

11-1983

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Lee Goldman, The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 36 *Vanderbilt Law Review* 1469 (1983)
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The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act

*Lee Goldman**

Throughout the turbulent labor history of this nation, the primary economic strike has been considered the union's ultimate weapon for bringing about recognition, or for forcing an employer to accede to its collective bargaining demands. Recent events, however, suggest that, at least with regard to the most bitter labor-management disputes, the strike weapon may be replaced, or at least substantially supplemented, by secondary boycott activity.¹

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1. 117 Daily Lab. Rep. (BNA) D-1 (June 18, 1981) (remarks of NLRB member Don Zimmerman before New York University's National Conference on Labor, June 10-12, 1981). *Accord*, Kamer, *The 8(b)(4) Publicity Proviso and NLRB v. Servette: A Supreme Court Mandate Ignored*, 16 GA. L. REV. 575, 575 (1982).

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I. INTRODUCTION

Labor's increased efforts to induce secondary consumer boycotts² have drawn into question the constitutionality of restrictions on labor's power to use picketing and nonpicketing publicity for this purpose. The Supreme Court addressed the constitutionality of restrictions on a union's ability to seek consumer support by picketing³ in *NLRB v. Retail Store Employees, Local 1001 (Safeco)*,⁴ holding that Congress, without violating the first amendment, may prohibit a union from picketing any secondary employer when the effect of the picketing predictably would result in substantial loss to or ruin of the secondary employer. Neither the courts nor the National Labor Relations Board (the Board), however, has addressed directly the constitutionality of restrictions on nonpicketing labor publicity.⁵ Rather, they consistently have avoided deciding the issue,⁶ as illustrated most recently by the Su-

2. A secondary boycott is the application of economic pressure by a union upon a person with whom the union *does not* have a dispute (the secondary or neutral party), in order to induce that person to apply pressure upon a person with whom the union *does* have a dispute (the primary or nonneutral party). Economic pressure in the form of appeals to consumers to withhold patronage is a secondary consumer boycott; union appeals directed to the secondary's employees seeking a work stoppage is a secondary employee boycott. This Article considers only secondary consumer boycotts.

3. Picketing typically refers to speech that includes patrolling, the carrying of placards, and face-to-face confrontation. See *Chicago Typographical Union No. 16*, 151 N.L.R.B. 1666, 1669 (1965).

4. 447 U.S. 607 (1980).

5. Unless otherwise noted, nonpicketing labor publicity, as used in this Article, refers to nonpicketing publicity directed against the *secondary*.

6. See, e.g., *Solien v. United Steelworkers*, 593 F.2d 82, 88 n.3 (8th Cir.), *cert. denied*,

preme Court's decision in *Edward J. DeBartolo Corp. v. NLRB*.⁷ The reluctance to address the first amendment questions that restrictions on nonpicketing labor publicity have raised leaves the state of the law in doubt and provides little guidance to unions that increasingly contemplate employing this most effective economic weapon. The courts' reluctance is particularly disturbing since Congress enacted the relevant statutory provision to avoid unconstitutional restrictions on union speech.⁸ Thus, a proper statutory analysis should have included consideration of the first amendment.

This Article attempts to provide the appropriate constitutional analysis of restrictions on nonpicketing labor publicity. Part II describes the relevant statute and illustrative cases, including the Supreme Court's *DeBartolo* decision, that have raised but not resolved the first amendment issues concerning nonpicketing labor publicity. The cases focus attention on two restrictions the courts have imposed on nonpicketing labor publicity—the “producer-distributor” and the “for the purpose of” requirements. Part III analyzes the protected status of the nonpicketing labor speech by comparing nonpicketing labor publicity with labor picketing and commercial speech—two areas that bear superficial similarity to nonpicketing labor publicity and that do not receive *full* first amendment protection. Demonstrating that the justifications for restrictions on labor picketing and commercial speech are not applicable to nonpicketing labor publicity and that nonpicketing labor publicity satisfies traditional first amendment values, this Article reasons that nonpicketing labor publicity should trigger *full* first amendment protection. Part IV identifies the possible govern-

444 U.S. 828 (1979); *Hospital and Serv. Employees Union Local 399 (Delta Air Lines)*, 263 N.L.R.B. 153, 111 L.R.R.M. (BNA) 1159 (Sept. 10, 1982); *Florida Gulf Coast Bldg. Trades Council (DeBartolo)*, 252 N.L.R.B. 702, 705 n.3 (1980), *enforced sub nom. Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *rev'd*, 103 S.Ct. 2926, 2933 (1983); *United Steelworkers (Pet, Inc.)*, 244 N.L.R.B. 96, 102 n.33 (1979), *rev'd sub nom. Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

7. 103 S. Ct. 2926, 2933 (BNA) (Sept. 10, 1983).

8. See 105 CONG. REC. 17,720 (1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1388-89 (1959) (statement of Sen. Kennedy) [hereinafter cited as LEGISLATIVE HISTORY]; 105 CONG. REC. 17,898-99 (1959), *reprinted in* LEGISLATIVE HISTORY, at 1432 (statement of Sen. Kennedy); 105 CONG. REC. 6233 (1959), *reprinted in* LEGISLATIVE HISTORY, at 1038 (statement of Sen. Humphrey); 105 CONG. REC. 18,133-34 (1959), *reprinted in* LEGISLATIVE HISTORY, at 1720-21 (statement of Rep. Thompson); see also *NLRB v. Servette*, 377 U.S. 46, 55 (1964) (“The proviso was the outgrowth of a profound Senate concern that the unions’ freedom to appeal to the public for support of their case be adequately safeguarded.”).

ment interests in the "for the purpose of" and "producer-distributor" requirements and shows that because these interests do not justify the infringements on nonpicketing labor publicity the requirements are unconstitutional. Finally, the Article in Part V concludes by recommending a less restrictive alternative that allows more, not less, speech and that equally can serve the government's interest.

II. BACKGROUND

A. *The Statute*

Section 8(b)(4)(ii)(B)⁹ of the National Labor Relations Act (the Act) governs the limits of a union's ability to induce a secondary boycott¹⁰ by prohibiting a labor organization from threatening, coercing, or restraining "any person engaged in commerce or in an industry affecting commerce" for the purpose of forcing the person to "cease doing business with any other person. . . ." Congress, however, in response to the first amendment concerns of its members¹¹ provided an exception to the prohibition of secondary boycotts. The exception, known as the publicity proviso, exempts union appeals to the public when the publicity (1) does not include picketing; (2) is truthful; (3) is for the purpose of informing the public that the primary party to the dispute produces a product that is distributed by the secondary; and (4) does not result in a work stoppage.¹²

The construction and constitutionality of the third element of the publicity proviso has fostered great controversy and Board and

9. 29 U.S.C. § 158 (b)(4)(ii)(B) (1976). Congress enacted this provision in 1959 as part of the Landrum-Griffin amendments to the Act.

10. Section 8(b)(4)(ii)(B) does not restrict labor activity aimed directly against the primary employer or directly against others sufficiently related to the primary's business to lose their neutral or secondary status.

11. See sources cited *supra* note 8.

12. The complete text of the publicity proviso is:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer 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;

National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

court attention.¹³ Recent decisions have established that the third element contains a two-prong requirement that union activity must satisfy for publicity proviso exemption. First, a producer-distributor relationship must exist between the union's primary and secondary targets (the "producer-distributor" requirement). Second, the union's publicity must relate solely to the primary dispute or to the secondary's relationship to the primary dispute (the "for the purpose of" requirement). This interpretation of the publicity proviso, in turn, raises the unanswered constitutional question that is the focus of this Article—whether the first amendment permits Congress to restrict truthful nonpicketing labor publicity that does not result in an employee work stoppage solely on the ground that the labor activity does not satisfy the "producer-distributor" or the "for the purpose of" requirements.

B. The Cases

1. The "Producer-Distributor" Requirement

The constitutionality of the "producer-distributor" requirement arose in *United Steelworkers (Pet, Inc.)*,¹⁴ and in *Florida Gulf Coast Building Trades Council (DeBartolo)*.¹⁵ In *Pet, Inc.*, the United Steelworkers Union (the Union) had a labor dispute with Hussmann, a wholly owned subsidiary of Pet, Inc. When the Union struck and Hussmann hired permanent replacements¹⁶ the Union responded by advertising in newspapers and distributing handbills in the St. Louis area urging the public to boycott Pet products and *all* Pet subsidiaries.¹⁷ The Union conducted its publicity in an orderly and peaceful manner, did not picket,¹⁸ and truthfully disclosed that its primary dispute was with Hussmann, whose connection to Pet the Union accurately indicated.¹⁹ The publicity did not cause any work stoppage.²⁰

Pet filed a petition with the National Labor Relations Board charging that the Union's activity violated section 8(b)(4)(ii)(B) of

13. See, e.g., cases cited *supra* note 6.

14. 244 N.L.R.B. 96 (1979), *rev'd sub nom.* *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

15. 252 N.L.R.B. 702 (1980), *enforced sub nom.* *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *rev'd*, 103 S. Ct. 2926 (1983).

16. *Solien v. United Steelworkers*, 593 F.2d 82, 83 (8th Cir.), *cert. denied*, 444 U.S. 828 (1979). *Solien* was a related injunction proceeding in federal court. See *infra* note 25.

17. 244 N.L.R.B. at 99.

18. *Id.*

19. *Id.* at 100.

20. *Id.* at 99.

the Act and that the publicity proviso did not protect the activity because the requisite "producer-distributor" relationship between Pet's subsidiaries and Hussmann did not exist.²¹ The Union countered that its conduct did not violate the Act, came within the language and purpose of the publicity proviso, and in any event, was conduct protected by the first amendment.²²

The Board ruled in favor of the Union, finding that the requisite "producer-distributor" relationship existed because "Hussmann applies capital, enterprise, and service to Pet and its other subsidiaries" in the form of profits and goodwill.²³ The Board therefore held that regardless of whether the Union's activity violated the prohibitions of section 8(b)(4)(ii)(B), the publicity proviso protected the activity.²⁴ Despite specific instructions from the court of appeals in a related proceeding,²⁵ the Board declined to address the first amendment issue.²⁶

21. *Id.*

22. *Id.* at 99-100.

23. *Id.* at 101.

24. *Id.* at 100 n.23. The Union asserted that its conduct had not violated the Act because Pet and its subsidiaries were not neutral secondaries and therefore did not fall within the Act's protection. The Union also asserted that it had not exercised any restraint or coercion within the meaning of the Act. One may wonder why the Board did not quickly dispose of the complaint by finding that Pet, Inc. was not a neutral secondary since it wholly owned Hussman. The neutrality issue, however, is not as simple as it may appear. The Board has held that divisions of the same company may be neutral; mere potential for control does not rob a parent of its neutrality. *See* Los Angeles Newspaper Guild Local 69, 185 N.L.R.B. 303, 304-05 (1970), *enforced*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); American Fed'n of Television and Radio Artists, Washington-Baltimore Local, 185 N.L.R.B. 593 (1970), *enforced*, 462 F.2d 887 (D.C. Cir. 1972). For a general discussion of the Board's neutrality doctrine, see Siegel, *Conglomerates, Subsidiaries, Divisions and the Secondary Boycott*, 9 GA. L. REV. 329 (1975); Comment, *The Single Employer Doctrine as Applied to Section 8(b)(4) of the National Labor Relations Act*, 28 CATH. U. L. REV. 555 (1979); Comment, *Unions, Conglomerates, and Secondary Activity Under the NLRA*, 129 U. PA. L. REV. 221 (1980).

