful, is banned only when the picketers express particular views.”¹³² He argued that “[t]he result is an abridgment of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.”¹³³

Sixteen years after its holding in *Tree Fruits*, the Supreme Court once again examined the scope of section 8(b)(4)(ii)(B)’s prohibition of secondary consumer boycotts in *NLRB v. Retail Store Employees Union, Local 1001, Retail Clerks International Ass’n, AFL-CIO (Safeco)*.¹³⁴ The secondary consumer boycott in this case was initiated by a union that represented some employees of Safeco Title Insurance Co., a real estate title insurance underwriter.¹³⁵ Safeco had business relationships with five

that a general prohibition of secondary consumer picketing was “inconsistent with the protections of the First Amendment, particularly when . . . other methods of communication are left open.” *Id.* at 93. By “other methods of communication,” Harlan was referring to non-picketing publicity that is protected by the publicity proviso. *See supra* note 85 and accompanying text.

128. *Id.* at 77 (Black, J., concurring).

129. *Id.* at 77 (Black, J., concurring) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)) (internal quotation marks omitted).

130. *Id.* (Black, J., concurring).

131. *Id.* at 78 (Black, J., concurring) (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)) (internal quotation marks omitted).

132. *Id.* at 79 (Black, J., concurring).

133. *Id.* (Black, J., concurring).

134. 447 U.S. 607 (1980).

135. *Id.* at 609.

local title companies.¹³⁶ These companies “search[ed] land titles, perform[ed] escrow services, and [sold] title insurance”; “[o]ver 90% of their gross incomes derive[d] from the sale of Safeco insurance.”¹³⁷ As a result of stalled contract negotiations with Safeco, the union went on strike, picketing both Safeco’s office and the offices of each of the five title companies,¹³⁸ but “direct[ing] its appeal [only] against Safeco insurance policies.”¹³⁹ Safeco and one of the title companies filed complaints with the NLRB, which found that, “since the sale of [Safeco’s] policies accounted for substantially all of the title companies’ business, . . . the [u]nion’s action was ‘reasonably calculated to induce customers not to patronize the neutral parties at all’” and was therefore a violation of section 8(b)(4)(ii)(B).¹⁴⁰ The union appealed the Board’s decision; relying on *Tree Fruits*, the court of appeals naturally concluded that section 8(b)(4)(ii)(B) offered no protection “from secondary picketing against the consumption of products produced by an employer involved in a labor dispute.”¹⁴¹

The Supreme Court disagreed, concluding that, because “the [u]nion’s secondary appeal against the central product sold by the title companies . . . is reasonably calculated to induce customers not to patronize the neutral parties at all[,] . . . [t]he resulting injury to their businesses is distinctly different from the injury . . . in *Tree Fruits*.”¹⁴² According to the Court, “successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, . . . plainly violat[ing] [section 8(b)(4)(ii)(B)].”¹⁴³

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 610.

140. *Id.*

141. *Id.* at 611.

142. *Id.* at 614 (citation omitted) (internal quotation marks omitted).

143. *Id.* at 615. But not every member of the Court was convinced by this reasoning. Writing for the dissent, Justice Brennan argued that “[t]he conceptual underpinnings of [the Court’s] new standard are seriously flawed,” and outlined the fundamental problem with the Court’s logic:

The type of economic pressure exerted upon the secondary retailer by a primary product boycott is the same whatever the percentage of its business the primary product composes—in each case, a decline in sales at the secondary outlet may well lead either to a decrease in purchases from the primary employer or to product substitution.

Id. at 622 (Brennan, J., dissenting). Brennan pointed out that “it is far from clear that the harmfulness of a primary product boycott is necessarily correlated with the percentage of the secondary firm’s business the product constitutes.” *Id.* Brennan was also concerned that “[l]abor unions [would] no longer be able to assure that their secondary site picketing [was] lawful by restricting advocacy of a boycott to the primary product, as ordained by *Tree Fruits*,” *id.* at 623, and [would] instead “be compelled to guess whether the primary proportion makes up a sufficient portion of the retailer’s

Although six of the justices agreed that the statute prohibited the union's conduct, a majority could not agree on why this prohibition did not conflict with the First Amendment. Writing for the plurality, Justice Powell argued that the prohibition was justified because secondary picketing furthers "unlawful objectives" through the "spread[ing] [of] labor discord by coercing a neutral party to join the fray,"¹⁴⁴ and relied on previous cases in which the Court "expressly held that a prohibition on 'picketing in furtherance of [such] unlawful objectives' did not offend the First Amendment."¹⁴⁵ Justice Blackmun concurred because of his "reluctan[ce] to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."¹⁴⁶ Finally, Justice Stevens expressed "agree[ment] with the plurality that [section 8(b)(4)(ii)(B)'s] content-based restriction is permissible," but he rejected the plurality's reasoning that this was simply because the restriction was "in furtherance of the objectives deemed unlawful by Congress."¹⁴⁷ Instead, Stevens argued that "picketing is a mixture of conduct and communication," and 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."¹⁴⁸ Because section

business to trigger the displeasure of the courts or the Labor Relations Board," *id.* at 624. The majority seemed untroubled by the new burden that it was placing on unions and the Board:

If secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today's decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss. Resolution of the question in each case will be entrusted to the Board's expertise.

Id. at 616–17 n.11.

144. *Id.* at 616. The "neutral party" referred to by Justice Powell is the secondary employer—in this case, the five title companies. The "unlawful objective" standard articulated by Justice Powell is sometimes also referred to as the "illegal objective" standard or test. *See Note, supra* note 28, at 942.

145. *Safeco*, 447 U.S. at 616 (quoting *Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951)) (citing *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 229–31 (1974); *Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957)).

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

147. *Id.* at 618 (Stevens, J., concurring). As Justice Stevens pointed out, Congress cannot get around the requirements of the First Amendment by simply labeling "the otherwise lawful expression of views" as "unlawful" and therefore unprotected—"[o]therwise the First Amendment would place no limit on Congress' power." *Id.* Rather, "it is [the Court's] responsibility to determine whether the method or manner of expression, considered in context, justifies the particular restriction." *Id.*; *cf. Note, Free Enterprise Values, supra* note 28, at 942–43 (describing the illegal objective test and criticizing it for being "circular and wholly deferential to legislative action").

148. *Safeco*, 447 U.S. at 619 (Stevens, J., concurring) (emphasis added).

