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Free Speech for Some: The NLRA, Secondary Boycotts, and the First Amendment

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"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people …. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated. Speech restrictions based on the identity of the speaker are all too often simply a means to control content."

--Citizens United v. Federal Election Com'n, 558 U.S. 310, 340 (2010)

Imagine three people standing on a public sidewalk in front of a Best Buy store, each holding a sign attached to a long wooden post. One, a Best Buy employee, holds a sign reading "DON'T SHOP AT BEST BUY! Best Buy sells electronics produced by child labor!"; the second, also a Best Buy employee, holds a sign reading "BUY IPHONES HERE! Guaranteed lowest prices!"; the third, who has no affiliation with Best Buy, holds a sign identical to the first person's child labor protest sign. American labor law currently turns this scenario into an absurd game of "One Of These Things Is Not Like The Other." Both the Best Buy employee who encourages shoppers to take advantage of the store's low prices and the third party encouraging consumers to boycott the store over its support of child labor are protected by the First Amendment and would not be open to any liability. Under current law, however, the Best Buy

employee who encourages consumers to boycott the store based on product manufacturers' labor policies violates the National Labor Relations Act and is not protected by the First Amendment.[1]

By encouraging customers to boycott the store because it sells goods at the center of a labor dispute, the first Best Buy employee engages in what is referred to as a secondary boycott or secondary picket. Best Buy itself is not the center of the labor dispute, but is still being picketed and boycotted because it sells products made by a company under dispute. Under §8(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA"), it is an illegal unfair labor practice for a labor organization to engage in boycotts or pickets against a "neutral" third party because of a labor dispute with a different "primary" target. In other words, a union and its members cannot picket or boycott one company in order to force its hand in dealings with other businesses. In the Best Buy example, the boycotters' target would be the electronics manufacturers, not Best Buy itself; Best Buy is a neutral third party. The employee-sanctioned boycott of Best Buy in this hypothetical is precisely the type of activity that §8(b)(4) aims to proscribe.

This ban raises serious constitutional questions under the First Amendment – questions which the Supreme Court has routinely used the doctrine of constitutional avoidance to dodge. The American legal system has routinely held that non-labor boycotts and pickets, both primary and secondary, with political goals are protected political activity; labor boycotts, on the other hand, are considered commercial or economic speech and are much more heavily restricted. The result of this distinction is that §8(b)(4)'s ban on secondary activity has been justified by the courts despite the fact that it explicitly restricts speech by virtue of its content and its speaker.

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[1] This scenario is loosely based on a hypothetical proposed in James Gray Pope, *The First Amendment, The Thirteenth Amendment, And The Right To Organize In The 21st Century*, 51 RUTGERS L. REV. 941,950-951 (1999). Pope's hypothetical uses Furbys as the subject of the picket signs. While the specific targets of the picket signs in Pope's hypothetical have been made more general here, the identities of the speakers, the messages of the signs, and the legal conclusions remain intact.

Activity which would be protected political speech when made by a non-labor speaker becomes impermissible commercial activity purely by virtue of the fact that the speaker is a labor organization. The Supreme Court has found creative methods to avoid conclusively ruling on the constitutionality of this ban, but the issues are unavoidable on the face of the NLRA's plain language.

This paper argues that the NLRA's ban on secondary union pickets and boycotts should be struck down as unconstitutional. Section I provides a brief overview of organized labor's role in American jurisprudence, from its early days as a criminal conspiracy to interfere with private contracts to the NLRA's codification of workers' statutory right to organize and the Labor-Management Relations Act's limitations on that right. Section II illustrates the National Labor Relations Board and Supreme Court decisions which have shaped the legal doctrine regarding secondary union activity. Section III traces the Supreme Court's jurisprudence which distinguishes "economic" secondary union activity from other "political" secondary activity, and argues that such a distinction is tantamount to unconstitutional content-based restrictions on speech. Section IV focuses on the Roberts Court's First Amendment jurisprudence, most significantly its landmark *Citizens United* decision, and argues that this Court is primed to strike down §8(b)(4) for impermissibly restricting speech based on the speaker's associational identity.

I. The People, United, Will Sometimes Be Defeated: A Brief History of American Labor Law

The legal history of organized labor has always been an uphill battle for labor rights. In the early days, most collective action by employees was frowned upon by the courts. The case typically considered to be the origin of the "labor law" field was the 1806 case of *Commonwealth v. Pullis*, commonly referred to as the *Philadelphia Cordwainers* case. In late

1805, the journeymen shoemakers in Philadelphia collectively engaged in a work stoppage in order to compel a higher wage. They were charged with common law conspiracy in the Mayor's Court of Philadelphia. While any individual's refusal to work at the status quo rate of pay would have been perfectly legal, the coordinated and collective nature of the work stoppage swayed the court, and the strike was deemed an "unnatural" conspiracy detrimental to the public interest.[2] This analysis continued to control the courts' view of organized labor through the Lochner Era, influenced heavily by the doctrine of "freedom of contract."[3] Even so, workers continued to attempt to organize, often resulting in violent and destructive confrontations with employers and leading courts to issue anti-labor injunctions as a matter of course for avoiding violent conflicts.[4]