25. After Pet, Inc. filed its complaint, the Board assumed jurisdiction of the case and sought an injunction against the Union in federal court pursuant to the National Labor Relations Act § 10(l), 29 U.S.C. § 160(l)(1976). The issues presented were identical to those later argued to the Board. The district court dismissed the Board's petition, finding that the Union's actions were outside the prohibition section of the Act. *See* Solien v. United Steelworkers, 449 F. Supp. 580 (E.D. Mo. 1978), *rev'd*, 593 F.2d 82 (8th Cir.), *cert. denied*, 444 U.S. 828 (1979). The court of appeals reversed, finding reasonable cause to believe that a violation of the Act had occurred. Without deciding whether an injunction would violate the Union's first amendment rights, the court of appeals directed the district court to grant an injunction. The court of appeals called the first amendment claim "not insubstantial" and directed the Board to consider the claim in the administrative proceeding. 593 F.2d at 88 n.3.

26. 244 N.L.R.B. at 102 n.33.

On appeal, the Eighth Circuit reversed.²⁷ According to the court, the connection between Pet's products and Hussmann was "highly attenuated," and the Board's finding that Hussmann was a producer of Pet's products because "Hussman's profits inure to the benefit of Pet" was "totally at odds with any normal interpretation of the word 'produce.'"²⁸ Thus, the court concluded that the publicity proviso did not protect the Union's conduct because Hussmann was not a producer of the products of Pet or Pet's subsidiaries and remanded the case to the Board to decide whether the union activity came within the prohibitions of section 8(b)(4)(ii)(B). The court recognized, but like the Board, declined to reach the first amendment issue.²⁹

Thus, in *Pet, Inc.*, Hussmann permanently replaced the Union members who engaged in primary activity and the court enjoined the Union's attempt through secondary activity to take its appeal to the public. At present, three courts and the National Labor Relations Board have heard the Union's case, yet the Union still has not received a decision on, or even a discussion of, its first amendment claims. The most recent case in which the constitutionality of the "producer-distributor" requirement arose is *DeBartolo*,³⁰ which concerned a primary labor dispute between the respondent Florida Gulf Coast Building Trades Council, AFL-CIO (the Union), and High Construction Company (High) over the payment of allegedly substandard wages and fringe benefits.³¹ The H.J. Wilson Company (Wilson) previously had hired High to build a retail store in a mall³² that the Edward J. DeBartolo Corp. (DeBartolo) managed. The Union, in support of its primary dispute with High,³³ circulated handbills urging the public not to shop at the mall or patron-

27. *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

28. *Id.* at 549.

29. *Id.* at 550.

30. 252 N.L.R.B. 702 (1980), *enforced sub nom. Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *rev'd*, 103 S. Ct. 2926 (1983).

31. *See id.* at 703.

32. *See id.*

33. The handbill appeal, *see infra* note 34, might suggest that the Union's primary dispute was with DeBartolo, not High, and accordingly that the Union's handbilling was primary and not secondary activity. The Union, however, possibly to avoid potential anti-trust liability, *see, e.g., Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), stipulated that its primary dispute was with High and not with DeBartolo. The charging party, rather than contest that stipulation, claimed that the handbill was misleading and untruthful by omitting High's name and focusing on DeBartolo. The Board rejected the claim, finding that the handbill had not "substantially departed from fact or intended to deceive." 252 N.L.R.B. at 704 n.2. The Board never questioned the stipulation that the primary dispute was with High.

ize the stores in the mall until "the mall's owner publicly promise[d] that all construction at the mall [would] be done using contractors who [paid] their employees fair wages and fringe benefits."³⁴ The Union conducted the handbilling peacefully and did not cause any employee work stoppage.³⁵

Before the Board, DeBartolo charged that the Union had violated section 8(b)(4)(ii)(B) of the Act. DeBartolo further asserted that since DeBartolo and the mall tenants had no relationship to High, no "producer-distributor" relationship existed and the publicity proviso of section 8(b)(4)(ii)(B) could not apply.³⁶ The Union responded that the publicity proviso exempted the Union's activity from the prohibitions of section 8(b)(4)(ii)(B) and that even if the proviso did not apply, the first amendment protected the Union's activity.³⁷ The Board ruled in favor of the Union and dismissed the complaint. Relying on its decision in *Pet, Inc.*,³⁸ the Board held

34. 252 N.L.R.B. at 703. The complete text of the handbill read:

PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL PLEASE

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of the Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working persons's [sic] ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means [sic] decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square 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.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

Id.

35. *See id.* at 703-04.

36. *See id.* at 704.

37. *See id.*

38. At the time of the Board's decision in *DeBartolo*, the Eighth Circuit had not reversed the Board's decision in *Pet, Inc.*

that "a union could lawfully handbill a neutral employer, urging a total consumer boycott of that employer, 'so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise, or service, a product of the neutral employer.'"³⁹ The Board, employing rather impressive sophistry, found that High's relationship with DeBartolo and the mall tenants satisfied the "producer-distributor" requirement as a result of the "mutual obligations" and "sympiotic" relationship of the parties.⁴⁰ The contribution of High (the primary employer and producer) to the mall enterprise was application of "its labor to a product, i.e., the Wilson's store, from which DeBartolo and its tenants [the secondary employers and distributors] will derive substantial benefit."⁴¹ The Board again did not address the first amendment issue.

On appeal, a divided panel of the Fourth Circuit, according great respect to the expertise of the Board⁴² and rejecting the analysis of the Eighth Circuit in *Pet, Inc.*, affirmed. The court clarified the Board's reasoning by supplying the missing "distributed by" link of the producer-distributor chain and thus found that a producer-distributor relationship existed between the mall tenants and High.⁴³ The court's clarification, however, made the Board's construction of the statutory language no less tortuous. Despite urging by the Board's appellate counsel, by intervenor Florida Gulf Coast Building Trades Council, and by amicus Building and Construction Trades Department, the Fourth Circuit also declined to address the first amendment issue.⁴⁴

39. 252 N.L.R.B. at 705.

40. *Id.*

41. *Id.*

42. 662 F.2d at 269.

43. The court summarized the Board's finding:

The Board concluded that High is a producer of the Wilson's store at the mall because, by its employees' labor, it adds value to the store. High is also a producer of the mall enterprise itself because, by helping to build the Wilson's store, it has applied capital, enterprise, and service to the mall enterprise and has thus added value to that enterprise. Both the Wilson's store and the mall enterprise itself, therefore, are products of High's labor.

Although the Board does not elaborate, its reasoning suggests that it considered DeBartolo and the mall's tenants to be distributors of both of High's products. DeBartolo and the tenants help "distribute" the new Wilson's store and its inventory by attracting shoppers, helping to maintain common areas, and participating in joint advertising. They help "distribute" the mall enterprise and the goods sold through that enterprise simply by conducting business.

Id.

44. *See id.* at 271 n.6.

The Supreme Court reversed *DeBartolo*.⁴⁵ The Court had little trouble with the Board's finding that a person who, at some stage, adds capital, service, or enterprise to a product is a producer within the meaning of the Act. The Court, however, faulted the Board for failing to give even a "fairly possible" meaning to the "distributed by" language of the publicity proviso.⁴⁶ The Court reasoned that by focusing on the relationship between two secondary employers, *DeBartolo* and the cotenants, and testing that relationship by a standard so generous that virtually any employer could satisfy it, the Board effectively had eliminated the "distributed by" language from the publicity proviso.⁴⁷ The Court held that the secondary parties in *DeBartolo* did not satisfy the "distributed by" language because they neither had a business relationship with nor sold any products whose chain of production could reasonably be said to include the primary, High.⁴⁸ The Court also declined to address the first amendment issue, remanding the case for the Board to determine whether the Union conduct fell within the prohibitions of section 8(b)(4)(ii)(B).⁴⁹ Thus the consti-

45. *Edward J. DeBartolo Corp. v. NLRB*, 103 S. Ct. 2926 (1983).

46. *Id.* at 2933.

47. *Id.* at 2932. One can make an entirely reasonable argument that Congress, in drafting the "producer-distributor" requirement did not intend to restrict the scope of the publicity proviso with its "distributed by" language. Congress may have chosen such language as an example since the normal context of a secondary boycott is when the secondary party distributes the goods of the primary manufacturer. Thus, reading the "distributed by" language out of the statute arguably is completely appropriate. *See, e.g., Kamer, supra* note 1, at 581-84. Of course such a construction would obviate the need for any constitutional analysis and was impliedly rejected by the Court.

48. 103 S. Ct. at 2932-33. The Court could have held that the Union appeal did not satisfy the "producer-distributor" requirement *solely* because the secondary did not sell any product whose chain of production included the primary. The Court, by also suggesting that the existence of a business relationship can satisfy the "producer-distributor" requirement, left open the possibility that a parent-subsidiary relationship as in *Pet, Inc.* might fall within the proviso's coverage. Whether the Court intended the proviso to include within its coverage parent-subsidiary relationships is unclear.

49. *Id.* at 2933. The Court cited *NLRB v. Retail Store Employees Union Local 1001 (Safeco)*, 447 U.S. 607 (1980) and *NLRB v. Fruit Vegetable Packers Local 706 (Tree Fruits)*, 377 U.S. 58 (1964), suggesting that the appropriate question on remand was whether the Union advocated a boycott of a "substantial portion" of the secondaries' business. 103 S. Ct. at 2933. The *DeBartolo* handbill, however, clearly presented a Union appeal for a total boycott.

Two additional arguments that avoid the first amendment issue are available, however, to establish that the Union's conduct did not violate § 8(b)(4)(ii)(B). The first argument is that the Union's message did not "threaten, coerce, or restrain" the secondaries, *DeBartolo* and the cotenants, since the secondaries' relationship to the primary, High, was so remote that even advocacy of a total boycott of the secondaries was not "reasonably calculated" to induce customers not to patronize the secondaries at all. *See NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607, 614 (1980). The second argument is that the object of the

tutionality of the "producer-distributor" requirement remains unaddressed.

2. The "For the Purpose of" Requirement

The question of the constitutionality of the publicity proviso's "for the purpose of" requirement arose in *Hospital and Service Employees Union Local 399 (Delta Air Lines)*.⁵⁰ In *Delta Air Lines*, the Union had a primary dispute with Statewide, a nonunion contractor that Delta Air Lines hired to perform janitorial services. In furtherance of its primary dispute with Statewide, the Union, in front of Delta's airport and downtown facilities distributed handbills urging passengers not to fly Delta.⁵¹ One of the handbills, in addition to publicizing the facts of the labor dispute, disclosed Delta's flight safety record implying that Delta was unsafe.⁵²

Delta filed a complaint with the Board charging that the Union violated section 8(b)(4)(ii)(B) and argued that the publicity proviso did not protect the Union conduct since the conduct was not solely "for the purpose of" advising the public of the primary labor dispute. A divided Board agreed with Delta and held that the handbill, by including information about Delta's flight safety record, was not "for the purpose of" advising the public of a labor dispute—only information related *solely* to the primary dispute could satisfy that requirement.⁵³ The Board declined to decide the constitutionality of this interpretation and took the position that

handbilling was not to force a secondary employer "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer," 29 U.S.C. § 158 (b)(4)(ii)(B) (1976), because neither DeBartolo nor the cotenants had *any* business relationship with or power to control the labor policies of the primary, High, or any *substantial* business relationship with or control over the contracting decisions of the initial secondary, Wilson. The Board by adopting either argument would once again avoid confronting the first amendment issue. The conflict between the "producer-distributor" requirement and the first amendment would nevertheless remain, in light of the Supreme Court's holding in *DeBartolo* that Congress intended the "producer-distributor" requirement to restrict the scope of the publicity proviso. See 103 S. Ct. at 2932. The merits of the statutory arguments are beyond the scope of this Article.

50. 263 N.L.R.B. No. 153, 111 L.R.R.M. (BNA) 1159 (Sept. 10, 1982).

51. See *id.* at 1160.

52. The Union had distributed a total of four different handbills and republished the text of two in two Union newspapers. *Id.* The statutory issues concerning all but the one handbill discussed in the text are not relevant here.