8(b)(4)(ii)(B) “affects only 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” and “is limited . . . to sites of neutrals in the labor dispute,” Stevens concluded that the statute’s restrictions “are sufficiently justified by the purpose to avoid embroiling neutrals in a third party’s labor dispute.”¹⁴⁹

While *Tree Fruits* and *Safeco* established the boundaries of permissible secondary consumer picketing, an important question was left unanswered: other than picketing, what other kind of “coercive” conduct does section 8(b)(4)(ii)(B) prohibit? The Court addressed this issue in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.¹⁵⁰ *DeBartolo* involved a union’s dispute with H.J. High Construction Company (“High”), which was hired by H.J. Wilson Company (“Wilson”) to construct a department store in a mall owned by the Edward J. DeBartolo Corporation (“DeBartolo”).¹⁵¹ The union had a primary labor dispute with High over wages and benefits.¹⁵² In an attempt to put pressure on Wilson and High, the union peacefully—and “without any accompanying picketing or patrolling”—handed out handbills at all four mall entrances.¹⁵³ The handbills “ask[ed] mall customers not to shop at any of the stores in the mall ‘until the Mall’s owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.’”¹⁵⁴ Neither DeBartolo nor any of the other mall tenants had any say over the selection of contractors by Wilson,¹⁵⁵ but the handbills did not inform consumers that the union’s dispute was with Wilson and High, and the union did not limit the distribution of its handbills to the “immediate vicinity of Wilson’s construction site.”¹⁵⁶

The NLRB held that the union’s handbilling was prohibited by section 8(b)(4)(ii)(B) because it “constituted coercion” under its prior cases.¹⁵⁷ Noting that “the Board’s construction of the statute . . . poses serious questions of the validity of [section] 8(b)(4) under the First

149. *Id.* (Stevens, J., concurring).

150. 485 U.S. 568 (1988).

151. *Id.* at 570.

152. *Id.*

153. *Id.* at 571.

154. *Id.* at 570.

155. *Id.*

156. *Id.* at 571.

157. *Id.* at 573.

Amendment,¹⁵⁸ the Court employed familiar methods to find a way out of invalidating section 8(b)(4)(ii)(B). First, the Court distinguished handbilling targeting mall employees—which was prohibited by section 8(b)(4)(i)(B)—from the handbilling in this case, which targeted mall customers only.¹⁵⁹ The Court then focused on the facts before it and concluded that “[t]here is no suggestion that the leaflets had any coercive effect on customers of the mall.”¹⁶⁰ Relying on Justice Stevens’s conduct-communication distinction in *Safeco*,¹⁶¹ the Court reasoned that handbilling is merely *persuasive*, unlike picketing which, due to its “conduct element,” is coercive.¹⁶² In doing so, the Court essentially equated picketing and patrolling with violence in terms of the coercive effects.¹⁶³ Finally, the Court reviewed the legislative history of section 8(b)(4)(ii)(B) and concluded that there was no indication that Congress intended to prohibit peaceful handbilling.¹⁶⁴

Taken together, *Tree Fruits*, *Safeco*, and *DeBartolo* evidence a tortured logic. Secondary consumer picketing is coercive and generally forbidden. When such picketing targets *only* the products made by the primary employer, it is allowed *unless* the secondary employer can reasonably be expected to suffer substantial loss.¹⁶⁵ Handbilling, on the other hand, is not coercive regardless of how much harm it inflicts (or may potentially inflict) on the secondary employer.¹⁶⁶ Since *DeBartolo*, the Board and the

158. *Id.* at 575. The Court appeared troubled by the fact that the Board’s holding would prohibit the peaceful distribution of “handbills [that] truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall.” *Id.*

159. *See id.* at 578 (“We note first that ‘induce[ing] or encourag[ing]’ employees of the secondary employer to strike is proscribed by § 8(b)(4)(i). But more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints. Those words, we have said, are ‘nonspecific, indeed vague,’ and should be interpreted with ‘caution’ and not given a ‘broad sweep’”). The distinction drawn by the Court rests on the difference in language between sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B). Section 8(b)(4)(i)(B) prohibits unions and their agents from “induc[ing] or encourag[ing] any individual employed by any person engaged in commerce or in an industry affecting commerce . . . to engage in, a strike or a refusal [to work],” while section 8(b)(4)(ii)(B) prohibits unions and their agents from “threaten[ing], coerc[ing], or restrain[ing] any person.” 29 U.S.C. § 158(b)(4) (2006) (emphasis added). Long before it decided *DeBartolo*, the Supreme Court had concluded that “[t]he words ‘induce or encourage’ are broad enough to include in them every form of influence and persuasion,” and are larger in scope than the words “restrain” and “coerce.” *Int’l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 701–03 (1951).

160. *DeBartolo*, 485 U.S. at 578.

161. *See supra* notes 148–49 and accompanying text.

162. *DeBartolo*, 485 U.S. at 580.

163. *See id.* at 578 (“There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall.”).

164. *Id.* at 583–88.

165. *See supra* notes 125–26, 142–43 and accompanying text.

166. *See supra* notes 161–62 and accompanying text.

lower appellate courts have been forced to sort out this mess without help from the Supreme Court. The courts of appeals have (not surprisingly) come to different conclusions as to whether different types of secondary boycott activity are more like picketing—and therefore prohibited—or more like handbilling, and therefore permissible.¹⁶⁷ As a final example of the confused case law dealing with section 8(b)(4)(B), the next part briefly details the Court’s application of the statute to prohibit *political* boycotts.

D. Political Boycotts Under Section 8(b)(4)(B)

In *International Longshoremen’s Association, AFL-CIO v. Allied International, Inc. (ILA)*,¹⁶⁸ the Court faced the question of “whether a refusal by an American longshoremen’s union to unload cargoes shipped from the Soviet Union is an illegal secondary boycott under [section] 8(b)(4).”¹⁶⁹ In *ILA*, “the president of the International Longshoremen’s Association (ILA), ordered ILA members to stop handling cargoes arriving from or destined for the Soviet Union” in order “to protest the Russian invasion of Afghanistan.”¹⁷⁰ As a result, “longshoremen up and down the east and gulf coasts refused to service ships carrying Russian cargoes.”¹⁷¹ This boycott disrupted the shipments of Allied International, Inc. (Allied), “an American company that import[ed] Russian wood products for resale in the United States.”¹⁷² “Allied was forced to renegotiate its Russian contracts, substantially reducing its purchases and jeopardizing its ability to supply its own customers.”¹⁷³ After being informed “that ILA members would continue to refuse to unload any

167. Compare, e.g., *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2008) (finding that a mock funeral in furtherance of a secondary consumer boycott of a hospital “was not ‘threaten[ing], coerc[ive], or restrain[ing],’ in violation of Section 8(b)(4)(ii)(B)”), with *Kentov v. Sheet Metal Workers’ Int’l Ass’n Local 15*, 418 F.3d 1259, 1266 (11th Cir. 2005) (holding that “there is reasonable cause to believe that [a] [u]nion violated Section 8(b)(4)(ii)(B)” when it staged a mock funeral in furtherance of a secondary consumer boycott of a hospital). For a discussion of the differing approaches that the D.C. Circuit and the Eleventh Circuit took in determining whether mock funerals violated section 8(b)(4)(ii)(B), see Dan Ganin, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539, 1558–61 (2008).

168. 456 U.S. 212 (1982).

169. *Id.* at 214.

170. *Id.*

171. *Id.* at 215.