As America's industrial sector began to boom, industrial labor's share of the labor market grew, and workers began to clash more regularly and more violently with their employers. Pressure mounted on Congress to change the violent and contentious state of affairs. In the interest of industrial peace and stability, Congress passed the Railway Labor Act ("RLA") in 1926 to regulate labor relations in the railroad industry (one of the largest industries in the country, as well as one of the most violent labor-management relationships).[5] The Railway Labor Act imposed two major procedural developments: when a railroad employer and its laborers found themselves unable to agree on contract terms, the RLA mandated that the parties submit to mediation before the 5-member National Mediation Board; when mediation failed, the RLA referred the dispute either to arbitration or to review by the executive branch.[6] This represented

[2] Kenneth G. Dau-Schmidt et. al., *Labor Law In The Contemporary Workplace* 17 (2009).
[3] *See, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077 (MA 1896) (sustaining an injunction against picketing laborers demanding higher wages).
[4] Dau-Schmidt et.al., *Labor Law In The Contemporary Workplace*, *supra* note 2, at 35.
[5] *See* JON R. HUIBREGSTE, AMERICAN RAILROAD LABOR AND THE GENESIS OF THE NEW DEAL, 1919-1935 (2010).
[6] Dau-Schmidt et.al., *Labor Law In The Contemporary Workplace*, *supra* note 2, at 41.

the first governmental recognition that labor interests played some role in forming the contracts at the center of Lochner-era rights.

The next major development in American labor law came in 1933. As the Great Depression rolled on, employers regularly and routinely reneged on pre-Depression promises, much to the chagrin of American workers.[7] Coupled with the judiciary's penchant for freely issuing employer-friendly injunctions, American workers found themselves utterly without recourse. Congress responded with the 1933 Norris-LaGuardia Act.[8] The Norris-LaGuardia Act drastically expanded the tools available for workers to stand up and fight back against their employers. Specifically, it barred courts from issuing injunctions without specific findings of fact and outlawed "yellow-dog contracts" (individual employment contracts conditioned on the employee's agreement not to join any labor organization).[9] While the RLA was the first recognition of labor rights in general, the Norris-LaGuardia Act represented the first major expansion of those rights and signaled a significant shift in Congressional attitudes towards labor rights.

Significant though those earlier developments were, the largest expansion of labor rights came through the New Deal. In 1935, President Franklyn Roosevelt signed the National Labor Relations Act (NLRA), colloquially known as the Wagner Act, into law. The NLRA, which still serves as the foundation for modern labor law, codified for the first time the right of workers to engage in collective action.[10] §7 of the NLRA outlines the collective rights of workers, chief among them the rights to self-organize, to join labor organizations, and to engage in "concerted

[7] *Id*. at 44.
[8] 29 U.S.C. §101 et. seq.
[9] Dau-Schmidt et.al., *Labor Law In The Contemporary Workplace*, *supra* note 2, at 44-45.
[10] 29 U.S.C. §§151 et. seq.

activity for mutual aid and protection."[11] §8 (now §8(a)), in turn, defined the unfair labor practices ("ULPs") which employers were prohibited from committing, as well as the duties which they owed to their employees' unions. These ULPs include interference with employee exercise of §7 rights, dominating or interfering with employee organizations, discriminating against employees based on union membership, retaliating against employees for exercising their rights under the NLRA, or failing to bargain in good faith with the union.[12] The NLRA also established the National Labor Relations Board ("NLRB") to adjudicate ULP charges. The NLRA came under heavy scrutiny from America's employer community, but the Supreme Court upheld the Act's constitutionality in its effort to avoid President Roosevelt's court-packing plan, the fabled Switch In Time To Save The Nine.[13] By upholding the validity of the NLRA, the Court firmly established that workers' right to organize and bargain collectively would remain in force.

Unable to defeat the NLRA on constitutional grounds, opponents of union rights set their sights on the next best alternative: amending the NLRA itself. After years of attempting to establish a more business-friendly labor law regime, Congress passed the Taft-Hartley Labor Management Relations Act in 1947. Taft-Hartley affirmed the rights of workers to abstain from collective activity, and explicitly added statutory protections for management rights.[14] Taft-Hartley's most significant additions to the NLRA came in §8. Where §8 previously outlined only ULPs which management could commit against unions, Taft Hartley added §8(b), outlining ULPs which unions could commit against management. Those ULPs include coercing or restricting employees in their exercise of §7 protected activity, failure to bargain in good faith,

[11] 29 U.S.C. §157.
[12] 29 U.S.C. §158(a)(1-5).
[13] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[14] For example, while §7 of the NLRA affirmed the right of workers to engage in concerted activity, the Taft-Hartley amendments to the NLRA added that workers "shall also have the right to refrain from any or all such activity."

and interfering with another already-existing labor organization – all parallels of ULPs proscribed against management in §8(a). Section 8(b) also contains, in subsection 8(b)(4) the prohibition against secondary economic activity.