53. See *id.* at 1161-62. The Board indicated that it would not prohibit publication of noncoercive information unrelated to the primary dispute. *Id.* at 1162 n.11. The publicity proviso, however, does not exempt such information. The prohibition section simply does not proscribe the information in the first instance.

the Board could "presume the constitutionality of the Act . . . absent binding court decisions to the contrary."⁵⁴

Thus, section 8(b)(4)(ii)(B), as interpreted by the Board and the courts, imposes at least two restrictions on truthful nonpicketing labor publicity that does not result in an employee work stoppage. The secondary must have a specified relationship with the primary—the "producer-distributor" requirement—and the publicity must relate solely to the primary dispute or the secondary's relationship to the primary dispute—the "for the purpose of" requirement. Curiously, however, the courts have avoided addressing the constitutionality of these restrictions on nonpicketing labor publicity despite the fact that unions increasingly are engaging in this activity and have presented the Board and courts with the opportunity to decide the issue. An appropriate constitutional analysis of the two restrictions on nonpicketing labor publicity as presented below necessitates a two-prong analysis—focusing first on the protected status of the speech infringed and second on the government's justification for the infringement. The analysis demonstrates that the "producer-distributor" and "for the purpose of" restrictions on nonpicketing labor publicity are unconstitutional.

III. THE FIRST AMENDMENT PROTECTION OF NONPICKETING LABOR PUBLICITY

The first inquiry in analyzing the constitutionality of the "producer-distributor" and "for the purpose of" requirements is the extent to which the first amendment protects nonpicketing labor publicity.⁵⁵ To make this determination, the courts may look to the

54. *Id.* at 1163 (footnote omitted).

55. The question whether nonpicketing labor publicity is entitled to *any* first amendment protection is not in issue, because it is clear that handbilling and other methods of peaceful publicity are forms of protected speech, *see, e.g.*, *United States v. Grace*, 103 S. Ct. 1702, 1706 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and that these forms remain within the area of free expression when their subject is a labor dispute. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) ("In the circumstances of our times 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."). Members of the Court, however, have begun to order the degree of protection afforded different classes of speech. *See, e.g.*, *FCC v. Pacific Found.*, 438 U.S. 726, 746-47 (1978) (indecent speech) (Stevens, J., concurring); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (nonobscene "adult movies") (plurality opinion); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *see also Connick v. Myers*, 103 S. Ct. 1684, 1689 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982)) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection"); Emerson, *First Amendment Doctrine and the Burger*

law of the seemingly related activities of labor picketing and commercial speech. The courts may treat nonpicketing labor publicity as speech plus conduct similar to labor picketing, or as economically motivated similar to commercial speech, and therefore relegate the publicity to lesser first amendment protection. A review of the justifications for judicial restrictions on labor picketing and commercial speech and a comparison of such speech with nonpicketing labor publicity, however, illustrate the inappropriateness of subjecting nonpicketing labor publicity to similar restrictions. Nonpicketing labor publicity satisfies traditional first amendment values and is entitled to full first amendment protection.

A. Labor Picketing vs. Nonpicketing Labor Publicity

The Supreme Court has treated labor picketing with increasing disrespect. The broad pronouncements concerning the importance of labor speech contained in *Thornhill v. Alabama*⁵⁶ have eroded to the point that the Court has upheld restrictions on labor picketing with the most " cursory " first amendment analysis.⁵⁷ The Court has justified its cavalier treatment of labor picketing speech through the use of two related doctrines—the "speech plus"⁵⁸ and "unlawful objective"⁵⁹ theories. The two theories, however appropriate they may be in the picketing context, are not applicable to

Court, 68 CAL. L. REV. 422, 452-53 (1980); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 282-96 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 212-14 (1982). The relevant inquiry therefore is the extent of protection nonpicketing labor publicity deserves, i.e., whether nonpicketing labor publicity is entitled to full first amendment protection. Whether the protection afforded different categories of speech should be ordered at all is beyond the scope of this Article.

56. 310 U.S. 88 (1940). See *supra* note 55.

57. See *NLRB v. Retail Store Employees Union Local 1001 (Safeco)*, 447 U.S. 607, 616 (1980) (Blackmun, J., concurring).

58. See, e.g., *Safeco*, 447 U.S. at 619 (Stevens, J., concurring); *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 229-30 (1974); *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58, 77 (1964) (Black, J., concurring); *id.* at 93-94 (Harlan, J., dissenting); *International Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289 (1957); *Hughes v. Superior Court*, 339 U.S. 460, 464-65 (1950); *International Bhd. of Teamsters Local 309 v. Hanke*, 339 U.S. 470, 474 (1950) (plurality opinion); *Building Serv. Employees Int'l Union Local 262 v. Gazzam*, 339 U.S. 532, 537 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 n.6 (1949) (quoting *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring)).

59. See, e.g., *Safeco*, 447 U.S. at 616; *International Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. at 293-94; *International Bhd. of Elec. Workers Local 501 v. NLRB*, 341 U.S. 694, 705 (1951); *Hughes v. Superior Court*, 339 U.S. at 465-66; *Building Serv. Employees Int'l Union Local 262 v. Gazzam*, 339 U.S. at 539-40; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. at 501.

nonpicketing labor publicity.

1. "Speech Plus" Theory

The "speech plus" theory focuses on the physical component of labor picketing, arguing that picketing is "something more" than speech. The "speech plus" aspect of labor picketing thus justifies additional restrictions on labor speech—restrictions that are not applicable to other forms of noncommercial speech. "Speech plus" theorists contend that labor picketing constitutes, at least in part, conduct designed to coerce and to "induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."⁶⁰ According to these theorists, coercion may take the form of (1) threats of physical harm, (2) threats of economic sanctions, (3) unreasoned appeals to class or union loyalties, or (4) psychological pressure in the form of possible social embarrassment.⁶¹ Regardless of their merits as applied to labor picketing, these arguments cannot justify restrictions on nonpicketing labor publicity because this form of publicity lacks the conduct necessary to effectively *coerce* the *listener*—i.e. the consumer.⁶²

60. *Hughes v. Superior Court*, 339 U.S. at 465 (quoting *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. at 775-76 (Douglas, J., concurring)). The first amendment does not protect from regulation speech that merely coerces the listener. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941); *see also Baker, Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. Rev. 964, 998-1002 (1978).

61. *See cases cited supra* note 58; *see also Gregory, Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191, 198-210 (1950); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 200-02 (1942).

62. Nonpicketing publicity may attempt to coerce *nonlisteners*, i.e. secondary employers. The union, by applying economic pressure to the secondary, hopes to coerce the secondary to pressure the person with whom the union has a primary dispute. The reviewing body considers this coercion when it determines if there is a statutory violation. A finding of coercion that satisfies the statutory requirements of § 8(b)(4)(ii)(B), however, cannot control the outcome of the first amendment question. Once the court reaches the first amendment issue, the analysis must focus on the possible coercion of the *listener* i.e., the consumer. *See Baker, supra* note 60, at 998; Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023, 1047-51 (1953).

Under the first amendment, the government cannot regulate secondary consumer boycotts on the grounds of nonlistener coercion any more than it can regulate, for example, the solicitation of voters by special interest groups attempting to "coerce"—lobby—legislators or the appeals to consumers by civil rights organizations seeking a boycott of stores to "coerce" employers to cease engaging in racial discrimination. *See NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409 (1982) (The first amendment protects a secondary boycott by civil rights organizers.). Unless the union coerces the listener, the government must base its regulation solely on the expected result of the uncoerced response of listeners to the union's message, precisely the kind of content-based restriction that is suspect under the first amendment. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557,

First, nonpicketing labor publicity does not threaten—either implicitly or explicitly—physical harm or violence. Although observers at one time may have associated labor picketing with regular outbursts of violence,⁶³ a similar association never has been present with nonpicketing labor publicity.⁶⁴ Nonpicketing publicity neither involves a procession of patrolling bodies that physically may intimidate consumers nor requires consumers seeking access to the secondary to contend with stationary crowds.⁶⁵ Many forms of nonpicketing publicity include no physical presence and, consequently, no face-to-face confrontation that even remotely could threaten violence.⁶⁶ Moreover, even if a slight chance of physical harm existed—for example, from a single overly enthusiastic handbiller—the appropriate response would be to regulate the offending conduct, not to regulate the speech that only remotely may produce the conduct.⁶⁷

Second, nonpicketing appeals to consumers to boycott a secondary employer do not threaten economic sanctions. A union—no matter how powerful—cannot punish or impose sanctions upon a consumer. The fear of economic sanctions is relevant only when a union directs its appeal to the employees of the secondary.⁶⁸ While

575 (1980) (Blackmun, J., concurring); *Linmark Assoc., Inc., v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977); *Cohen v. California*, 403 U.S. 15, 23-24 (1971); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508-09 (1969); see also, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 580-81 (1978); Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 33-34 (1980); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-1502 (1975); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

63. See Jones, *supra* note 62, at 1030; Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1490-91 (1982) [hereinafter cited as Note, *Peaceful Picketing*].

64. The association of labor picketing to sporadic violence does not suggest that the government properly may restrict labor picketing because of a perceived potential for physical intimidation. Not all picketing presents this concern, thus the government's restriction on all picketing may violate the first amendment. See *Cafeteria Employees Union Local 302 v. Angelos*, 320 U.S. 293, 295-96 (1943); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 952-53 (1982) [hereinafter cited as Note, *Labor Picketing*]; Note, *Peaceful Picketing*, *supra* note 63, at 1491; see also *infra* note 140.

65. When disruptive handbillers block public access, the publicity may constitute picketing. See *Service and Maintenance Employees Union Local 399*, 136 N.L.R.B. 431 (1962).

66. No one would argue, for example, that a newspaper advertisement physically abused its reader.

67. See *infra* note 140 and accompanying text.

68. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 445-46 (1970); Cox,

consumer appeals inadvertently may reach the secondary's employees, nonpicketing publicity is less likely to induce employees to engage in a secondary boycott than is consumer picketing. Consumer picketing is more visible and conjures up the historical battle between management and labor and thus carries much greater symbolic force than does the distribution of handbills. Moreover, even if nonpicketing publicity directed at consumers occasionally induces a secondary employee boycott, the proper first amendment response is not to prohibit the broad class of nonpicketing publicity but rather to treat separately the occasional instances of resultant secondary employee boycotts.⁶⁹

Third, while nonpicketing publicity does appeal to consumer loyalties this without more does not constitute coercion. In many disputes the union must rely not only on its presentation of its grievances but also on the public's existing class biases. The union may seek to convince the public that the union's individual dispute is part of labor's greater cause. Such appeals, however, are no different than a political candidate's declaration of party affiliation to garner machine and party support despite possible differences on individual issues. In short, the government and courts must not limit first amendment protection to speech that seeks only to change the listener's mind but must extend protection to speech that encourages the listener to act on existing beliefs and loyalties.

Strikes, Picketing and the Constitution, 4 VAND. L. REV. 574, 594-95 (1951); Note, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment*, 26 HASTINGS L.J. 167, 177-78 (1974).

69. See *infra* note 140 and accompanying text. A prohibition of nonpicketing publicity that results in a work stoppage may have its own constitutional problems. See Note, *Labor Picketing*, *supra* note 64, at 945 n.40 ("the economic effect, actual or intended, of a peaceful consumer picket has no bearing on whether it is communication and should not be relevant in determining its level of protection under the First Amendment"). Some obvious differences exist, however, between nonpicketing publicity that does result in a work stoppage and publicity that does not produce a stoppage which may justify different constitutional treatment. When a work stoppage results, it is more likely that the union implicitly or explicitly threatened economic sanctions or promised benefits (e.g., support in any future work stoppage by the secondary employees), see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and it is more likely that the union had an objective that was illegal or contrary to a public policy unrelated to the expression (e.g., violation of a no-strike clause). See Note, *Labor Picketing*, *supra* note 64, at 938 n.2. Moreover, the court may presume that the union intended an employee work stoppage when a consumer appeal results in a work stoppage. See *American Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 419 U.S. 215, 231-32 (1974) (rational inferences arising from the effect of picketing may be relevant to a determination of its purpose). If the union did not have such an intent, the union could request that the secondary employees return to work. The secondary employees probably would honor the union's request, particularly if the secondary employees knew that the court otherwise would hold the union liable.