172. *Id.* Allied had contracted with Waterman Steamship Lines (“Waterman”) for shipment of the wood from Russia to the United States. *Id.* Waterman employed John T. Clark & Son of Boston, Inc. (“Clark”), “to unload its ships docking in Boston.” *Id.* It was Clark who had hired ILA members as longshoring employees under the terms of a collective-bargaining agreement. *Id.*

173. *Id.* at 215–16.

Russian cargo,” Allied sued ILA for damages in district court, “[c]laiming that the boycott violated the prohibition against secondary boycotts in [section] 8(b)(4).”¹⁷⁴ Finding that “the ILA boycott [was] a purely political, primary boycott of Russian goods,” the district court dismissed the complaint.¹⁷⁵ The court of appeals reversed, holding that the ILA boycott was prohibited, “despite its political purpose, and that resort to such behavior was not protected activity under the First Amendment.”¹⁷⁶

In contrast to its non-literal interpretation of section 8(b)(4)(B) in *Tree Fruits*,¹⁷⁷ the Supreme Court relied on the plain language of the statute, stating: “[t]he secondary boycott provisions in [section] 8(b)(4)(B) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person. By its terms the statutory prohibition applies to the undisputed facts of [this] case.”¹⁷⁸ Acknowledging that the purpose of ILA’s boycott may not have been to negatively affect Allied’s business, but “simply to free ILA members from the morally repugnant duty of handling Russian goods,” the Court reasoned that this “argument misses the point.” “[W]hen a purely secondary boycott reasonably can be expected to threaten neutral parties with ruin or substantial loss, the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless.”¹⁷⁹ Rather than looking—as in previous cases—at whether the statute clearly indicated that Congress intended to prohibit political boycotts, the Court instead looked for evidence that Congress did *not* intend to prohibit political boycotts and concluded that, “[i]n the absence of any limiting language in the statute or legislative history, [there is] no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision purposefully drafted in broadest terms.”¹⁸⁰ The Court appeared outraged “that a national labor union ha[d] chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal

174. *Id.* at 216. Allied was able to bring this action in district court under section 303 of the Labor Management Relations Act. *Id.* at 216; Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 303, 61 Stat. 136, 158–59 (1947) (codified as amended at 29 U.S.C. § 187).

175. *ILA*, 456 U.S. at 217.

176. *Id.* at 218.

177. *See supra* note 120; *see also supra* notes 120–21 and accompanying text.

178. *ILA*, 456 U.S. at 222.

179. *Id.* at 224 (citation omitted) (internal quotation marks omitted).

180. *Id.* at 225. The Court explained that “accept[ing] the argument that ‘political’ boycotts are exempt from the secondary boycott provision” would “create a large and undefinable exception to the statute” and that “[t]he distinction between labor and political objectives would be difficult to draw in many cases.” *Id.*

labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity.”¹⁸¹

The Court hastily dismissed the argument that its application of section 8(b)(4) to ILA’s boycott “infringe[s] upon the First Amendment rights of the ILA and its members.”¹⁸² Since the Court “ha[d] consistently rejected the claim that secondary picketing by labor unions . . . is protected activity under the First Amendment,” the Court saw no reason why ILA’s activity—“conduct designed not to communicate but to coerce”—should be protected by the First Amendment.¹⁸³ According to the Court, “[t]here are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others.”¹⁸⁴

The Court’s ruling in *ILA* would seem less shocking if not for its ruling in *NAACP v. Claiborne Hardware*,¹⁸⁵ a case decided in the same year. The events that led to the litigation in *Claiborne* were initiated when black citizens of Claiborne County “presented white elected officials with a list of particularized demands for racial equality and integration.”¹⁸⁶ The officials did not respond favorably, and at a subsequent NAACP meeting, “several hundred black persons voted to place a boycott on white merchants in the area.”¹⁸⁷ Three years into the boycott, seventeen of the merchants “filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity”; two corporations and 146 individuals were named as defendants.¹⁸⁸ The Mississippi Supreme Court partially upheld the trial court’s imposition of liability on the basis of a common-law tort theory because some of the boycott participants had used force and violence to effectuate the boycott.¹⁸⁹

181. *Id.* at 225–26 (internal quotation marks omitted).

182. *Id.* at 226.

183. *Id.* at 226–27.

184. *Id.* at 227. The Court failed to identify exactly what “rights” the ILA was infringing on in this case.

185. 458 U.S. 886 (1982).

186. *Id.* at 889.

187. *Id.*

188. *Id.*

189. *Id.* at 894. Because some of the defendants “engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers,” the Mississippi Supreme Court had concluded that “the evidence show[ed] that the volition of many black persons was overcome out of sheer fear, and they were *forced and compelled* against their personal wills to withhold their trade and business intercourse from the complainants.” *Id.* at 894–95 (emphasis added). This finding led the court to “conclude[] that the entire boycott was unlawful.” *Id.* at 895. The court did, however, dismiss thirty-eight of the defendants. *Id.* at 896.

The Supreme Court acknowledged that individuals could be held liable for their own violent conduct, but rejected the notion that collective liability could be imposed for these acts without “findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.”¹⁹⁰ The Court somewhat unconvincingly distinguished its section 8(b)(4)(B) jurisprudence by once again relying on the conclusory statement that “[s]econdary boycotts and picketing by labor unions may be prohibited[] as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”¹⁹¹ The Court continued:

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit *peaceful political activity* such as that found in the boycott in this case. This Court has recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values. [S]peech concerning public affairs is more than self-expression; it is the essence of self-government.¹⁹²

But in both *ILA* and *Claiborne*, the Court never explained why, when evaluating the constitutionality of limits on secondary boycott activity, the Court must focus on the *economic effects* of unions’ activity while disregarding such effects and focusing on the *political purpose* of such activity when engaged in by civil rights groups. The speech of civil rights protestors, however, is not the only type of speech that the Supreme Court seems to prefer to union speech. The next part of this Note describes *Citizen United*’s seemingly unconditional protection of corporate speech in the form of campaign financing and the spillover effect of the Court’s reasoning in *Citizen United* into the realm of corporate commercial speech.

190. *Id.* at 933–34.

191. *Id.* at 912 (quoting *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring)).

192. *Claiborne*, 458 U.S. at 913 (emphasis added) (citation omitted) (internal quotation marks omitted).