The statutory language banning unions from engaging in certain economic advocacy is lengthy and complex. In addition to secondary activity, §8(b)(4) also bans unions from engaging in "hot cargo" agreements, strikes by some workers to promote unionization of other workers, or striking for better job assignments.[15] On secondary activity, §8(b)(4)(ii)(B) makes it a ULP for a labor organization

> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is [….] forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization.[16]

Recognizing some of the constitutional ramifications of these restrictions Congress also included a proviso which explicitly excepts the rights of employees to honor other employees' primary picket lines from those restrictions. It also permits employees to engage in "publicity, other than picketing, for the purpose of truthfully advising the public […] that a product or products are produced by an employer with whom the labor organization has a primary dispute" without falling within the restriction.[17] Applying this ban on the use of economic pressure against one employer to coerce concessions from a second, while also heeding the "truthful public appeals" proviso, has tended to present the Court with serious First Amendment issues.

II. Jumping Through Hoops: A Doctrinal Approach to Secondary Activity

[15] Sections 8(b)(4)(ii)(A), (C), and (D), respectively.
[16] 29 U.S.C. §158(b)(4)(ii)(B).
[17] 29 U.S.C. §158(b)(4).

The Supreme Court's first serious consideration of 8(b)(4)(ii)(B)'s validity came in its 1964 *Tree Fruits* decision.[18] A Washington fruit packing company, which sold its produce at SafeWay stores, was locked in a bitter labor dispute with its union. In response, the union initiated a consumer boycott campaign against the fruit packing company and began picketing and leafleting outside the SafeWay locations which sold the produce.[19] The picket signs and leaflets made clear that the labor dispute was with the fruit packing company and not with SafeWay, and only encouraged consumers to boycott the apples produced by that specific packer.[20] The NLRB found that the union had committed a ULP by engaging in secondary boycott and picketing activity in violation of §8(b)(4), and the case came to the Supreme Court on appeal.

Writing for the Court, Justice Brennan read the NLRB's decision as "necessarily rest[ing] on the finding that Congress determined that such picketing always threatens, coerces or restrains the secondary employer."[21] The Court rejected that premise, relying heavily on statements made on the floor in Congress' consideration of §8(b)(4)(ii)(B) and several amendments thereto. The Court cited to its past rulings, which held peaceful picketing to be constitutionally protected speech, and noted several instances in the floor debate on §8(b)(4) and its subsequent amendment in which legislators expressed desire that the ban not infringe on non-coercive protected speech.[22] Most prominently, the Court noted a statement by Senator Edward Kennedy that the language of the proposed ban aimed to "prevent unions from appealing to the general public as consumers for assistance in a labor dispute" and constituted "a basic infringement upon

[18] N.L.R.B. v. Fruit And Vegetable Packers And Warehousemen, Local 760, 377 U.S. 58 (1964). *Tree Fruits* is the colloquial name for this case.
[19] *Id*. at 59-60.
[20] *Id*. at 72.
[21] *Id.* at 62.
[22] *Id*. at 63-69.

freedom of expression."[23] The Senate then amended the bill to ban only *coercive* secondary activity and added the public appeals proviso. Brennan thus rejected the reading of §8(b)(4) that presumes all picketing to be coercive, and rather distinguishes between "persuasive" picketing which is not proscribed and "coercive or threatening" picketing which is proscribed.[24] The Court found the activity in this case was "employed only to persuade customers not to buy the struck product" and was thus "closely confined to the primary dispute," though the site of the appeal was "expanded to include the premises of the secondary employer."[25] The Court attempted to distinguish this activity from union activity "employed to persuade customers not to trade at all with the secondary employer," which "inflict[s] injury on [the secondary employer's] business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer."[26] The Court thus held that §8(b)(4)'s ban on secondary picketing and boycotts did not proscribe the union activity at issue, and the NLRB's decision was overturned.

Justice Black concurred in the *Tree Fruits* Court's judgment, but castigated the Court for failing to consider the facial constitutional issues raised by §8(b)(4). Justice Black saw the Court's reliance on legislators' statements in Congressional debates unconvincing in the face of the plain language of the law; picketing, in Justice Black's reading, was nothing if not the dissemination of information about a labor dispute, and Congress' intentions to place blanket bans on secondary labor picketing was evident on the face of the statute.[27] If patrolling was inherently coercive and Congress wished to regulate it as such, this statute failed to do so explicitly, and relied instead on categorical content-based bans. "[T]he only patrolling" which

[23] *Id*. at 69.
[24] *Id*. at 71.
[25] *Id*. at 72.
[26] *Id*.
[27] *Id*. at 78.