Finally, while nonpicketing publicity may produce social embarrassment⁷⁰ and cause some persons to shop elsewhere rather than suffer some minor discomfort, the Supreme Court has recognized that social embarrassment alone cannot justify restrictions on protected speech.⁷¹ The purposes of the first amendment would be undermined severely if speech became unprotected merely because it caused people to feel uncomfortable. The novel, the radical, the religious, and the political all may cause discomfort to one group or another.

Thus, nonpicketing publicity does not contain the same elements of conduct that the Court has considered sufficient to justify reduced protection of labor picketing.⁷² The isolated incidents of coercion that could arise do not justify restrictions on first amendment rights.

A second argument that "speech plus" adherents might advance is that nonpicketing publicity is part of an integrated course of union conduct that is designed to put pressure on the secondary. This argument would claim that the appeal to boycott transforms what otherwise would be protected speech into economic conduct subject to regulation.⁷³ This view has two problems. First, as the Supreme Court repeatedly has acknowledged, the first amendment "extends to more than abstract discussion, unrelated to action. . . . 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."⁷⁴ Second, distinguishing between information that discloses a secondary's participation in or connection with a labor dispute and appeals to consumers to boycott the secondary is not practicable. The former necessarily implies a request for the latter. Thus, this second justi-

70. To the extent one considers social embarrassment relevant, labor picketing carries a much greater potential for embarrassment than nonpicketing publicity. Picketing is more visible, carries greater symbolic force, requires face-to-face confrontation, and generally includes larger numbers of persons than does nonpicketing publicity.

71. See *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3424 (1982).

72. The Supreme Court in dicta has recognized some of the common sense differences between labor picketing and nonpicketing publicity. See, e.g., *Safeco*, 447 U.S. at 618-19 (Stevens, J., concurring); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 311 n.17 (1979); *Hughes v. Superior Court*, 339 U.S. 460, 464-65 (1950).

73. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . .").

74. *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3424 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)); see also *In re Primus*, 436 U.S. 412, 432 (1978); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

fication for characterizing nonpicketing publicity as "speech plus" also fails.

2. "Unlawful Objective" Theory

The "unlawful objective" theory, as originally formulated, denied protection to any picketing whose object or imminent effect was the violation of a valid state law.⁷⁵ The courts, however, soon expanded the doctrine to preclude from protection picketing whose purpose was to induce any action that either the legislature or the courts judged to be against state or congressional policy.⁷⁶

The "unlawful objective" doctrine is not applicable to nonpicketing labor publicity for two reasons. First, the doctrine evolved from the Court's finding that labor picketing was "speech plus," which permitted application of a less strict first amendment analysis.⁷⁷ While nonpicketing labor publicity may have the same ultimate objective as secondary labor picketing—that is, to force the secondary to apply pressure to the primary—nonpicketing labor publicity does not share the necessary "speech plus" elements upon which the "unlawful objective" theory depends.⁷⁸

Second, a union does not seek an unlawful objective when it appeals to consumers to boycott a secondary employer. The public violates no law if it heeds the union's advice and refuses to purchase from the secondary employer; the secondary employer does not act illegally if, as a result of the consumer pressure, it ceases to deal with the primary; and the primary does not violate the law if in response to such pressure it agrees to the union's demands concerning the terms and conditions of employment.⁷⁹ A

75. *See, e.g.,* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (union picketed in an attempt to obtain agreement from wholesale ice distributor to refuse to sell to nonunion ice peddlers; the agreement would violate state antitrust statute so the picketing was not protected under the first amendment).

76. *See, e.g.,* *Hughes v. Superior Court*, 339 U.S. 460 (1950) (the Court affirmed an injunction prohibiting picketing for purpose of inducing employer to hire blacks in proportion to their population in the area because the picketing violated judicial policy against hiring on the basis of race); *see also* *International Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289-93 (1957) (tracing the evolution of the illegal objective doctrine).

77. *See, e.g.,* *American Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 419 U.S. 215, 229-30 (1974); *International Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289-93 (1957); *Hughes v. Superior Court*, 339 U.S. 460, 464-66 (1950); *Building Serv. Employees Int'l Union Local 262 v. Gazzam*, 339 U.S. 532, 537 (1950).

78. *See supra* notes 60-74 and accompanying text.

79. *Cox, supra* note 62, at 36-37; *see Note, Labor Picketing, supra* note 64, at 945-46. *But cf. Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) (contractor's agreement with union to subcontract only to union subcontractors was subject to the Federal Antitrust Laws).

court, nevertheless, could find that the objective of nonpicketing publicity contravenes a valid law or policy by determining that section 8(b)(4)(ii)(B) itself prohibits secondary boycotts. This reasoning, however, clearly constitutes bootstrapping and, if valid, would permit states or Congress to impose by legislation any restriction on speech simply by declaring invalid the purpose of the speech.⁸⁰

Thus, neither the "unlawful objective" nor the "speech plus" theories, by which courts justify restrictions on labor picketing, are applicable to nonpicketing labor publicity. Accordingly, the labor picketing cases, although indicative of the Court's unsympathetic view toward union appeals, are not controlling in determining the constitutionality of restrictions on nonpicketing publicity.⁸¹

B. Commercial Speech v. Labor Speech

The Supreme Court has manifested its view that labor speech may be unworthy of full first amendment protection not only by a differential treatment of labor picketing, but also by making unflattering characterizations of labor speech in dicta in commercial

80. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 14 (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 446 (1970). But see *NLRB v. Retail Store Employees Union Local 1001 (Safeco)*, 447 U.S. 607, 616 (1980) (plurality opinion).

The Court in *Safeco* apparently applied this fallacious reasoning when it upheld the restrictions on labor picketing contained in § 8(b)(4)(ii)(B). The plurality opinion held that the secondary consumer picketing furthered an unlawful objective and therefore was subject to regulation. The *Safeco* opinion marked the greatest departure from the early illegal objective cases and was the first consumer picketing case in which the court found the illegal objective in the very statute that made the speech illegal.

The plurality opinion in *Safeco* garnered only four votes and has been sharply criticized. See Cox, *supra* note 62, at 36-39; Note, *Labor Picketing*, *supra* note 64, at 944-46; Note, *Peaceful Picketing*, *supra* note 63, at 1480-81; Comment, *Picketing at the Secondary: Retail Store and the Right to Publicize*, 30 *BUFFALO L. REV.* 405 (1981). No reason supports the extension of the discredited *Safeco* reasoning to nonpicketing publicity.

81. The picketing precedents also are inapplicable to nonpicketing publicity because, while restrictions on picketing leave other channels of communication open, see *NLRB v. Fruit Vegetable Packers Local 706 (Tree Fruits)*, 377 U.S. 58, 93 (1964) (Harlan, J., dissenting), a prohibition extending to nonpicketing publicity would cut off the entire message. Thus, the uniqueness of the medium or the manner of presentation could not justify reduced first amendment protection of nonpicketing publicity. See also *infra* note 125. The Supreme Court often has acknowledged the difference between regulations that leave alternate channels of communication open and those that do not. Compare *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976) (time-place-manner regulation of adult movie theatres valid because those wanting to view adult movies still had access) with *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (absolute ban on one form of adult entertainment unconstitutional). See also *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 227 (1982); *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979); *FCC v. Pacifica Found.*, 438 U.S. 726, 750 n.28 (1978); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 566-67 (1972).

speech cases.⁸² The first amendment values underlying labor speech, particularly nonpicketing publicity, however, indicate such speech is not analogous to commercial speech and is deserving of full first amendment protection.

1. The Commercial Speech Analogy

The Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁸³ reversed the longstanding rule of *Valentine v. Christensen*⁸⁴ and extended limited first amendment protection to commercial speech. The Court based its decision in part upon the similarity between commercial and labor speech, finding "no satisfactory distinction between the two kinds of speech."⁸⁵ The Court explicitly refused to express any views on the constitutionality of restrictions on labor speech.⁸⁶ The Court's inability to distinguish labor and commercial speech coupled with its characterization of some labor speech as "of an entirely private and economic character,"⁸⁷ however, raises the question whether labor speech should enjoy any greater first amendment protection than commercial speech.

The Court's decision four years after *Virginia State Board of Pharmacy* in *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁸⁸ raised further doubts about the protected status of labor speech. The Court in *Central Hudson* struck down a regulation that prohibited electric utilities from advertising to promote the purchase of utility services, characterizing commercial speech as "expression related solely to the economic interests of the speaker and its audience."⁸⁹ As the concurrence warned, this broad definition—unlike the Court's usual definition of commercial speech as speech proposing no more than a commercial transaction⁹⁰—arguably includes labor speech.⁹¹ Although labor speech is

82. See *infra* notes 83-94 and accompanying text.

83. 425 U.S. 748 (1976).

84. 316 U.S. 52 (1942) (the first amendment does not protect purely commercial advertising).

85. 425 U.S. at 763.

86. *Id.* at 763 n.17.

87. *Id.* Several later cases draw upon this characterization of labor speech. See, e.g., *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3425-26 (1982); *Bates v. State Bar*, 433 U.S. 350, 364 (1977); see also *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (rejecting the claim that labor picketing deserves more first amendment protection than other picketing and suggesting the contrary was true).

88. 447 U.S. 557 (1980).

89. *Id.* at 561.

90. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 51 U.S.L.W. 4961, 4963 (June 24,

not related solely to the economic interests of its audience, the union's economic interests certainly are a motivating factor. The *Central Hudson* definition of commercial speech uncomfortably parallels the Court's characterization of some labor speech as "of an entirely private and economic character."⁹² Thus, *Central Hudson* and *Virginia State Board of Pharmacy* provide precedent for extending to any form of labor speech no greater first amendment protection—and perhaps even less—than that afforded commercial speech.⁹³

2. First Amendment Values

An analysis of how commercial⁹⁴ and labor speech satisfy the values underlying the first amendment—(a) individual self-fulfill-

1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

The Court in *Central Hudson* restated the traditional definition of commercial speech later in its opinion, 447 U.S. at 562, but whether the Court believes the definitions are equivalent or prefers one definition is unclear.

91. See *Central Hudson*, 447 U.S. at 579-80 (Stevens, and Brennan, JJ., concurring). The concurring justices opined that the majority's definition of commercial speech was too broad because the definition "arguably could include labor speech." Labor speech, according to the concurrence, should not receive the lesser commercial standard of first amendment protection, but the maximum protection available under the first amendment. *Id.*

92. More ominous to Professor Cox was the fact that the Court's decision in *Central Hudson* seemed to afford even greater respect to commercial speech than to labor speech. See Cox, *supra* note 62, at 36-39; see also Note, *Peaceful Picketing*, *supra* note 64, at 1487. In *Central Hudson*, as in *Safeco*, which the Court decided the same day, the government proscribed a form of expression appealing to readers or observers because the government believed that the message would persuade its audience to behave in an undesirable way. Yet the Court, without providing an explanation for the different treatment, invalidated the nonlabor regulation in *Central Hudson* and upheld the labor regulation in *Safeco*. See Cox, *supra* note 62, at 37.

93. Some commentators have suggested that the Court already may have relegated labor speech to no greater than commercial speech status. See, e.g., Cox, *supra* note 62, at 39; Note, *Labor Picketing*, *supra* note 64, at 959-60.

94. This discussion considers commercial speech to be that speech which does no more than propose a commercial transaction. See *supra* note 90 and accompanying text; see also Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 35 (1976). This Article does not consider the categorization problems here. See *Bolger v. Youngs Drug Prod. Corp.*, 51 U.S.L.W. 4961, 4962-63 (June 24, 1983); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976). But see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 21-24 (1979) (categorization has not been and should not be a problem).