II. “CORPORATIONS ARE PEOPLE, MY FRIEND”¹⁹³: *CITIZENS UNITED*’S SPEAKER-BASED ANALYSIS AND THE EMERGING CORPORATE COMMERCIAL SPEECH DOCTRINE

A. Citizens United

The “headline version” of the Court’s holding in *Citizens United* is “that corporations may use their general treasury funds to finance independent expenditures and electioneering communications that expressly advocate the election or defeat of clearly identified candidates for public office.”¹⁹⁴ For purposes of this Note, what is most relevant about *Citizens United* is the principle that the majority relied on to arrive at this holding: “[t]he First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker.”¹⁹⁵ The facts of *Citizens United* are straightforward. During the 2008 presidential primary elections, Citizens United—a nonprofit corporation—released a 90-minute documentary about Hillary Clinton, who was one of the Democratic candidates.¹⁹⁶ The movie “was released in theatres and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.”¹⁹⁷ Citizens United also wished “to promote the video-on-demand offering by running advertisements on broadcast and cable television.”¹⁹⁸ Citizens United wanted to make the movie “available through video-on-demand within 30 days of the 2008 primary elections,” but worried that this would be a violation of a federal law that prohibited corporations and unions from using their general treasury funds for express advocacy or “electioneering communication”¹⁹⁹—which meant any publicly distributed²⁰⁰ “broadcast,

193. The phrase “corporations are people, my friend,” was Republican Presidential Candidate Mitt Romney’s response to a heckler who was “apparently urging Romney to raise taxes on corporations that have benefited from loopholes in the tax code.” Philip Rucker, *Mitt Romney Says “Corporations Are People” at Iowa State Fair*, WASH. POST, Aug. 11, 2011, http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html. Romney’s comment “stirred a brief but intense controversy.” Gary Gutting, *Corporations, People and Truth*, N.Y. TIMES (Oct. 12, 2011, 2:19 PM), <http://opinionator.blogs.nytimes.com/2011/10/12/corporations-people-and-truth>.

194. Frances R. Hill, *Implications of Citizens United for the 2010 Election and Beyond*, SS019 ALI-ABA 103, 105 (2010).

195. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

196. *Id.* at 887.

197. *Id.*

198. *Id.*

199. See 29 U.S.C. § 441b (2006).

200. The requirement that the broadcast, cable, or satellite communication be “publicly distributed” was specified in FEC regulations. *Citizens United*, 130 S. Ct. at 887 (citing 11 C.F.R.

cable, or satellite communication’ that ‘refers to a clearly identified candidate for federal office’ and is made within 30 days of a primary or 60 days of a general election.’²⁰¹ Seeking a declaratory injunction against the Federal Election Commission (FEC), Citizens United claimed that the federal law was unconstitutional as applied to the movie.²⁰² As Citizens United argued²⁰³—and as was pointed out by Justice Stevens in his dissent²⁰⁴—the Court could have resolved the case on narrower grounds without invalidating the statute or overturning precedent, thereby allowing Citizens United to broadcast the movie and the ads and avoiding the constitutional issue. Alternatively, the “straightforward path” proposed by Justice Stevens would have been for the Court to adhere to the precedent set by *Austin v. Michigan Chamber of Commerce*²⁰⁵—in which the Court held that corporations could be prohibited from using general corporate treasury funds for independent expenditures that support or oppose candidates during an election²⁰⁶—and “hold[] that the funding of Citizen United’s film can be regulated.”²⁰⁷

Rather than taking this straightforward path, the majority overruled *Austin*²⁰⁸ and invalidated the challenged statute.²⁰⁹ Justice Kennedy,

§ 100.29(a)(2) (2009)). “‘In the case of a candidate for nomination for President . . . *publicly distributed* mean[t]’ that the communication ‘[could] be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days.’” *Id.* (quoting 11 C.F.R. § 100.29(b)(3)(ii)).

201. *Id.* (quoting 2 U.S.C. § 434(f)(4)(A) (2006)).

202. *Id.* at 888. Citizens United also argued that certain disclaimer and disclosure requirements in the Bipartisan Campaign Reform Act of 2002 were unconstitutional as applied to the movie and the ads for the movie. *Id.* The Court rejected this argument and found the statutory requirements valid. *Id.* at 914.

203. Citizens United argued that the movie did not qualify as an “electioneering communication” both as a matter of statutory interpretation and precedent. *Id.* at 888–89. In addition, it argued that the statute “should be invalidated as applied to movies shown through video-on-demand, [because] this delivery system has a lower risk of distorting the political process than do television ads,” and that an exception should be created to the expenditure ban “for nonprofit corporate political speech funded overwhelmingly by individuals.” *Id.* at 890–91.

204. *See id.* at 936–38 (Stevens, J., concurring in part and dissenting in part) (discussing narrower grounds of decision that the majority could have adopted).

205. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876 (2010).

206. *Austin*, 492 U.S. at 655. The Michigan statute that was at issue in *Austin*—the Michigan Campaign Finance Act—defined an independent expenditure as one that “is not made at the direction of, or under the control of, another person and . . . is not a contribution to a committee.” *Id.* at 655. The Act “[d]id not impose an *absolute* ban on all forms of corporate political spending but permit[ted] corporations to make independent political expenditures through separate segregated funds.” *Id.* at 660. In addition, the Act contained a “media exception” under which media corporations were exempted from the expenditure restriction. *Id.* at 666–67.

207. *Citizens United*, 130 S. Ct. at 938 (Stevens, J., concurring in part and dissenting in part).

208. *Id.* at 913. The majority also overruled the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which had relied on the holding in *Austin*. *Citizens United*, 130 S. Ct. at 913.

209. *Citizens United*, 130 S. Ct. at 913.

writing for the majority, was unequivocal in rejecting *Austin*: “the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”²¹⁰ The Court justified its abandonment of precedent mainly²¹¹ by relying on *First National Bank of Boston v. Bellotti*.²¹² In *Bellotti*, a case that predated *Austin*, the Court had invalidated²¹³ a Massachusetts criminal statute that “prohibited . . . [specified business corporations] from making contributions or expenditures for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.”²¹⁴ According to the *Citizens United* majority, the principle behind *Bellotti* was both clear and compelling: “the Government lacks the power to ban corporations from speaking.”²¹⁵

For purposes of the analysis below, two final points should be noted. The first is the majority’s rejection of the argument—relied on in *Austin*—that individuals are distinguishable from corporations for First Amendment purposes because “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”²¹⁶ According to the Court, “[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”²¹⁷ Second, it is important to note that none of the opinions in *Citizens United* even mention the possibility of applying the speech-conduct distinction in the context of campaign expenditures. This equating of money with speech is a legacy of *Buckley v. Valeo*,²¹⁸ in which the Court famously upheld individual campaign contribution limits, while holding that “limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his

210. *Id.*

211. As Justice Stevens pointed out, the majority “justif[ied] its claim” that “*Austin* [was] ‘a significant departure from ancient First Amendment principles’” by relying on “[s]elected passages from two cases, *Buckley* [v. *Valeo*] and *Bellotti*,” but the majority placed “greater weight” on *Bellotti*. *Id.* at 957–58 (Stevens, J., concurring in part and dissenting in part).

212. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

213. *Id.* at 795.

214. *Id.* at 767–68 (citations omitted) (internal quotations omitted).

215. *Citizens United*, 130 S. Ct. at 903.

216. *Id.* at 905 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1989)).

217. *Id.* (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

218. 424 U.S. 1 (1976).

personal funds are [unconstitutional].”²¹⁹ It was in *Buckley* that the Court explicitly rejected the argument that giving and spending money in political campaigns was a form of *conduct*, not speech, stating: “this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”²²⁰

As stated above, what is most significant about *Citizens United* for purposes of this Note is the majority’s unconditional embrace and sweeping application of the principle that Government may not suppress political speech on the basis of the speaker’s corporate identity. Nothing in the majority’s opinion suggests that this principle does *not* apply equally to invalidate laws that suppress the political speech of labor unions.²²¹ At the very *least*, then, it seems that *Citizens United* should lead the Court to re-interpret section 8(b)(4)(B) of the NLRA so as to allow political boycotts by labor unions.²²² This leads to a difficult question: is the Court willing to extend *Citizens United*’s rationale into the realm of non-political

219. *Id.* at 14.