§8(b)(4)(ii)(B) bans, in Justice Black's reading, "is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom the picketers have a dispute."[28] Justice Black read the secondary picket and boycott ban as "a case in which picketing, otherwise lawful, is banned only when the picketers express particular views," and thus viewed the provision as unconstitutional restriction on speech.[29] While Justice Black's concurrence did not sway the Court in the *Tree Fruits* case, it does demonstrate that there have always been voices on the Court sympathetic to the argument that §8(b)(4)(ii)(B) is unconstitutional.

The next major step in the Court's secondary activity jurisprudence attempted to apply the *Tree Fruits* distinction to a case of a neutral secondary that only sold products of the primary.[30] In *Safeco*, a title insurance brokerage was being picketed by union in the midst of a labor dispute with Safeco Title Insurance Co. The brokerage sold policies insured by several title insurance providers, but derived roughly ninety percent of its business from the sale of Safeco.[31] The NLRB, applying *Tree Fruits*, held that the union's picket and boycott were aimed only at the products of the primary and were thus protected, but the DC Circuit disagreed.[32] In affirming the Circuit Court's ruling, the Supreme Court emphasized that *Tree Fruits* was a case where the boycotted product was "but one item among the many that made up the retailer's trade."[33] A case where the neutral deals only in the product of the secondary, like *Safeco*, was held to present the

[28] *Id*. at 78-79.
[29] *Id*. at 79.
[30] N.L.R.B. v. Retail Store Employees Local 100, 447 U.S. 607 (1980) (colloquially referred to as *Safeco*).
[31] *Id*. at 609.
[32] *Id*. at 610-611. The constitutional concerns raised in this case are essentially identical to those presented in *Tree Fruits*, and the Court avoided them similarly. *Tree Fruits* implicitly hinted that the product/seller distinction would be blurred in a context where the seller dealt primarily in a single product. This was the Court's first opportunity to actually rule on such a case.
[33] *Id*. at 613.

neutral with "ruin or substantial loss."[34] This rendered the picket and boycott coercive in the eyes of the Court, and the Circuit Court's ruling in favor of the insurance brokerage was sustained.

The final piece of the Court's fundamental §8(b)(4)(ii)(B) jurisprudence dealt with the shopping mall context.[35] DeBartolo owned a shopping mall in which one store had contracted with a non-union contractor to do some construction work, and the union responded by peacefully leafleting the mall's customers encouraging them not to shop at the mall at all.[36] The Court of Appeals had declined to enforce the NLRB's order holding that the union have violated §8(b)(4)(ii)(B), and DeBartolo appealed. The Circuit Court based its decision on constitutional concerns. The Supreme Court, however, declined to rule on the statute's constitutionality, instead relying on the peacefulness of the handbilling.[37] The Court read the combination of §8(b)(4)(ii)(B) and the proviso as removing non-coercive handbilling from the scope of the ban on secondary activity.[38] Despite the fact that its conclusion is far from the most natural reading of §8(b)(4)(ii)(B), the *DeBartolo II* Court held that "interpreting § 8(b)(4) as not reaching the handbilling involved in this case is not foreclosed either by the language of the section or its legislative history."[39] This allowed the Court to affirm the Court of Appeals' central holding without reaching its serious constitutional implications.

It is critical to note how vastly the plain language of §8(b)(4)(ii)(B) differs from the Court's doctrine. Under the plain language of the statute, any picketing or handbilling by a union

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[34] *Id*. at 614-615.
[35] Edward J DeBartolo Corp. v.Florida Gulf Coast Bldg. and Const. Trades Council., 485 U.S. 568 (1988). This opinion, referred to as *DeBartolo II*, is the second ruling of the Court on DeBartolo's struggles with the union. The NLRB first held that the proviso for truthful consumer appeals protected the handbilling at issue here. In *DeBartolo I,* the Court remanded the case to the NLRB, holding that a general contractor is not a "producer" and its jobs are not "products" within the meaning of the proviso. *See* Edward J. DeBartolo Corp. v. Nat'l Lab. Rel. Bd., 463 U.S. 147 (1983).
[36] *Id*. at 571.
[37] *Id*. at 578.
[38] *Id*. at 582-583.
[39] *Id*. at 588.

that aims to drive business away from a secondary employer would be illegal unless it fell within the narrow scope of the consumer appeals proviso. The proviso explicitly does not protect picketing activity, but the Court still found that the picketing in *Tree Fruits* was not proscribed. The *DeBartolo II* Court found that secondary boycott activity against the DeBartolo Corporation was legal despite the fact that it had already held the activity to be outside the scope proviso. The activity in *Safeco* was only held to be proscribed because it was "coercive" because of its prospective impact on the secondary employer's business. This set of results does not comply with the language of §8(b)(4). In fact, it has been pointed out that these results are consistent with a pure First Amendment analysis, which could be applied even without §8(b)(4)'s application. The First Amendment allows regulation of protected expression where that expression is intended to incite an unlawful boycott.[40] Most significantly, the Court has recognized that freedom of expression may be restricted incidentally, where a substantial non-expression reason for a policy exists, or directly, in order to avoid incitement.[41] This doctrine prohibits confrontational or coercive appeals, but would permit peaceful and lawful picketing and handbilling to continue – as the Court already has.[42] Finally, misleading consumer appeals can be regulated under already-validated defamation law, eliminating the need for the proviso's exclusion of non-truthful appeals.[43]