This Article does not examine the values that commercial speech satisfies to analyze the merits of the Court's decision in *Virginia State Bd. of Pharmacy*, because that analysis is beyond the scope of this Article. See generally *id.*; Baker, *supra*; Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. REV. 372 (1979); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*,

ment, (b) the advancement of knowledge and discovery of truth, (c) participation in decisionmaking by all members of society, and (d) the maintenance of the proper balance between stability and change⁹⁵—compels the conclusion that labor speech, particularly nonpicketing labor speech, deserves greater protection than commercial speech.⁹⁶

(a) *Individual Self-Fulfillment*

Professor Emerson argues that “every man . . . has the right to form his own beliefs and opinions” and “to express these beliefs and opinions. . . . For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self.”⁹⁷ Thus, this first amendment value fosters individual self-re-

39 GEO. WASH. L. REV. 429 (1971); Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720 (1982). Rather, the Article addresses the values satisfied by commercial speech to provide a framework for analysis and comparison of the value of the labor speech upon which the “producer-distributor” and “for the purpose of” requirements infringe.

95. Professor Emerson first described the values the accompanying text analyzes and other noted commentators generally have accepted these values. T. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 6-7 (1970); see also G. GUNTHER, *CONSTITUTIONAL LAW* 1044 n.3 (9th ed. 1975); Baker, *supra* note 60, at 990-91. Some scholars emphasize one value over or to the exclusion of another. See, e.g., A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948) (emphasizing the value of political participation, but defining it sufficiently broadly to encompass other values); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (emphasizing exclusively the decisionmaking value, arguing that the first amendment extends only to explicitly political speech); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (emphasizing only political speech, but accepting extension of protection to some additional speech for pragmatic and institutional reasons); Jackson & Jeffries, *supra* note 94 (emphasizing the value of self-government, although also acknowledging a possible interest in individual self-fulfillment). The Emerson values, however, do not exclude any important value. Moreover, while some commentators criticize the Emerson choices as overinclusive, the overinclusiveness may be more apparent than real. Some values derive from others, see, e.g., Baker, *supra* note 60, at 991, and Emerson himself recognized that the four values have meaning only as an integrated set. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980); accord Note, *supra* note 94, at 731 n.80.

96. Indeed, since the courts have subjected restrictions on commercial speech to an increasingly rigorous first amendment analysis, see *infra* notes 155 and 156, the courts should provide full first amendment protection to nonpicketing labor publicity.

97. T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 5 (1966); see also Baker, *supra* note 60, at 995 (the value of self-expression is the most important value underlying the first amendment).

The Supreme Court also has recognized that the first amendment protects the individual's interest in self-expression. See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 n.2 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978); *id.* at 804 (White, J., dissenting); *Cohen v. California*, 403 U.S. 15, 24-26 (1971).

alization and self-determination.

Providing first amendment protection to commercial speech will not promote these goals.⁹⁸ A seller hawking his wares is not engaged in an expression of self. The advertisements giving the price of cigarettes or toilet tissue are not instrumental to the development of anyone's personality and do not give the speaker a feeling of self-fulfillment.⁹⁹

Labor speech, by contrast, is an expression of self—of the individual's frustrations and aspirations. The individual pleading "Do Not Patronize"—like the person wearing the jacket bearing the words "Fuck the Draft"¹⁰⁰ or a war protestor chanting "Stop This War Now"¹⁰¹—is expressing his emotions and views on a subject of special importance to him. Providing first amendment protection to such speech "comport[s] with the premise of individual dignity"¹⁰² and channels emotions away from more socially undesirable behavior—e.g. violence—that may undermine the individ-

98. See Baker, *supra* note 94, at 9-25; Jackson & Jeffries, *supra* note 94, at 14-15. But see Note, *supra* note 94, at 744. The form of an advertisement, in some limited cases, may be an expression of self, e.g., a humorously presented commercial or nouveau poster. The protection given the commercial message, however, may be separable from that given the form of communication. Even if not separable, uniquely expressive advertisements are rare and their existence only suggests the problems of categorization (i.e. whether particular speech "does no more than propose a commercial transaction.") While problems of categorization may justify coverage of *all* commercial speech, see Farber, *supra* note 94, at 384, the Court in *Virginia State Bd. of Pharmacy* did not rely on this reasoning, finding instead that speech which does no more than propose a commercial transaction deserves protection for its own sake. 425 U.S. 748; see Jackson & Jeffries, *supra* note 94, at 18-20.

99. Without a self-fulfillment interest, an individual's commercial speech, unlike labor speech, does not deserve first amendment protection unless the speech satisfies other first amendment values *and* the speech of *other* speakers could not satisfy those values. This follows because only the self-fulfillment value furthers the *speaker's* first amendment interests. See Note, *supra* note 94, at 738.

100. See *Cohen v. California*, 403 U.S. 15 (1971).

101. Baker, *supra* note 60, at 994. Professor Baker argues that:

[t]o engage voluntarily in a speech act is to engage in self-definition or expression. A Vietnam war protestor may explain that when she chants "Stop This War Now" at a demonstration, she does so without any expectation that her speech will affect the continuance of war or even that it will communicate anything to people in power; rather, she participates and chants in order to *define* herself publicly in opposition to the war. This war protestor provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization. Generally, any individually chosen, meaningful conduct, whether public or private, expresses and further defines the actor's nature and contributes to the actor's self-realization.

Id. (emphasis in original).

102. *Cohen v. California*, 403 U.S. 15, 24 (1971); see Z. CHAFEE, *supra* note 80, at 33 ("There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living . . ."); see also Cox, *supra* note 62, at 1.

ual's self-actualization as well as society's stability.¹⁰³

Labor speech also is connected intimately with the individual's associational rights. The union member acts as part of a group—the union—and learns to interact with other members of that group. He achieves his goals most effectively when he coordinates his efforts with those of his co-workers in an attempt to persuade his employer and often the public. Thus, labor speech not only leads to the development of the individual *qua* individual, but also contributes to the individual's growth as a member of the group and of the larger society.¹⁰⁴

(b) *Advancement of Knowledge and Discovery of Truth*

The second value is essentially a formulation of the classic "marketplace of ideas" metaphor that litigants and the courts frequently invoke to protect challenged speech.¹⁰⁵ As Justice Holmes explained, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"¹⁰⁶

Commercial speech only remotely promotes this value. Commercial speech does not convey ideas, is not a response to the ideas of another, is not susceptible to opposing argument, and is not conducive to dialogue that will ferret out facts to yield some ultimate

103. See *infra* note 125 and accompanying text.

104. See Baker, *supra* note 60, at 1033 ("the contribution of associations or assemblies as the embodiment of people's power to the first amendment values of self-fulfillment or participation in change should be obvious").

A trade association promoting its product also may include some element of association rights. Since the individual's message lacks an expression of self, however, the combined efforts of the group conveying the commercial message make a reduced contribution to the individual's growth. Moreover, unlike labor speech, a trade association's commercial speech, although formulated jointly, is rarely communicated to the public through group activity. Perhaps most important, trade association speech is not representative of commercial speech. Whereas *all* labor speech contains an element of association, only a very small portion of commercial speech has that element of joint communication.

105. See, e.g., Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2808 (1982); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 272 n.13, 279 n.19 (1964); see also L. TRIBE, *supra* note 62, at 576-77. For a criticism of the market place of ideas model, see Baker, *supra* note 60, at 974-81.

106. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); accord Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980); see also 2 SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON 333 (1926), quoted in Thomas v. Collins, 323 U.S. 516, 546 n.1 (1945) (Jackson, J., concurring); Stone, *supra* note 62, at 101-03.

truth. Commercial speech presents facts and little more.¹⁰⁷

Some labor speech, like commercial speech, may suffer from a failure to express ideas. The union member carrying a picket sign saying no more than "on strike" provides a new fact, but may not contribute to the marketplace of ideas any more than a classified advertisement that offers minimum wage.¹⁰⁸ Most labor speech, however, provides greater impact on the formation of opinions and beliefs than an "on strike" sign. In particular, nonpicketing publicity typically will provide information and express opinions about the labor dispute.¹⁰⁹ In contrast to the use of a picket sign that the public may have difficulty reading if all the details of the labor dispute are presented, a handbill or advertisement is circulated precisely to allow for a more thorough discussion of the facts.¹¹⁰

Finally, since labor unions most often communicate verbally, by handbill or by picketing, a representative sharing the expressed opinion generally is available to respond to questions. The representative can indicate the causes of the dispute, the reasons for the action, and the goals the union seeks. When such information is

107. The claim that the facts conveyed in commercial speech are essential to the proper working of the economic marketplace, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 765 (1976), is not sufficient to satisfy the second value in the first amendment analysis. The marketplace depends on much more than just commercial speech. For example, the absence of automotive transportation would cripple delivery systems. Yet the first amendment does not prevent governmental restrictions on and regulation of motor vehicles. Quite simply, arguments based upon the needs of the marketplace merely resurrect economic due process "in the ill-fitting garb of the first amendment." Jackson & Jeffries, *supra* note 94, at 30; see also Note, *Labor Picketing*, *supra* note 64, at 957-58. Furthermore, the argument that these commercial facts help to form opinions about important public issues also falls short of satisfying the second value in the first amendment analysis. See *infra* note 114.

108. Both the picketer and the classified advertisement may help to form the opinion that labor is oppressed. Neither, however, directly makes that argument; instead, the public must arrive at its own conclusion based on the interaction of the individual's life experience with the new fact.

109. For an example, see the *DeBartolo* handbill, *supra* note 34.

110. The difference in the detail with which labor picketing and nonpicketing publicity describe a labor dispute arguably could provide a justification for treating the two forms of publicity differently. That is, one could attempt to treat labor speech that presents views or opinions (typically nonpicketing publicity) differently from so-called "signal" labor speech (presumably picketing), which does not add to the marketplace of ideas, but merely manifests that a labor dispute exists. This approach, however, presents several problems. First, determining what constitutes enough information to contribute to the marketplace of ideas would be a difficult task. Second, when union activity provides few details the message is less persuasive, proportionately reducing the government interest in suppressing the communication. Last, a detail-based approach does not accord sufficient weight to the contribution that a picket sign makes to the value of self-expression. Cf. Baker, *supra* note 60, at 995 (self-expressive speech more fully promotes fundamental first amendment values than does speech that communicates propositions and attitudes).

provided, the employer who is the object of the dispute has something to which he may respond. He may post signs in his store window, speak to customers personally, or counteradvertise. Labor publicity therefore permits the dialogue that the marketplace of ideas model envisions.

(c) *Participation in Decisionmaking*

The third main function of free expression is to provide for participation in decisionmaking through a process of open discussion that is available to all members of the community.¹¹¹ This function has particular significance in the political realm in which the state makes most of the immediate decisions on its survival, welfare, and progress, and in which the state has a special incentive and often more effective power to suppress free expression.¹¹² Thus, to many, the most important societal interest that the first amendment advances is this third value, self-government.¹¹³

Commercial speech does not provide information directly relevant to the individual's participation in the political process.¹¹⁴

111. See T. EMERSON, *supra* note 97, at 8-11.

112. See *id.* at 9.

113. See, e.g., *Connick v. Myers*, 51 U.S.L.W. 4436, 4437 (Apr. 20, 1983); *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 39 (1976). Indeed, some commentators argue that the political process principle should be the *only* premise employed when construing the limits of the first amendment. See also *supra* note 95.

114. "The typical newspaper advertisement or television commercial makes no comment on governmental personnel or policy. It does not marshal information relevant to political action, nor does it focus public attention on questions of political significance." Jackson & Jeffries, *supra* note 94, at 15; accord *BeVier*, *supra* note 95, at 353-55.