220. *Id.* at 16. The *Buckley* Court reasoned that

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19; *see also id.* at 65 n.76 (“[M]oney is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication.”).

221. In fact, the majority relied on a string of cases that dealt with speech by *labor unions* in order illustrate why “the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional” until the late 1970s. *Citizens United*, 130 S. Ct. at 900–01; *see id.* at 900–01 (discussing cases in which the Court avoided declined to address this issue). Similarly, the majority relied several times on excerpts from decisions that equated union speech with corporate speech. For example, the majority quoted the dissenting opinion in *United States v. Automobile Workers*, 352 U. S. 567 (1957), in which “the dissent concluded that deeming a particular group ‘too powerful’ was not a ‘justificatio[n] for withholding First Amendment rights from any group—labor or corporate,’” *Citizens United*, 130 S. Ct. at 901 (quoting *Automobile Workers*, 352 U.S. at 597 (Douglas, J., dissenting)). The majority also cited *Bellotti* for the proposition that “the worth of speech ‘does not depend upon the identity of its source, whether corporation, association, union, or individual,’” *id.* at 904 (emphasis added) (quoting *Bellotti*, 435 U.S. at 777). *See also id.* at 919 (Roberts, J., concurring) (“The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation *or union*.”) (emphasis added).

222. *See infra* Part III.

speech and invalidate *all* of section 8(b)(4)(B)? The next part of this Note offers one reason to think that the answer to this question is *yes*.

*B. Sorrell's Extension of Corporate Personhood into the Realm of Commercial Speech*²²³

In a series of cases beginning with *Bigelow v. Virginia*²²⁴ in 1975, the Supreme Court first extended the protections of the First Amendment to commercial speech²²⁵—most commonly defined as speech which does no more than propose a commercial transaction.²²⁶ The commercial speech doctrine was created the following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Pharmacy)*.²²⁷ Under this doctrine, “[c]ommercial speech is offered less protection than political or other quintessentially protected speech, but regulation directed at this speech must meet an intermediate scrutiny test.”²²⁸ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,²²⁹ “the Court set out the four-part test for commercial speech still applicable today (albeit more strictly interpreted).”²³⁰ In order to be considered protected speech under the *Central Hudson* test,

the [commercial] speech in question must (1) concern a legal activity and not be misleading (that is it must be truthful speech about a legal activity); (2) if the government seeks to regulate that speech it must do so pursuant to a “substantial interest”; (3) such legislation must directly further the substantial interest in question;

223. This part will also provide some background on the commercial speech doctrine, as established by cases such as *Virginia Pharmacy*, 425 U.S. 748 (1976), *Central Hudson & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

224. 421 U.S. 809 (1975).

225. In *Bigelow*, the Court first stated that advertising was entitled to First Amendment protection. CHEMERINSKY, *supra* note 9, at 1122. However, the Court refused to “decide . . . the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.” *Bigelow*, 421 U.S. at 825.

226. *See supra* notes 9–10.

227. 425 U.S. 748 (1976); *see Piety, supra* note 9, at 2599 (“Most observers agree the [commercial speech] doctrine was created in 1976 in the *Virginia Pharmacy* case.” (citations omitted)).

228. Piety, *supra* note 9, at 2599. Piety notes that, “over the last couple of decades, [intermediate scrutiny] has begun to look a lot more like strict scrutiny.” *Id.* (citing David Vladeck, *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1055–59 (2004)).

229. 447 U.S. 557 (1980).

230. Piety, *supra* note 9, at 2601 (citing *Central Hudson*, 447 U.S. at 557).

and (4) the regulation must be no more expansive than necessary to advance that substantial interest (often described as “fit”).²³¹

While it has not yet abandoned the *Central Hudson* test, in *Sorrell v. IMS Health, Inc.*,²³² the Court appears to have tacitly extended *Citizen United*’s logic into the arena of commercial speech. In *Sorrell*, three Vermont data miners²³³ and an association of pharmaceutical manufacturers²³⁴ challenged a Vermont statute “that sought to restrict the access of pharmaceutical companies to information about the prescribing habits of Vermont doctors.”²³⁵ This type of information is valued by drug companies “because it permits them to identify those doctors most likely to prescribe drugs, and because it allows them to ascertain how best to present their sales pitches when making sales calls at the doctors’ offices—a process called ‘detailing.’”²³⁶ Vermont justified the law on two grounds: first, “that [the] law was necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship,” and second, that the law “[wa]s integral to the achievement of public policy objectives—namely, improved public health and reduced health care costs.”²³⁷ In essence, the Vermont legislature had “concluded that by restricting access to prescriber-identifying information, it could interfere sufficiently with the detailing process to effect a shift in overall drug sales away from brand-name drugs and toward lower-priced generic drugs (which Vermont concluded were often at least as safe and effective as equivalent brand-name drugs).”²³⁸

231. *Id.* (citing *Central Hudson*, 447 U.S. at 566).

232. 131 S. Ct. 2653 (2011).

233. Data miners are “firms that analyze prescriber-identifying information and produce reports on prescriber behavior. . . . Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements.” *Id.* at 2660.

234. *Id.* at 2661.

235. Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2011 CATO SUP. CT. REV. 129, 130 (2011). More specifically, the Vermont statute prohibited “pharmacies and several other entities” from “sell[ing] . . . regulated records containing prescriber-identifiable information” and “permit[ting] the use of [such] records . . . for marketing or promoting a prescription drug, unless the prescriber consents.” *Sorrell*, 131 S. Ct. at 2673 (Breyer, J., dissenting) (internal quotation marks omitted). The statute also barred pharmaceutical manufacturers and pharmaceutical marketers from “us[ing] prescriber-identifiable information for marketing or promoting a prescription drug [without] the prescriber[’s] consent[.]” *Id.* at 2660 (internal quotation marks omitted).

236. Samp, *supra* note 235, at 130; *see also Sorrell*, 131 S. Ct. at 2656 (describing the detailing process used by pharmaceutical manufacturers).

237. *Sorrell*, 131 S. Ct. at 2668.