The Court has routinely ignored the plain language of §8(b)(4)(ii)(B). Instead, it has doctrinally applied principles consistent with a pure First Amendment analysis and reached results consistent with First Amendment doctrine. This suggests that the Court has long been

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[40] Michael C. Harper, *First Amendment Protection For Union Appeals to Consumers*, 27 WIS. J. L. GEN. SOC'Y 176, 190 (2012).
[41] On incidental restriction, see *U.S. v. O'Brien*, 391 U.S. 367 (1968). On anti-incitement restrictions, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[42] Harper, *supra* note 40, at 201-202.
[43] *Id*. at 202.

aware of the shaky constitutional foundations underlying §8(b)(4)(ii)(B) and, rather than explicitly strike the provision down, have found ways to makes its decisions on pure First Amendment grounds instead of the statute.

III. Economic or Political? Longshoremen, The NAACP, And Political Issue Advocacy

In 1982, the Supreme Court decided two cases that highlight the ways the Court has attempted to distinguish labor activity outlawed by §8(b)(4)(ii)(B) from legal secondary boycotts by other speakers. The first decision, handed down in April 1982, dealt with a secondary boycott spearheaded by a labor union. In 1980, President Carter announced that the Soviet Union was under partial embargo due to its invasion of Afghanistan. Mere days later, the International Longshoremen's Association ("ILA") announced that its members would treat the Soviet Union as under total embargo and would refuse to handle, load, or unload goods directed to or from the Soviet Union, as well as any goods transported on Russian ships.[44] Allied International imported Russian wood; Allied contracted with a second company to ship the wood to the US from Russia; the shipping company contracted with yet a third company which hired ILA members to unload the shipments.[45] As a result, Allied had to renegotiate its contracts with Russia, greatly decreasing its wood supplies and threatening its ability to meet customer demand.[46] Allied sued the ILA for engaging in an illegal secondary boycott. The District Court dismissed the claim on grounds that the ILA had not engaged in an illegal secondary boycott, but the First Circuit reversed, finding that the boycott's impact was "in commerce." As a result, the boycott fell within the restrictions of §8(b)(4) despite its political purpose and was not protected speech.[47]

[44] International Longshoremen's Ass'n v. Allied Intern, Inc., 452 U.S. 212, 214 (1982).
[45] *Id*. at 215.
[46] *Id*.
[47] *Id*. at 217-218.

The Supreme Court agreed with the First Circuit. It found that Allied and its contractors were "in commerce," and that the impact of the boycott was designed to obstruct that commerce. As such, Congress had jurisdiction to prohibit such boycotts within the commerce power.[48] The Court also found that the boycotts fell squarely within §8(b)(4)(ii)(B); the ILA had no dispute with Allied or its contractors, and its sole complaint was with the Soviet occupation of Afghanistan.[49] While the Court showed some sympathy with the "understandable and even commendable" goals of the ILA boycott, it ultimately found that the "certain effect of its action [was] to impose a heavy burden on neutral employers."[50] Even if the ends of the boycott were legitimate and the ethical and moral foundations solid, the Court found, "the pressure on secondary parties must be viewed as at least one of the objects of the boycott."[51] Quoting the NLRB's opinion on the matter, the Court concluded that "it is difficult to imagine a situation that falls more squarely within" the NLRA secondary boycott ban.[52]

In holding that §8(b)(4) proscribed the ILA boycott, the Court rejected the argument that political boycotts should be excepted from the ban. From the statutory perspective, the Court noted that the ban's express language provides no limitation which would except political boycotts.[53] From a constitutional perspective, the Court saw little difficulty in ruling that applying the ban to the ILA boycott would not infringe the ILA's First Amendment rights to political activity. Still relying on the "commercial" nature of the ILA's activity, the Court noted that secondary picketing had routinely been held to fall outside the scope of First Amendment

[48] *Id*. at 218-219.
[49] *Id*. at 222-223.
[50] *Id*. at 223.
[51] *Id*. at 224.
[52] *Id*. at 223.
[53] *Id*. at 225.

protection, and emphasized the idea that coercive activity was unworthy of protection. [54] Because "there [were] many ways in which a union and its individual members [could] express their opposition to Russian foreign policy without infringing upon the rights of others," the Court had no problem applying §8(b)(4) to the ILA boycott without giving any serious attention to the ILA's First Amendment concerns.[55]