Commercial speech arguably transmits information that contributes to the public's formation of political opinions and thereby indirectly contributes to the individual's participation in the political process. See Note, *supra* note 94, at 745; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *id.* at 780 n.8 (Stewart, J., concurring). For example, Justice Stewart argued in *Virginia State Bd. of Pharmacy* that drug price information might affect a person's views concerning price control issues, government subsidy proposals, special health care, consumer protection, or tax legislation. *Id.* at 780 n.8. The ban on drug prices challenged in *Virginia State Bd. of Pharmacy*, however, also may help the public form opinions on those same issues and has the identical political significance. See Jackson & Jeffries, *supra* note 94, at 15 n.53. Similarly, an individual viewing a street fight may conclude that the government should do more to reduce crime, should make sentencing or parole laws stricter, should reform prisons, or should improve police service. No one, however, would seriously argue that the ban on drug price information in *Virginia State Bd. of Pharmacy* or the street fight were protected speech. In short, all of life's experiences may affect a person's views concerning some political issues. Accordingly, a more direct link to the political process than that Justice Stewart postulates is necessary to trigger first amendment protection for commercial speech.

Commercial speech also does not further the individual's ability to participate in the political process. Unlike speech in such fields as philosophy, logic, or literature, commercial speech neither expands the limits of the mind nor improves upon the individual's overall decisionmaking processes.¹¹⁵

Labor speech also generally makes no comment on governmental personnel or policy and, like commercial speech, often is economically motivated. Labor speech, however, unlike commercial speech, does concern political and social choices. The union appeals to the public for support in its particular dispute and in its larger struggle.¹¹⁶ The success of the appeal depends upon the public's decision to forego what it had perceived as in its economic self-interest and to support the political and social values the union represents.¹¹⁷ The meaningfulness of these political and social choices ultimately rests upon the union's ability to communicate its message. A public deprived of information concerning the facts of a labor dispute is deprived of the ability to participate knowledgeably in the decisionmaking process.¹¹⁸ Furthermore, re-

115. Commercial speech, of course, does enable the consumer to engage more rationally in economic decisionmaking. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 765; see also Redish, *supra* note 94, at 443-45. The first amendment, however, was not designed to further strictly economic interests. See *supra* note 107.

116. See *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940); Note, *Labor Picketing*, *supra* note 64, at 955.

The Court in *Thornhill* reasoned that free discussion concerning labor disputes is indispensable to the proper use of governmental processes to shape the destiny of modern industrial society. 310 U.S. at 103. This reasoning arguably suffers from the same defect implicit in the *Virginia State Bd. of Pharmacy* opinion—the lack of a direct link between the speech and the political decision. See *supra* note 114. If the only political decision at issue was a future electoral decision on the roles of labor and management in industrial relations, the argument might have merit. A union's message and its act of transmitting it through group association, however, unlike the commercial advertisement, have more immediate political and social repercussions. See *infra* note 117 and accompanying text.

117. Moreover, the union members themselves engage in political decisionmaking by the very practice of bonding together with their fellow workers to voice their concerns on public issues. See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981).

While the political and social choices the union and the public make do not immediately register in the voting booth, only the most restrictive definition of political speech would require electoral significance. See Bork, *supra* note 95, at 29-35. Judge Bork would limit first amendment protection to political speech that deals "explicitly, specifically and directly with politics and government." *Id.* at 26. Although this interpretation of political speech would exclude labor speech from first amendment protection, it also would exclude scientific and literary expression as well. *Id.* at 28. The Supreme Court never has endorsed the Bork definition of political speech. See *Connick v. Myers*, 51 U.S.L.W. 4436, 4438 (Apr. 20, 1983); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231-32 (1977).

118. See *Carpenters and Joiners Union Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942) (Black, J., dissenting).

Disputes between one or two unions and one contractor over the merits and justice of

pression of labor's grievances also might affect the political processes by undermining the confidence and faith of the public in the democratic system. Justice Brandeis recognized that "repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."¹¹⁹

(d) *Balance Between Stability and Change*

The final value the first amendment promotes is a "method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."¹²⁰ Expression therefore allows society to avoid the natural tendency toward rigidity on the one hand and the violent response such rigidity may produce on the other.¹²¹

Commercial speech does not satisfy this value. Commercial speech neither calls for nor addresses social, political, or even economic change nor allows dissidents to "let off steam,"¹²² nor constitutes a response to such minority views. Rather, commercial speech is merely a means by which the speaker seeks to benefit from the existing economic structure.¹²³ Indeed, observers have ex-

union as opposed to non-union systems of employment are but a part of the nationwide controversy over the subject. I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right.

Id. at 730.

119. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The need to prevent repression closely parallels the due process requirements of our judicial system. Both further the individual's self-dignity and the operation of the underlying system, whether judicial or political, by maintaining confidence in its equity and fairness. The Brandeis argument does not apply to commercial speech because this form of speech lacks a self-expression value and thus repression would not breed hatred.

120. T. EMERSON, *supra* note 97, at 11; *cf.* *Connick v. Myers*, 51 U.S.L.W. 4436, 4437 (Apr. 20, 1983) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.").

121. *See* T. EMERSON, *supra* note 97, at 11-12.

122. *Id.* at 12.

123. Certain businesses will benefit over others through the process of consumers registering their preferences in the marketplace. This process may result in a gradual change in our economic institutions. The consequent change, however, is a mere shifting of interests within a given segment of the existing economic structure, resulting in neither a fundamental change in the distribution of wealth between existing classes, nor a restructuring of the

pressed concern that commercial speech may help to rigidify the prevailing distribution of wealth and economic structure.¹²⁴

By contrast, advocacy of political and social change is at the core of labor speech. The essence of the labor movement is the realignment of individual wealth from one segment of society to another. The union member appeals to the public to support his cause in a particular dispute. The union member's plea, however, is also directed to the public's sentiments towards labor's larger struggle, which the individual dispute is, in fact, the first step toward resolving. Silencing labor speech not only would impede social change, but also would risk channeling union frustrations into more destructive avenues of release.¹²⁵ The union will accept more readily the common judgment when given an opportunity to persuade consumers to adopt the union's cause. If, however, the law permits complete repression of the union's voice, the union may resort to force, rather than consumers' marketplace votes, to persuade the secondary employer. Thus, allowing labor speech strikes the delicate balance between stability and change.

In summary, neither the labor picketing nor the commercial speech precedents can justify reduced first amendment protection of nonpicketing labor publicity. Nonpicketing labor publicity satisfies all the values underlying the first amendment and does so more fully than commercial speech. Indeed, since the Supreme Court recently has subjected restrictions on commercial speech to increasingly thorough first amendment analysis, courts should apply an even more rigorous analysis to restrictions on nonpicketing labor publicity. Under an appropriate analysis, the "for the purpose of" and "producer-distributor" requirements clearly infringe fully protected nonpicketing labor speech. The finding that the "producer-distributor" and "for the purpose of" requirements are an infringement on fully protected speech, however, does not end the relevant inquiry.

larger economic system. The fourth value contemplates the balance between stability and change in these larger institutions. See *id.* at 11-14.

124. See Baker, *supra* note 60, at 979-80 and n.59.

125. See T. EMERSON, *supra* note 97, at 12-13. This justification for protecting labor speech is particularly strong for nonpicketing publicity. An individual restrained from picketing may have alternate avenues of communication to convey his message, but a prohibition extended to nonpicketing publicity cuts off an entire message. While other avenues may be available to pressure the *primary* employer, the union member nevertheless may feel frustrated by his inability to make the *secondary* bear the full responsibility of his relationship to and possible support of—whether by action or inaction—the primary.

IV. JUSTIFYING THE RESTRICTIONS ON PROTECTED SPEECH

The second stage in the analysis of the constitutionality of the "producer-distributor" and "for the purpose of" requirements is an evaluation of the government's justification for infringing upon nonpicketing labor speech. To regulate fully protected speech¹²⁶ on the basis of its content, the government must show that the regulation is a narrowly tailored means to promote a compelling government interest.¹²⁷ The "producer-distributor" and "for the purpose

126. Congress may regulate fully protected speech if the regulation is "a reasonable, content-neutral, time, place or manner regulation." *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderley v. Florida*, 385 U.S. 39 (1966); *Kovacs v. Cooper*, 336 U.S. 77 (1949). The "for the purpose of" and "producer-distributor" requirements, however, prohibit certain messages and consumer appeals at all times, at all places, and in every manner, *see infra* notes 128-32 and accompanying text, and, therefore, lack the content neutrality required of reasonable time, place, and manner regulations. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516-17 (1981) (plurality opinion); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

The government also may regulate fully protected speech if the communication is part speech and part conduct and the regulation promotes an important or substantial government interest, is unrelated to the suppression of free expression, and imposes incidental restrictions on first amendment freedoms no greater than is essential to further the government's interest. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* test—whether viewed as limited to expressive conduct or as representing a subcategory of time, place, and manner regulations—and regardless of the feasibility of separating conduct from expression, *see generally*, L. TRIBE, *supra* note 62, at 599-601; Baker, *supra* note 60, at 1009-12; Cox, *supra* note 62, at 48-49; Ely, *supra* note 62, at 1493-95; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 743-46 (1980); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 148 n.204 (1981)—has no application to the nonpicketing publicity upon which the "for the purpose of" and the "producer-distributor" requirements infringe. The restrictions resulting from those requirements are not "unrelated to the suppression of expression." The government's concern arises from the nonpicketing publicity's communicative impact—the way the public is expected to respond to the union's message—and is explicitly content-based. *See* Ely, *supra* note 62, at 1497; *infra* notes 128-32 and accompanying text.

The government also may regulate fully protected speech that occurs in a nonpublic or special forum. *See, e.g.*, *Connick v. Myers*, 51 U.S.L.W. 4436 (Apr. 20, 1983) (office environment of government employer); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (prison); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (interior advertising space of mass transit vehicle). This justification for restricting protected speech is not even arguably applicable to the "for the purpose of" and "producer-distributor" requirements, which apply to publicity conducted through traditional channels of communication that are open to the public. When labor publicity occurs on private property, an employer nondiscriminatorily may enforce valid trespass laws, regardless of the "for the purpose of" and "producer-distributor" requirements. *See* *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

127. *See* *Bolger v. Youngs Drug Prods. Corp.*, 51 U.S.L.W. 4961, 4962 (June 24, 1983); *United States v. Grace*, 51 U.S.L.W. 4444, 4446 (Apr. 20, 1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765,

of” requirements, however, do not satisfy any of the judicially approved bases for regulating protected speech. The two restrictions on nonpicketing labor publicity are content-based and are not the least restrictive means of achieving a sufficiently compelling governmental interest.

A. Content-Based Restrictions

The “for the purpose of” and “producer-distributor” requirements most assuredly are content-based. The two restrictions do not merely regulate labor speech in the context of a statute balancing labor and management rights¹²⁸ or present difficult questions concerning the content-neutrality of *subject-matter* regulation.¹²⁹ Rather, the “for the purpose of” and “producer-distributor” requirements restrict speech that presents a particular point of view—the union’s. Moreover, the restriction is triggered only when the union’s speech has a particular message.¹³⁰ Even in labor picketing cases members of the Court have recognized that restrictions on appeals to consumers to boycott a secondary are content-based.¹³¹ A fortiori when the restriction completely cuts off a particular message, regardless of whether the communication is speech only or speech plus conduct the government has regulated on the basis of content.¹³²

786 (1978); NAACP v. Button, 371 U.S. 415, 438-39 (1963); see also Redish, *supra* note 126, at 113; Stone, *supra* note 62, at 82.

The government subjects certain categories of speech to content regulation on a regular basis. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libelous speech); Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). These categories, however, are not exceptions to the general rule against content-based restrictions on protected speech, but are examples of speech that the Court has found not worthy of first amendment protection.

128. See Farber, *supra* note 126, at 736; Stephan, *supra* note 55, at 204.

129. See generally Farber, *supra* note 126; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *supra* note 62.

130. For example in *Pet, Inc.*, 244 N.L.R.B. 96, *rev'd sub nom. Pet, Inc. v. N.L.R.B.* 641 F.2d 82 (8th Cir. 1981), the Union could have circulated handbills in the same location requesting that the public not shop at Hussmanns. The Union, however, apparently lost its first amendment rights by including other Pet subsidiaries in its plea. Similarly, in *Delta Air Lines*, 263 N.L.R.B. 153, 111 L.R.R.M. (BNA) 1159 (Sept. 10, 1982) the Union handbill would not have violated the Act if it had not included information about Delta’s flight safety record. The inclusion of that specific message caused the Union to lose its protection.