238. Samp, *supra* note 235, at 130; *see also Sorrell*, 131 S. Ct. at 2670 (describing Vermont’s policy goals); *id.* at 2682 (Breyer, J., dissenting) (reviewing the legislative record supporting

In a 5–4 decision, the Supreme Court struck down the Vermont law after concluding that the statute “d[id] not advance the State’s asserted interest in physician confidentiality”²³⁹ and did not advance the goals of lowering medical costs and promoting public health in a permissible way.²⁴⁰ While the Court could have perhaps reached the same decision by straightforwardly applying the *Central Hudson* test, the significance of *Sorrell* lies in the fact that “the Court went well beyond a typical *Central Hudson* analysis in its discussion of speech restrictions based on the content of the speech and the *identity of the speaker*.”²⁴¹ Writing for the majority, Justice Kennedy began the opinion by seemingly jettisoning the intermediate scrutiny analysis that had previously been applied to commercial speech by stating that “Vermont’s statute must be subjected to *heightened* judicial scrutiny” because “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.”²⁴² The Court explained that heightened judicial scrutiny was warranted because the Vermont statute “is designed to impose a specific, content-based burden on protected expression,”²⁴³ but also stated that heightened scrutiny was justified because the law “imposes a content- and speaker-based burden on . . . speech.”²⁴⁴ It is therefore not clear whether the majority believes that just one or both types of burdens must be present before heightened scrutiny is required.

What *is* clear is that the Court at least partly relied on *Citizen United*’s basic premise—“the proposition that the First Amendment bars regulatory distinction based on a speaker’s identity, including its identity as a corporation”²⁴⁵—in striking down the Vermont statute. In addressing the question of whether the Court’s consideration of the statute required

Vermont’s conclusion that the statute furthered the State’s public health goals).

239. *Sorrell*, 131 S. Ct. at 2669. The Court believed that the statute did not further physician confidentiality because “[t]he explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers,” thus, the “prescriber-identifying information [was therefore] available to an almost limitless audience.” *Id.* at 2668.

240. *Id.* at 2670. The Court did not challenge Vermont’s assertion that the statute would lower the costs of medical services and promote public health; instead, it attacked what it characterized as “the premise” of the statute: “that the force of speech can justify the government’s attempts to stifle it.” *Id.* at 2671. Instead, the Court reasoned that it was impermissible for “[t]he State . . . [to] burden[] a form of protected expression that it found too persuasive” while “[l]eaving[] unburdened those speakers whose messages are in accord with its own views.” *Id.* at 2672.

241. Samp, *supra* note 235, at 133 (emphasis added).

242. *Sorrell*, 131 S. Ct. at 2659 (emphasis added).

243. *Id.* at 2664.

244. *Id.* at 2666 (emphasis added).

245. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

heightened scrutiny, Justice Kennedy wrote: “[t]he statute . . . disfavors marketing, that is, speech with a particular content. More than that, *the statute disfavors specific speakers, namely pharmaceutical manufacturers.*”²⁴⁶ Also significant is the fact—pointed out by the dissent and at least one commentator—that the Court’s ruling in *Sorrell* extended the protections of the First Amendment to an activity that was not previously recognized as speech: the buying and selling of data.²⁴⁷ In fact, the State had argued that “heightened judicial scrutiny was unwarranted . . . because sales, transfer, and use of prescriber-identifying information are *conduct*, not speech,” and the Court of Appeals for the First Circuit had essentially agreed with Vermont’s argument, “characteriz[ing] prescriber-identifying information as a mere ‘commodity’ with no greater entitlement to First Amendment protection than ‘beef jerky.’”²⁴⁸ While the Supreme Court believed that “there [was] a strong argument that prescriber-identifying information is speech for First Amendment purposes,” it concluded that the Vermont statute was entitled to heightened scrutiny, “even assuming, as the State argues, that prescriber-identifying information is a mere commodity.”²⁴⁹ The majority arrived at this conclusion by comparing Vermont’s statute to “a law prohibiting trade magazines from purchasing or using ink,” and reasoning that, “[l]ike that hypothetical law, [the Vermont statute] imposes a speaker- and content-based *burden* on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny.”²⁵⁰ In the majority’s view, then, it did not matter that prescriber-identifying information was not speech, because, by limiting the sale of the information, Vermont’s statute restricted pharmaceutical manufacturers’ commercial speech by burdening their ability to effectively advertise brand-name drugs to doctors.

246. *Sorrell*, 131 S. Ct. at 2663 (emphasis added). The majority was also concerned about the fact that the statute singled out detailers. *See id.* (“Vermont’s law . . . has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner.”).

247. *See id.* at 2675 (Breyer, J., dissenting) (“Vermont’s statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product.”); Purdy, *supra* note 16, at 51 (“*Sorrell* . . . extended First Amendment protection beyond anything recognizable as speech. . . . [M]ost of what the . . . decision protects is not verbal expression or even political spending, but simply the sale of data.”).

248. *Sorrell*, 131 S. Ct. at 2666 (emphasis added).

249. *Id.* at 2667.

250. *Id.* (citations omitted) (emphasis added).

III. ARE UNIONS PEOPLE TOO?

A. *The Legal Analysis*

Taken together, *Citizens United* and *Sorrell* indicate that the Supreme Court has embraced the neutrality principle—that the inherent worth of speech does not depend upon the identity of its source—at least when that principle can be used to strike down laws regulating corporations. *Citizen United*'s articulation of the neutrality principle with respect to corporate political speech could not have been more categorical; Justice Kennedy's words bear repeating: "the Government may not suppress political speech on the basis of the speaker's corporate identity. *No sufficient governmental interest* justifies limits on the political speech of nonprofit or for-profit corporations."²⁵¹ Because the law the Court struck down in *Citizens United* restricted campaign spending by both corporations and unions, surely it follows that no governmental interest justifies limits on the political speech of unions.²⁵² If the Court was willing to treat union boycotts as *speech*, *Citizens United* would undoubtedly lead to an invalidation of section 8(b)(4)(B)'s prohibition of political boycotts. The rationale behind the Supreme Court's holding in *ILA*, however, remains a roadblock to this seemingly inevitable extension of *Citizens United*. In stating that union members' refusal to handle cargo from Russia was not protected activity under the First Amendment, the *ILA* Court explicitly relied on the fact that earlier cases had held that secondary picketing by labor unions was not protected speech. Because union secondary picketing was not protected, the Court reasoned, neither was a union's refusal to handle cargo.²⁵³

The only way out of this doctrinal dead end is to recognize that the Supreme Court's insistence that secondary picketing is unprotected is *in and of itself* a violation of the neutrality principle that the Court has now wholeheartedly embraced. This is obvious if one looks at the three separate but interlinking doctrines that the Court has (inconsistently) relied on to reject constitutional challenges to section 8(b)(4)(B): the unlawful objectives test,²⁵⁴ the delicate balance rationale,²⁵⁵ and the speech-conduct

251. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

252. The Court even relied on several union cases to support its holding in *Citizens United*. See *supra* note 221.

253. *Supra* note 183 and accompanying text.