Just a few short months after the *Longshoremen* decision was issued, the Court issued its opinion on the National Association for the Advancement of Colored People's boycott of white businesses in Mississippi who refused to hire African-Americans.[56] A group of black citizens in Port Gibson, Mississippi, presented local governmental officials with demands for desegregation in early 1966, which were largely ignored. The NAACP voted to boycott local white businesses, and several of those businesses sued to recover some of the resulting damages from the NAACP and its supporters, as well as injunctive relief to prevent future boycotts.[57] The trial court (a Mississippi state chancery court) held that the boycott violated antitrust laws, constituted tortious interference with business, and violated the state's blanket ban on secondary boycotts; the trial court explicitly rejected the boycotters' arguments that their activity was protected by the First Amendment.[58] On appeal, the Mississippi Supreme Court upheld the tort liability holding, but rejected the other two theories; significantly, it rejected the secondary boycott theory because the statute was passed once the boycott had already been in effect for two years, not based on the merits of the claim.[59] The court held, though, that violence, threats, or force could still impose tort liability, and it found that the NAACP boycott had occasionally involved threats, thus

[54] *Id*. at 226.
[55] *Id*. at 227.
[56] NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).
[57] *Id*. at 889-890.
[58] *Id*. at 891-892.
[59] *Id*. at 894.

condemning the entire enterprise.[60] Most significantly, one of the boycott's organizers publicly threatened to "break [black people's] damn neck[s]" if they were caught "going in any of them racist stores."[61] The Mississippi Court also rejected the boycotters First Amendment defense, holding that violence or threats of violence precluded First Amendment protection.[62]

The Supreme Court of the United States roundly disagreed with the Mississippi Supreme Court. While the state court saw the boycott as generally violent by virtue of some violent conduct, the Court found it to be generally peaceful. The Court found that

> [t]he few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children. The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott. Such activity was fairly irregular, occurred primarily on weekends, and apparently was largely discontinued around the time the lawsuit was filed.[63]

The Court did, however, identify ten or so incidents of threatening or violent discipline targeted at those who violated the boycott.[64] The Court found that the boycott comprised of the economic campaign proper, as well as speeches and peaceful pickets in its support – each of which on their own, the Court stated, entitled to First Amendment protection.[65] On the aggregate of these activities, the Court strongly emphasized the importance of associational rights to American political discourse and public issue advocacy.[66] On the minority element of the boycott that had resorted to violence, the Court remarked that "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[67] The Court also reinforced its earlier holding that peaceful picketing, like boycotts, is First Amendment protected activity absent some

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[60] *Id*. at 895.
[61] *Id*. at 902
[62] *Id*. at 895.
[63] *Id*. at 903.
[64] *Id* at 904.
[65] *Id*. at 907.
[66] *Id*. at 907-908.
[67] *Id*. at 908.

other reason for restriction.[68] In total, the Court found that "through speech, assembly, and petition—rather than through riot or revolution—[the boycotters] sought to change a social order that had consistently treated them as second-class citizens," and that such activity was entitled to First Amendment protection.[69]

The Court also weighed in on the possibility that the law could validly place incidental restrictions on otherwise-protected activity in certain circumstances. The Court noted its previous holdings affirming "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association"; the Court particularly noted that such interests include curtailing inter-company collusion and maintaining industrial stability through labor regulations.[70] However, the Court distinguished the NAACP boycott from those cases. Here, the Court held, the NAACP and its supporters had a right to engage in peaceful political activity on public issues, and that the government had no interest which could outweigh that right.[71] Due to the importance of protecting the right to issue-based advocacy which the NAACP and its supporters were exercising in this case, the Court refused to impose any liability on the boycotters and upheld the boycott's First Amendment protected status.

The similarities between the NAACP boycott and the longshoremen's boycott are striking. Both sought to alter the political or military policies of a government; the NAACP aimed to alter municipal civil rights law, while the ILA aimed to protest the Soviet occupation of Afghanistan. Both organizations chose to pursue those goals through wielding their memberships' collective economic power, and did so with reasonable degrees of success. In

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[68] *Id*. at 909 (*quoting* Thornhill v. Alabama, 310 U.S. 88 (1982)).
[69] *Id*. at 911-912.
[70] *Id*. at 912. In this passage the Court cites, entirety without irony, to its decision in *Longshoremen* without addressing any of the logical inconsistencies between the two decisions.
[71] *Id*. at 913.

doing so, both harmed the business of supposedly-neutral third parties whose business activities helped to support the political activities which the boycotts targeted. In the Court's eyes, however, these boycotts were distinguishable. The labor boycott of the Soviet occupation of Afghanistan was deemed to be coercive commercial activity, despite the fact that it involved no violence, intimidation, or threats thereof, and was thus outside the scope of First Amendment protection. The NAACP boycott of local white-owned businesses, on the other hand, was deemed protected political activism. This holding stood despite the fact that the NAACP boycott *did* include intimidation and threats of violence, however infrequent or inconsequential they may have been. Even though both boycotts targeted political actors' political policies, and even though both campaigns consisted of otherwise-protected activity, the labor boycott was deemed to carry implicit economic coercion by virtue of its status as labor speech while the non-labor boycott was protected as political speech.