131. See, e.g., NLRB v. Retail Store Employees Local 1001 (*Safeco*), 447 U.S. 607, 618 (1980) (Stevens, J., concurring); NLRB v. Fruit & Vegetable Packers Local 760 (*Tree Fruits*), 377 U.S. 58, 79 (1964) (Black, J., concurring) (“[W]e have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views.”).

132. See also Ely, *supra* note 62, at 1498. (A regulation is content-based if the need for the regulation would disappear when the audience could not read English).

B. The Government's Interest in the "For The Purpose Of" Requirement

The acknowledged government interest in enacting the secondary boycott provisions of the Act was to protect neutral employers and employees from disputes not of their own making.¹³³ The "for the purpose of" requirement as interpreted by the Board in *Delta Air Lines* does not promote that interest. The Board clearly indicated that it would have found no fault with a Union handbill without the flight safety information and would have permitted the Union to enmesh Delta in its primary dispute by requesting customers to withhold patronage from Delta.¹³⁴ Thus, the "for the purpose of" requirement, as interpreted by *Delta Air Lines*, will not protect neutral employers from labor disputes not of their own making.

A second government interest that arguably justifies the *Delta Air Lines* interpretation of the "for the purpose of" requirement is preventing severe economic harm to the business of an individual employer. That strictly economic interest, however, does not constitute, in the first amendment context, a substantial—much less compelling—government interest.

Furthermore, the government's interest in regulating one activity is not sufficiently compelling when the government does not regulate other activity that jeopardizes the same interest.¹³⁵ The arguable interest in preventing severe economic harm to an individual business suffers from this infirmity. The government fails to regulate not only some other activity, but *all* other activity that produces the same "evil" as the union's publicity.¹³⁶ The decision

133. 93 CONG. REC. 4323 (1947), reprinted in 2 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1106 (1948) (Statement of Sen. Taft); see also *DeBartolo Corp. v. NLRB*, 103 S. Ct. 2926, 2932 (1983); *NLRB v. Denver Bldg. & Constr. Trade Council*, 341 U.S. 675, 692 (1951); *Service Employees Local 399 (Delta Air Lines)*, 263 N.L.R.B. No. 153, 111 L.R.R.M. (BNA) 1159, 1161-62 (Sept. 10, 1982).

134. *Service Employees Local 399 (Delta Air Lines)*, 263 N.L.R.B. No. 153, 111 L.R.R.M. (BNA) 1159, 1162 (Sept. 10, 1982).

135. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520 (1981) (plurality opinion); *Carey v. Brown*, 447 U.S. 455, 465 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 100 (1972).

136. The defect of the "for the purpose" requirement is not simply that too little speech falls within the prohibition. Rather, by ignoring some speech that is indistinguishable from the speech prohibited, the government has undermined the likelihood that a genuine state interest exists for restriction of the prohibited speech. As explained by Justice White, "The exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest . . ." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490,

in *Delta Air Lines* would have allowed any person other than a Union member to publicize the same information contained in the Union's handbill without incurring liability. For example, Ralph Nader or even a competing business would not violate the law by publishing Delta's flight safety record,¹³⁷ yet the injury to Delta would be as great as, if not greater than, the injury the Union's handbilling caused.¹³⁸

A final arguable justification for the "for the purpose of" requirement is that the restriction serves the government interest in preventing the dissemination of misleading information. The concern is that union publication of information about the secondary—such as Delta's safety record—may present the data misleadingly or lead the public to believe that a primary dispute exists with the secondary. While the Board's "for the purpose of" requirement may prevent the dissemination of misleading data by prohibiting all information unrelated to the primary dispute, the restriction obviously is overbroad. Handbills and advertisements are memorialized on paper—the government easily can police their truthfulness on an individual basis.¹³⁹ Since "broad prophylactic rules in the area of free expression are suspect,"¹⁴⁰ the solution to

520 (1981) (plurality opinion).

137. See RESTATEMENT (SECOND) OF TORTS § 768 (1982). First amendment rights should not depend solely upon who the speaker is. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). The "for the purpose of" restriction is particularly objectionable because it makes first amendment rights depend not only on who the speaker is, but also on whether the speaker is a union member. The restriction therefore also may violate first amendment associational rights. See *Baker*, *supra* note 60, at 1031-35 (first amendment protects association as well as assembly); see also *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3423 (1982); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

138. When the Union publishes Delta's flight safety record, the public, believing that a vindictive motive prompted the Union to publish the information, may discount the record's credibility. See *NLRB v. Local Union 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 477 (1953).

139. Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466 (1978) ("in-person solicitation is not visible or otherwise open to public scrutiny," therefore, the government may justify more easily prophylactic regulation).

140. See, e.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *In re Primus*, 436 U.S. 412, 432 (1978); *NAACP v. Button*, 371 U.S. 415, 438 (1963). But see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

In *Ohralik*, a commercial speech case, the Court endorsed the use of broad prophylactic regulations. 436 U.S. at 464. Labor speech, however, is not commercial speech, nor should it be treated similarly. See *supra* notes 97-125 and accompanying text. Moreover, the more demanding inquiry into the government's interest and the precision of its regulation that the Supreme Court has made in other commercial speech cases indicates that *Ohralik* may be limited to its facts. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *In re Primus*, 436 U.S. 412 (1978); *First Nat'l Bank v. Bel-*

the problem of potentially misleading messages is not to enjoin all messages as did the Board in *Delta Air Lines*, but to restrain only the misleading ones¹⁴¹ or perhaps to require greater disclosure.¹⁴² Thus, the "for the purpose of" requirement is not narrowly tailored to accomplish any sufficiently compelling government interest.¹⁴³

C. The Government's Interest in the "Producer-Distributor" Requirement

The constitutional validity of the "producer-distributor" requirement also is suspect. The producer-distributor language attempts to further the acknowledged government interest of protecting neutral parties from labor disputes not of their own making¹⁴⁴ by focusing on the secondary's relationship to the primary: the more remote the relationship, the more "neutral" the secondary, and the less the union can justify the publicity. In contrast, when the secondary distributes the primary's product, a close relationship exists between the parties, and the secondary is less neutral, and a secondary boycott directed against the primary's product¹⁴⁵ injures the secondary roughly¹⁴⁶ to the extent the secon-

lotti, 435 U.S. 765 (1978).

141. The Board in *Delta Air Lines* discussed the possibility that the safety data might be misleading, but did not rule on that basis. The Board's injunction prohibited *all* publication of information unrelated to the primary dispute, not merely nontruthful or misleading publicity. See 263 N.L.R.B. 996, 111 L.R.R.M. 1159 (BNA) (Sept. 10, 1982). Moreover, the majority expressly rejected the administrative law judge's finding that the publicity proviso did not cover the handbill because it contained "misleading unrelated" information. *Id.* at 998, 111 L.R.R.M. at 1161. Finally, to the extent the handbill misled the public about the parties to the primary dispute, the Union's appeal probably was less effective and the government's interest not as great. See *supra* note 138.

142. See *infra* notes 156-66 and accompanying text.

143. The Court's decision in *NLRB v. Local Union 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464 (1953), ostensibly supports the constitutionality of the restriction in *Delta Air Lines*. In *Jefferson Standard*, technicians employed by, and in a labor dispute with a broadcasting company, distributed handbills attacking the quality of the company's product. The Board and the Supreme Court found that the employer was justified in terminating the responsible technicians since the disparaging information was unrelated to the primary dispute. No constitutional issue, however, arose in *Jefferson Standard*. The Court did not prohibit the employees from publicizing their message, but merely found that the employees' activity had no affirmative statutory protection. The case involved state action.

144. See *supra* note 133.

145. A boycott directed against only the primary's product is a product boycott. A union's appeal to the consumer to withhold *all* patronage from the secondary is a total boycott. A product boycott in some cases may "merge" into a total boycott when the primary product is inseparable from the secondary's remaining business. See, e.g., *Hoffman v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972) (struck product was homes, secon-

dary benefits from its relationship with the primary. While this focus on the relationship between the primary and secondary may appear tailored to the government's interest,¹⁴⁷ the Board and courts have interpreted the prohibitions of section 8(b)(4)(ii)(B) and the producer-distributor language of the publicity proviso in a manner inconsistent with the government's acknowledged goal. The Board and courts have not focused properly on the injury to the secondary vis-a-vis its relationship to the primary; rather, they have adopted a bifurcated approach when construing section 8(b)(4)(ii)(B) that belies the government's acknowledged interest.

The inquiry under the "producer-distributor" requirement is whether some business relationship or chain of production nexus exists between the primary and secondary.¹⁴⁸ When some minimal relationship exists, the law permits total boycotts as well as product boycotts.¹⁴⁹ The law does not attempt to tailor the extent of permissible injury to the nature of the secondary's relationship

dary employer was real estate developer), *cert. denied*, 411 U.S. 986 (1973); *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969) (struck product was bread, secondary employer was restaurant owner). When a merger occurs, the Board and the courts have treated the appeal as one for a total boycott. *Id.* at 154.

146. Some consumers may withhold all patronage from the secondary even when the union requests only a product boycott. *See NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58, 82-83 (1964) (Harlan, J., dissenting). With that exception, however, the secondary boycott would have no greater effect on the secondary employer than an effective primary strike.

147. The statute, even if construed literally, still might be insufficiently tailored to the government's interest. By focusing on the lines of production and distribution existing between primary and secondary, the proviso ignores other situations in which the secondary's contributions to the primary are far greater than that of a distributor. *But see supra* note 48. For example, when the secondary is the parent of the primary but does not have apparent actual control, the Board might consider the parent neutral, even though the parent company may substantially influence the labor policy of the primary. *See supra* note 24; Comment, *Unions, Conglomerates, and Secondary Activity Under the NLRA*, *supra* note 24, at 239 ("A conglomerate's power in labor negotiations stems from its size and diversification, which give it the ability to 'cross-subsidize between industries and plants and whipsaw different unions at . . . various facilities—supported by substantially enhanced financial staying power.'") (quoting Alexander, *Conglomerate Mergers and Collective Bargaining*, 24 *INDUS. & LAB. REL. REV.* 354, 362 (1971)); *see also* Comment, *Consumer Picketing of Economically Interdependent Parties: Retail Store Employees Local 1001 v. NLRB (Safeco Title Insurance Co.)*, 32 *STAN. L. REV.* 631, 643 (1980). This criticism, of course, may apply more strongly to the Board's neutrality definition than to the "producer-distributor" requirement.

148. *See supra* note 48.

149. *See, e.g., United Steelworkers (Pet, Inc.)*, 244 N.L.R.B. 96, 101 (1979), *rev'd on other grounds sub nom. Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981); *American Fed'n of Television and Radio Artists Local 55 (Great Western Broadcasting Corp.)*, 150 N.L.R.B. 467, 470-72 (1964), *aff'd sub nom. Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966).

with the primary, and as a result, a secondary employer can incur injury far beyond that which its relationship with the primary warrants. The inquiry, when the publicity proviso is found inapplicable, even more starkly belies a government interest in protecting secondary parties to the extent of their neutrality. The reviewing body asks whether the boycott threatens substantial loss or financial ruin to the secondary,¹⁵⁰ protecting the secondary only when the boycott affects a substantial portion of the secondary's business. Thus, rather than protecting relatively innocent parties, the courts have construed the statute to provide more protection to those secondary distributors who are *less neutral*.¹⁵¹

The chief problem, however, with the "producer-distributor" requirement is not its failure to focus on the harm to the secondary vis-a-vis the extent of its neutrality. Rather, it is that the restriction is not the least restrictive alternative necessary to achieve the government's goal. The government can achieve its goal equally well by ensuring that the public learns of the actual relationship between the secondary and primary employers.