254. See *supra* notes 144–45 and accompanying text.

255. See *supra* note 146 and accompanying text. Although the Court did not explicitly rely on the delicate balance rationale in *ILA*, it seems to underlie the Court's outrage at the way that the union

distinction.²⁵⁶ As applied by the Court in the context of section 8(b)(4)(B), these standards can only be described as aberrations in the Court's First Amendment jurisprudence. The unlawful objectives test is the worst of the three; as Justice Stevens pointed out in his *Safeco* concurrence, the test essentially says that Congress can get around the requirements of the First Amendment by simply labeling "the otherwise lawful expression of views" as "unlawful" and therefore unprotected.²⁵⁷ The test has been rightly critiqued as "circular and wholly deferential to legislative action," because it allows "[t]he state, whose actions the First Amendment is intended to limit, . . . to establish the parameters of First Amendment protection for labor picketing."²⁵⁸ If such a test were applied in the commercial speech context, it would mean that the Vermont legislature could get around the Court's ruling in *Sorrell* by enacting a statute that defined the purchase of prescriber-identifying information by pharmaceutical corporations as "unlawful conduct" and then prohibiting that conduct; yet it strains the imagination to think of anyone using the unlawful objective test to defend such a statute without being laughed (or thrown) out of the court room. Because this test is applied *only* to speech by unions or their members, it cannot be reconciled with the neutrality principle.

The delicate balance rationale—relied on by the Court in *ILA* and by Justice Blackmun in his *Safeco* concurrence²⁵⁹—is similar to the unlawful objectives test and likewise conflicts with the neutrality principle. This rationale asserts that the Supreme Court cannot hold section 8(b)(4)(B) unconstitutional because it is *Congress's* role to strike the delicate balance "between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."²⁶⁰ But this rationale is as flawed and discriminatory as the unlawful objectives test: while it is true that Congress has the power to regulate commerce, it has never been implied by the Court—outside of the context of union expression—that Congress's decision to regulate a certain type of expression strips that expression of

went beyond its "traditional" role and exercised its economic power for political purposes. *See supra* note 181 and accompanying text.

256. *See supra* notes 148–49, 160–63, and 183 and accompanying text.

257. *Supra* note 147 and accompanying text.

258. Note, *supra* note 28, at 943.

259. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc (ILA)*, 456 U.S. 212, 226 (1982) ("The labor law requires a careful balancing of interests."); *supra* note 146 and accompanying text (describing Justice Blackmun's concurring opinion).

260. *Supra* note 146 and accompanying text.

First Amendment protection.²⁶¹ The delicate balance standard could perhaps be justified before *Citizens United*: maybe the Court's adoption of the standard was premised on the idea that, by giving unions certain legal privileges through the NLRA, Congress gained a greater ability to regulate unions.²⁶² But now that the *Citizens United* Court has categorically rejected the *identical* argument as applied to corporate speech,²⁶³ the delicate balance standard truly lacks any principled foundation.

Finally, the validity of the speech-conduct distinction is likewise undermined by the neutrality principle. In the Court's nonlabor picketing jurisprudence, the Court has repeatedly stated that picketing *is* protected by the First Amendment.²⁶⁴ By formulating a standard under which secondary labor picketing is treated as unprotected conduct, the Court has committed the same sin that it accused Congress of in *Citizens United*²⁶⁵ and the Vermont legislature of in *Sorrell*²⁶⁶: it has discriminated against disfavored speech by disfavored speakers. After all, there is surely no more flagrant violation of the neutrality principle than the Court's adopted rule—illustrated by *ILA* and *Claiborne*—that expression which “rest[s] on the highest rung of the hierarchy of First Amendment values” and “is the

261. *Cf., e.g.,* *New York v. United States*, 505 U.S. 144, 156 (1992) (“Congress exercises its conferred powers subject to the limitations contained in the Constitution. . . . [U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.”); *FEC v. League of Women Voters*, 468 U.S. 364, 378 (1984) (“[A]lthough the Government’s interest in ensuring balanced coverage of public issues is plainly both important and substantial, we have . . . made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area.”); *Am. Commc’ns Ass’n, CIO v. Douds*, 339 U.S. 382, 446 (1950) (Black, J., dissenting) (“[T]he First Amendment was added after adoption of the Constitution for the express purpose of barring Congress from using previously granted powers to abridge belief or its expression.”).

262. This could explain the *ILA* Court’s ire at the fact that a labor union had used powers that were created by the NLRA to further “a random political objective.” *See supra* note 181 and accompanying text.

263. *See supra* notes 216–17 and accompanying text.

264. *See, e.g.,* *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (emphasis added) (concluding that picketing at a soldier’s funeral by members of a fundamentalist church—displaying signs such as “God Hates the USA/Thank God for 9/11,” “God Hates Fags,” and “Priests Rape Boys,”—is “speech . . . at a public place on a *matter of public concern*, [and] . . . is [therefore] entitled to ‘special protection’ under the First Amendment”); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (“There can be no doubt that [a statute] . . . prohibiting peaceful [nonunion] picketing on the public streets and sidewalks in residential neighborhoods . . . regulates expressive conduct that falls within the First Amendment’s preserve.”); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (“[P]icketing plainly involves expressive conduct within the protection of the First Amendment” (citations omitted)).

265. *Cf. supra* note 210 and accompanying text.

266. *See supra* note 246 and accompanying text.

essence of self-government²⁶⁷ magically becomes coercive conduct not entitled to any First Amendment protection when used by unions.²⁶⁸

Though it is not a picketing case, *Sorrell* undermines the speech-conduct distinction in yet another way. Recall the *Sorrell* Court's reasoning that, even assuming that prescriber-identifying information is a mere commodity, *not speech*, heightened judicial scrutiny is appropriate when a statute imposes a speaker- and content-based burden on protected expression.²⁶⁹ The Court's comparison of the Vermont law to "a law prohibiting trade magazines from purchasing or using ink"²⁷⁰ may have been somewhat inapt,²⁷¹ but the Court's reasoning was straightforward: even if the sale of prescriber-identifying information is not speech, by prohibiting pharmaceutical corporations from purchasing such information, the Vermont law inhibited those corporations' ability to effectively engage in protected commercial speech. This argument is quite similar to Justice Black's concurring opinion in *Tree Fruits*, in which Black observed that, while some aspects of picketing may be classified as conduct, not speech, the fact that conduct "is intertwined . . . with constitutionally protected free speech and press [means that] regulation of the non-protected conduct may at the same time encroach on freedom of speech and press."²⁷² According to Black, "it is the duty of courts . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights of speech and press."²⁷³ Perhaps the similarity of Justice Black's words to

267. *Supra* note 192 and accompanying text.

268. *See supra* notes 148–49, 160–63, and 183 and accompanying text. For a more detailed argument that labor picketing is *not* inherently coercive, see Guza, *supra* note 44, at 1288–92. For example, Guza points out that, "in an era of multinational conglomerates and powerful corporate interests, it seems unlikely that most forms of picketing will actually result in coercion." *Id.* at 1288. But his most compelling argument is a purely legal one: "if labor picketing is inherently coercive because of its combination of conduct and speech, then why should primary picketing be legal? In fact, if picketing always contains a conduct element, then why should any picketing—labor or otherwise—be free of regulation?" *Id.* at 1290.

269. *See supra* notes 249–50 and accompanying text. The Court clearly recognized that pharmaceutical companies can advertise to doctors *without* prescriber-identifying information; such information merely makes their advertising more effective. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) ("Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception.").