Distinguishing labor picketing from issue picketing on the grounds that labor picketing is "economic" while issue picketing is "political" is utterly impracticable. The Court attempted that distinction due to its long-held view that, in the realm of free speech protection, commercial speech is the least protected while political speech is the most protected.[72] If the Court could find a way to distinguish economic labor pickets and boycotts from political issue pickets and boycotts, it follows, §8(b)(4)(ii)(B) can be preserved as totally consistent with the Court's First Amendment jurisprudence.[73] Unfortunately for constitutional avoidance advocates, and despite the Court's best efforts at making that distinction, labor picketing and boycott activity still bear a

[72] Carey v. Brown, 447 U.S. 455, 466-467 (1980).

[73] The first sentence in *Claiborne* following its citation of *Longshoremen*, as it turns out, states this explicitly: "While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity." *Claiborne Hardware*, 458 U.S. at 913.

significantly greater resemblance to political activity than commercial activity.[74] Making this distinction requires the acceptance of the premise labor relations are driven entirely by economics. That premise is deeply flawed. When unions undertake secondary boycotts, it is rarely if ever intended for purely economic reasons. The socio-economic ramifications of the underlying labor disputes are typically the more significant motivator of the boycott or picket.[75] It is totally impracticable, as a matter of legal doctrine, to distinguish between a boycott campaign that advocates for increased wages or better working conditions and a campaign that advocates for race or gender parity.[76] The right to a safer working environment or better payment is just as crucial a political right as the gender and race policies targeted by so-called "political" boycott campaigns. "For the Supreme Court of the United States to hold that secondary labor picketing does not fall under the auspices of the First Amendment's protection of political speech," as such, "is nothing less than a failure to acknowledge the larger socio-political reality in which workers exist."[77] Attempting to distinguish labor campaigns as apolitical economic activity, subject only to the least stringent First Amendment protection, is not realistic or predictable. The purported distinction cannot be applied without a tortured logic, and it only serves to impermissibly discriminate against labor activity.

Even if the distinction could be practicably applied, this content-based approach, which bans peaceful labor boycotts and pickets purely because they involve a "labor dispute" (in a broad sense) while permitting even violent political campaigns that are otherwise identical to their labor counterparts, does not comport with the Court's own doctrine. Suppression of speech is permitted only in narrow circumstances; specifically, speech may only be restricted when the

[74] Joseph L. Guza, A Cure for Laryngitis: A First Amendment Challenge to the NLRA's Ban on Secondary Picketing, 59 BUFF. L. REV. 1267, 1292 (2011).
[75] *Id*. at 1295-1296.
[76] *Id*.
[77] *Id*. at 1297.

restriction is within constitutional power, furthers an important or substantial government interest which is unrelated to the suppression of expression, and the restriction must be as narrowly tailored as possible.[78] When using this analysis to differentiate between a primary and secondary boycott, one must consider what the interests of a target of a boycott generally will be and determine the degree to which those interests are different when the boycott is "secondary."[79] Any business, to be sure, has a cognizable interest in continued operation. However, absent an explicit contract guaranteeing continued patronage, no business has a protectable interest in continued business with its current customers.[80] In any isolated transaction, the customer has the right to choose where to take his or her business. Whether that decision is based on the service provider's labor practices, political advocacy, or any other factor, the decision is up to the consumer. By convincing customers not to patronize the secondary party, the boycott has not infringed any cognizable interest of that secondary.

This highlights a second major misunderstanding in the Court's secondary boycott jurisprudence: which party is granted the right not to be coerced. All of the Court's §8(b)(4)(ii)(B) jurisprudence, particularly *Safeco*, emphasize the right of the neutral secondary not to be coerced. Coercion in the labor context is judged with the "ruin or substantial loss" test, which places the analytical focus on the boycott's results.[81] Compare this with the standard in all non-labor boycotts: where the *O'Brien* standard is used, coercion is judged by the campaign's *methods and intentions*, not the boycott's success.[82] Applying these different tests leads to absurd results. A successful labor boycott is coercive if it is successful, no matter what methods were used; on the other hand, a labor boycott that unsuccessfully attempts to violently coerce

[78] U.S. v. O'Brien, 391 U.S. 367, 376-377 (1968).
[79] Barbara J. Anderson, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811, 831 (1984).
[80] *Id*. at 835.
[81] *Id*.
[82] *Id*. at 836.