A union is unlikely to conduct a consumer boycott of a secondary that has no business relationship with the primary. The possible pressure a secondary could apply to the primary would be minimal. More importantly, even if informal means of pressure did exist—through, for example, personal relationships of officers or directors of the primary and secondary—the secondary likely could not be persuaded to exercise the pressure through a consumer boycott since the consumer appeal would have little effect on the secondary *if* the public was aware of the secondary's neutrality.¹⁵²

On the other hand, if the secondary does have a business relationship with the primary, the government's interest does not re-

150. See *supra* note 49.

151. This, of course, assumes the Court has not determined the secondary to be non-neutral, see *supra* note 24; see also *NLRB v. Business Mach. & Office Appliance Mechanics Local 459 (Royal Typewriter)*, 228 F.2d 553 (2d Cir. 1955) (ally doctrine), *cert. denied*, 351 U.S. 962 (1956), or otherwise outside the prohibitions of § 8(b)(4)(ii)(B). See generally *supra* note 49. As the *Safeco* case illustrates, however, the secondary can have a substantial relationship with the primary without falling within either of these categories.

152. This highlights yet another infirmity with the Act's restrictions on nonpicketing publicity. The Act by not requiring the charging party to show *actual* harm to the secondary or imminent coercion of the primary before the trier issues an injunction thus sweeps within its scope harmless as well as harmful speech and speech that does not produce a "clear and present danger" of the feared substantive evil. See Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 U. Pa. L. Rev. 995, 1020-27 (1954). Since the Act does require a showing of harm for a damage award, see National Labor Relations Act § 303, 29 U.S.C. § 187 (1976), the problems of proof can not justify their overbreadth.

quire that the secondary receive full protection from the union's message since the secondary no longer would be completely neutral. While the interested secondary arguably should not incur injury far beyond its relationship to the primary, here again, the best judge of the extent of the secondary's neutrality is the public. A public that is aware of the secondary's relationship can decide whether the relationship is significant enough to warrant the pressure the union urges.¹⁵³ Thus, the key to achieving the government's interest is full and accurate disclosure of the secondary's relationship with the primary.

The central failing of both the "producer-distributor" and "for the purpose of" requirements ultimately is the government's unwillingness to allow truthful speech for fear that the public may not perceive its true merit or give it proper weight. Such paternalistic regulation cannot meet the exacting scrutiny of the compelling interest standard,¹⁵⁴ and likely would be infirm even under the lesser commercial speech standard.¹⁵⁵

153. The collective judgment may distort the individual's judgment—that is, many consumers may feel that a secondary's limited relationship with the primary justifies limited withholding of patronage and therefore decide to shop elsewhere, unaware that many other consumers are doing likewise. The result, of course, would be a reduction in the secondary's sales beyond that which the individual consumer desired. This "very distant possibility of harm", however, does not justify infringing first amendment rights. *In re Primus*, 436 U.S. 412, 436 (1978).

154. See *id.* at 432; *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *Cohen v. California*, 403 U.S. 15, 24 (1971); see also *Redish, supra* note 126, at 143; *Stone, supra* note 62, at 82.

155. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Court announced a four-part analysis for restrictions on commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

The Court has applied these requirements rigorously, see, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748 (1976), and repeatedly has acknowledged that the government may not suppress commercial speech entirely merely because the government fears the misuse of such speech. See, e.g., *Central Hudson*, 447 U.S. at 566 n.9; *First Nat'l Bank*, 435 U.S. at 791-92 & n.31; *Virginia State Bd. of Pharmacy*, 425 U.S. at 770. The restrictions on nonpicketing labor publicity suffer from precisely that infirmity.

Moreover, even in the case of commercial speech, the preferred solution to potential harm is more—not less—speech, see *infra* note 159, the simple expedient that has eluded the government in its restrictions on nonpicketing publicity. Thus, even under the lesser protection due commercial speech, which is the minimum protection due nonpicketing labor

V. A LESS RESTRICTIVE ALTERNATIVE

The "producer-distributor" and "for the purpose of" requirements are not the least restrictive means to achieve the government's goal to ensure that the union's appeals do not unjustly injure secondary employers.¹⁵⁶ The government can achieve its interest as effectively and less restrictively by more, not less, disclosure, a remedy that also accords well with the theoretical underpinnings of the first amendment.¹⁵⁷ Full disclosure would provide an informed public that could decide best if and the degree to which the public should boycott the secondary. Full disclosure would protect substantially innocent parties without trampling first amendment rights. The government could place responsibility for disclosure on either the secondary, the union, or both.

First, the law might require that the secondary employers themselves provide the additional disclosure of information about the secondary-to-primary relationship. Secondary employers can counteradvertise, speak to consumers personally, or display signs in their company windows. Placing the burden of disclosure on the secondary alone, however, may be a more attractive than practical solution. A secondary employer may not know of the union's activity or what the union's message is until after the union has begun its appeal. Moreover, counteradvertising may not reach the identical audience that the union appeal reaches.

speech, *see supra* notes 96-125 and accompanying text, the "for the purpose of" and "producer-distributor" requirements violate the first amendment.

156. Of course, least restrictive analysis can be a "slippery slope" for, as some justices have recognized, "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Widmar v. Vincent*, 454 U.S. 263, 279 n.3 (1981) (Stevens, J., concurring) (quoting *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)). By the same token, however, less restrictive alternative analysis requires something more than merely deferring to the legislative judgment when the alternate regulation is only marginally less effective than the regulations that restrict first amendment rights. *See Ely, supra* note 62, at 1486-87; *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

The Court has often applied a rigorous, less restrictive alternative analysis even in the commercial context. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540-41 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Accordingly, a rigorous analysis is appropriate here, particularly since nonpicketing labor publicity is a traditional mode of communication, *see Ely, supra* note 62, at 1488, and since the proposed remedy relies on opening, not closing, the channels of communication. *See In re R.M.J.*, 455 U.S. 191, 201 (1982) ("preferred remedy is more disclosure, rather than less"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

157. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

The second and preferred solution is to require the union to make the disclosure. The Board already treats publicity that does not sufficiently identify the primary as untruthful.¹⁵⁸ A requirement that the union disclose additional information to prevent an appeal from misleading the public would be within the limits of this precedent.¹⁵⁹

The union disclosure solution, however, does not resolve the issue of what constitutes enough disclosure. The current Board truthfulness requirement prohibits publicity that substantially departs from fact or that is intentionally deceptive,¹⁶⁰ but because of difficult questions of intent, this standard may not suffice to ensure full disclosure.¹⁶¹ The Board or the court, however, could engraft onto the truthfulness requirement a simple burden-shifting procedure to alleviate this problem and still provide the union with some measure of predictability. For example, the Board could give the union the burden of asking the secondary employer to provide

158. See, e.g., *Local 732, Int'l Bhd. of Teamsters (Servair)*, 229 N.L.R.B. 392, 392 (1977); *Honolulu Typographical Union, No. 37*, 167 N.L.R.B. 1030, 1032 (1967), *aff'd*, *Honolulu Typographical Union, No. 37 v. NLRB*, 401 F.2d 952, 957-58 (D.C. Cir. 1968).

159. Questions arise whether the proposed disclosure requirements would be found constitutional. To the extent the omission makes the publicity untruthful, the answer is simple—untruthful speech is subject to regulation. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53, 67 (1966). Merely because the Board defines misleading speech as untruthful, however, does not make it so. The Supreme Court, nevertheless, has broadly endorsed disclosure requirements at least in the commercial speech context, to prevent misleading, even if not untruthful, messages. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (the remedy in the first instance for potentially deceptive speech is not necessarily a prohibition but preferably a requirement of disclaimers or explanation); see also *id.* at 200 & n.11; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-71 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). But see *Friedman v. Rogers*, 440 U.S. 1, 12 n.11 (1979). The Court has reasoned that the commercial speaker is in a position to know the truth of his message and has a strong financial motive that would overcome any chilling effect that requiring disclosure would produce. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976). Whatever the merits of a category-by-category approach to chilling effects, see *Farber, supra* note 126, at 759, the Court likely would find the same arguments applicable to labor speech. The union is a participant in the labor dispute and therefore is likely to know the facts. Moreover, the union's strong motivation to present its message frequently leads it not only to ignore threats of an injunction, but also to speak in violation of an injunction. But see *T. EMERSON, supra* note 95, at 449 (full protection theory applied to labor publicity would mean that the government could not impose a truthfulness requirement).

160. See *DeBartolo*, 252 N.L.R.B. at 704 n.2; *International Bhd. of Teamsters Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901, 906 (1961).

161. See *supra* note 33.

a disclaimer about its connection to the primary. The union's request would shift the burden of providing such a disclaimer to the secondary. The union, exercising its option to include the secondary's disclaimer in its publicity, would raise the potentially irrebuttable presumption that both parties had made sufficient disclosure.¹⁶² The presumption would serve as the union's "safe harbor." The union's choice not to include the secondary's statement in the union publicity would raise a presumption that the union "intended to deceive." The union could rebut by explaining why it excluded the disclaimer¹⁶³ and by demonstrating that the message nonetheless was truthful and not misleading.

This remedy, admittedly, may not prevent all harm to a neutral secondary. For example, consumers may not read the union's entire message yet may respond to the appeal to withhold patronage. Alternatively, the initial receptors of the union message may perceive the secondary's true relationship to the primary yet convey that message incorrectly to others.¹⁶⁴ The secondary, however, partially may reduce these harms by counteradvertising. Unlike the voter in an election, a consumer may recast his economic vote.¹⁶⁵ More fundamentally, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . [I]f there be any danger that the people cannot evaluate the information and arguments advanced . . . , it is a danger contemplated by the Framers of the First Amendment."¹⁶⁶

VI. CONCLUSION

Labor increasingly has used the secondary boycott as a weapon to apply economic pressure upon noncooperating employers. The secondary boycott raises statutory issues that the Na-

162. Cf. *International Bhd. of Teamsters, Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901, 906 (promptly remedied handbill was evidence that the union did not intend to deceive).

163. The union might decide to exclude the secondary employer's disclaimer from the union's handbill because the disclaimer was too long, too costly, or inaccurate.

164. Nonpicketing publicity also may produce certain harms such as violence or restricted access that are unrelated to the union's message. State law, however, provides sufficient remedy for those injuries. See *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 274-75 (1956); see also *supra* note 126.

165. But see Teller, *supra* note 61, at 201; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1208 (1965).

166. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791-92 (1978); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); Stone, *supra* note 62, at 104.

tional Labor Relations Board and the courts have analyzed extensively. The courts also have considered the constitutionality of restrictions on one form of secondary pressure, consumer picketing. The Board and the courts, however, repeatedly have avoided addressing the constitutionality of restrictions on nonpicketing forms of secondary consumer pressure. The legitimacy of such restrictions remains in doubt.

This Article argues that nonpicketing labor publicity should receive full first amendment protection. Nonpicketing labor publicity shares few of the qualities that have justified the lesser protection accorded labor picketing. Despite its economic motivation, nonpicketing labor publicity also is more deserving of full first amendment protection than commercial speech, an area of speech in which restrictions have come under increasingly rigorous scrutiny. Unlike commercial speech, nonpicketing publicity fully satisfies all the traditional values that underlie the First Amendment.

The restrictions that recent Board and court decisions impose on nonpicketing publicity therefore infringe fully protected speech. That infringement remains unjustified. The "for the purpose of" and "producer-distributor" requirements are content-based restrictions that are not drawn narrowly to further a compelling government interest. By ignoring the simple expedient of requiring more, not less, speech, the restrictions are likely infirm under the reduced commercial speech standard which is the minimum standard that courts can apply to nonpicketing labor publicity. In an era of complex economic relationships, the use of secondary consumer pressure is likely to increase and take novel forms. Accordingly, the failure of the Board and courts to provide guidance to unions and their advisors on the constitutional protection due such activity is most unfortunate. The courts should adopt the analysis that this Article recommends and remedy their failure to date to provide this guidance.