270. *Sorrell*, 131 S. Ct. at 2667 (citations omitted).

271. It was inapt in the sense that a law prohibiting trade magazines from purchasing or using ink would mean that trade magazines would cease to exist. In contrast, the Vermont law merely makes the speech of pharmaceutical corporations *less effective* by taking away some of the information—albeit very valuable information—that the drug detailers relied on in making their sales pitches to doctors.

272. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 77 (1964) (Black, J., concurring).

273. *Id.* at 78 (internal quotation marks omitted).

those of the *Sorrell* majority are a portent of things to come. If the Court becomes willing to reevaluate its section 8(b)(4)(B) jurisprudence, it need look no further than Justice Black's concurrence in *Tree Fruits* or the Court's opinion in *Thornhill* to find straightforward articulations of the standards by which restraints on labor expression in the form of picketing should be judged.²⁷⁴

B. The Real-World Prospects for Section 8(b)(4)(B)'s Demise

Just as *Citizens United* should lead to an invalidation of section 8(b)(4)(B)'s prohibition of political secondary boycotts, *Sorrell* should lead to an invalidation of section 8(b)(4)(B)'s prohibition on economic secondary boycotts. As stated in the Introduction, if the *Sorrell* Court was applying *Citizens United's* rationale to commercial speech—speech that is an economic activity—it follows that union speech, whether on political or economic matters, should receive no less protection than the economic speech of corporations, non-corporate institutions, and individuals. The legal critique of the unlawful objectives test, the delicate balance rationale, and the speech-conduct distinction applies equally to secondary political and economic boycotts. If history is any guide,²⁷⁵ however, even the most compelling legal argument against the constitutionality of section 8(b)(4)(B) may not sway the Court. This is because, as James Atleson has pointed out, many judicial and administrative labor law decisions are based not on statutory language or legislative history,²⁷⁶ but instead on frequently unstated “assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees.”²⁷⁷

Atleson gives several examples of such unstated assumptions and values, but two seem especially relevant in the context of the Court's section 8(b)(4)(B) jurisprudence: (1) “continuity of production must be maintained, tempered only when statutory language *clearly* protects employee interference” and (2) “employees, unless controlled, will act irresponsibly.”²⁷⁸ The Court's secondary boycott case law is perhaps best understood as an ongoing struggle between these (and perhaps other)

274. See, e.g., Guza, *supra* note 44, at 1302 (“Because section 8(b)(4)(ii)(B) restricts secondary labor picketing, while allowing other non-labor groups to engage in the same activities, the statute constitutes viewpoint discrimination. Justice Black realized this in his concurrence in *Tree Fruits*.”).

275. See *supra* notes 21–22 and accompanying text.

276. ATLESON, *supra* note 83, at 2.

277. *Id.* at 10.

278. *Id.* at 7.

unstated assumptions and fundamental First Amendment values of the kind the Court relied on in *Thornhill*.²⁷⁹ This struggle helps to explain the Court's willingness to narrow section 8(b)(4)(B)'s prohibitions in cases where the Court believed secondary boycotts would not have much effect (*Tree Fruits*²⁸⁰ and *DeBartolo*²⁸¹) while affirming the prohibitions in cases where the Court believes secondary boycotts could do real harm to the secondary employer (*Safeco*²⁸² and *ILA*²⁸³). Though the current Court may continue in the tradition of *Tree Fruits* and *DeBartolo* by progressively narrowing section 8(b)(4)(B)'s secondary boycott prohibitions, the invalidation of section 8(b)(4)(B) on First Amendment grounds will require a Court that is willing to both acknowledge and abandon the unstated assumptions that are a fixture in much of labor law.

CONCLUSION

If *Citizen United*'s postulate that "the First Amendment stands against attempts to disfavor certain subjects or viewpoints" and "[p]rohibit[s] . . . restrictions distinguishing among different speakers, allowing speech by some but not others"²⁸⁴ is to have any meaning, the Court must apply it to its own case law, not just to legislative action it finds objectionable. *Citizens United*'s formulation of the neutrality principle should lead the Court to either reinterpret section 8(b)(4)(B) so as not to apply to political secondary boycotts or strike the statute down on the grounds that it suppresses political speech on the basis of the speaker's identity as a union.²⁸⁵ *Sorrell* indicates that the former route is insufficient. Rather, the

279. See *supra* note 97 and accompanying text.

280. See *supra* note 126 and accompanying text.

281. See *supra* notes 160–62 and accompanying text.

282. See *supra* notes 142–43 and accompanying text.

283. See *supra* note 181 and accompanying text.

284. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

285. One final point from *ILA* should be addressed: the Court's refusal to exempt political boycotts from section 8(b)(4)(B) because "[t]he distinction between labor and political objectives would be difficult to draw in many cases." *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, (*ILA*), 456 U.S. 212, 225 (1982). The *ILA* Court's concern about its own ability to distinguish between the purposes of speech seems disingenuous. The Supreme Court has regularly resolved corporate political speech cases and corporate commercial speech cases and has seemingly had no difficulty differentiating between the two categories of speech, yet the distinction between the two is far from obvious. After all, a compelling argument can be made that there is no such thing as political speech by corporations: "when the speaker is a for-profit corporation the content [of the speech] is always, by virtue of the nature of the for-profit corporate structure, 'commercial.' Even if the subject is not obviously commercial, the purpose of such speech is always to advance a commercial interest." *Piety*, *supra* note 9, at 2593; see *id.* at 2623–34 (providing support for the position that corporate speech is always commercial). Surely if the Court can differentiate so easily between the political and

Court should strike down or at least apply a form of heightened scrutiny to section 8(b)(4)(B). After all, *Sorrell* not only reaffirmed the neutrality principle in the context of commercial speech, it also rejected the idea that speech which “results from an economic motive” is entitled to less than heightened scrutiny,²⁸⁶ and it is difficult to see how the court could conclude that the labor speech in a case like *Safeco* does *not* have an economic motive. If it follows this analytical path, perhaps the Court will decide that section 8(b)(4)(B) is able to survive such heightened judicial scrutiny. But at the very least, labor speech will no longer be relegated to a state of limbo, somewhere on the periphery of the Court’s First Amendment jurisprudence.

*Zoran Tasić**

commercial speech of corporations, it can do so with respect to the political speech and economic speech of unions.

286. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011).

* J.D. Candidate (2013), Washington University in St. Louis School of Law; B.S. in Electrical Engineering (2006) and A.B. in Music (2006), Washington University in St. Louis. I would like to thank the staff of the Washington University Law Review—especially Chantel Kramme, Brett Walker, Andrew Metcalf, Kirk Altman, and Caitlin Reardon—for their help in getting this note ready for publication. I am also indebted to Professor Gregory Magarian for giving me permission to write about the First Amendment, and to Professor Marion Crain for her expert insights on the topic of labor law and her willingness to provide feedback on an early draft of this Note. Finally, I am most grateful to my family for their constant support and to my partner, Christie, for always providing encouragement and the much-needed perspective of a non-lawyer.