consumers using methods which would be illegal in other contexts is protected, because its unsuccessful boycott did not meet the substantial loss standard. This problem can be assuaged by focusing on the methods that labor campaigns use rather than their results, as the Court does in the non-labor context. This, however, requires an analysis radically different from the text of §8(b)(4). To be sure, an unsuccessful boycott that utilizes violent and coercive means may still violate other laws without violating 8(b)(4); however, if boycotts by such coercive methods are already illegal regardless of their practical impacts, §8(b)(4)(ii)(B) serves only to prohibit peaceful labor demonstration that would be protected if conducted by a non-labor speaker. The Court's analyses of secondary labor boycotts also mistakenly considers whether the *consumers* are coerced, despite the fact that the plain language of §8(b)(4)(ii)(B) grants the *secondary* the right not to be coerced. The more logical approach, focusing on the boycott's methods rather than its results, is already codified in *O'Brien*. In other words, striking down §8(b)(4)(ii)(B) and merely applying the Court's existing First Amendment doctrines and existing restrictions on coercive activity to secondary labor boycotts would solve the current absurdities.

The Court's failed attempts to salvage §8(b)(4)(ii)(B)'s constitutionality by distinguishing labor-based secondary boycotts from similar boycotts in other areas have created a vortex of uncertainty and absurdity. The 1982 Supreme Court term demonstrates the discriminatory results of the distinction perfectly: a sometimes-violent "political" boycott was deemed legal and protected, while a peaceful labor boycott was deemed coercive and unprotected. The distinction must logically fail. The arguments on which the distinction is based are internally inconsistent, and the results of its application are absurd and discriminatory. On its face, §8(b)(4)(ii)(B) singles out labor and punishes it for engaging in a successful boycott that would have been legal if run by non-labor interests, while also permitting labor to engage in

otherwise illegal campaign tactics so long as they do not succeed. This distinction is utterly impracticable. Legal doctrine regarding secondary labor boycotts and pickets would be brought into consistency with the rest of the Court's boycott rulings by openly doing what the Court has effectively already done, as discussed in the previous section: recognizing that §8(b)(4)(ii)(B) unconstitutionally discriminates against labor speech in violation of the First Amendment, striking it down, and instead applying its existing First Amendment framework for boycott analysis.

IV. Look Who's Talking: Citizens United *And Speaker Discrimination*

Regardless of whether the Court's doctrinal approach to §8(b)(4)(ii)(B) is sufficiently constitutionally based or intellectually consistent, the Court's recent First Amendment jurisprudence should still cause jurists to revisit the statute's constitutionality. In its *Citizens United* decision, which most in the labor world were quick to castigate, the Court held that corporate election expenditures were speech and could not be banned only because the speaker was a corporation.[83] The Court, however, ruled on the issue in terms much broader than a mere response to the case at bar. The rules of law, and resulting holdings, employed by the Court were painted in broad categorical statements. The Court explicitly ruled that a speaker cannot be banned from speaking because of who the speaker is. The opinion begins from the premise that "[s]peech is an essential mechanism of democracy" because "it is the means to hold officials accountable to the people."[84] The Court notes that the First Amendment is based in a foundational mistrust of governmental restrictions of speech along either viewpoint or speaker lines. The First Amendment, as the Court read it, necessarily prohibits "restrictions

[83] *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010).
[84] *Id*. at 339.

distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[85] Turning to the issue of corporate speech, the Court continued to rule in broad strokes. Rather than addressing only corporations, the Court held that "[c]orporations and *other associations*, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas," and thus rejected the argument that the "political speech of corporations or *other associations* should be treated differently under the First Amendment simply because such *associations* are not natural persons."[86] From there, the Court gives an extensive history of federal and state bans on "independent expenditures by corporations *and labor unions*."[87] The Court thus deemed association speech to be just as deserving of First Amendment protection as individual speech and rejected the premise that the government could justifiably discriminate against speakers purely because they were associations.

The Court also reconsidered its earlier holdings on corporate campaign finance restrictions. In Austin v. Michigan Chamber of Commerce, the Supreme Court had applied an "anti-distortion" rationale to preserve restrictions on corporate election expenditure limits; the government, *Austin* concluded, had a cognizable interest in keeping floods of corporate money from distorting public discourse and could prevent corporate contributions above a certain amount.[88] The *Citizens United* Court roundly rejected that rationale. It noted, significantly, that "[if] the antidistortion rationale were to be accepted, however, it would permit Government to

[85] *Id*. at 340 (internal citations omitted).
[86] *Id*. at 342-343 (emphasis added, internal citations omitted).
[87] *Id*. at 343-345 (emphasis added).
[88] 494 U.S. 652 (1990).

ban political speech simply because the speaker is an association."[89] Several of the cases cited by the Court in support of that conclusion, it is worth noting, were cases which affirmed the rights of unions to engage in political activity.[90] The *Citizens United* Court held, finally, that *Austin*'s rationale impermissibly interfered with the First Amendment's open marketplace of ideas and would permit "the government to ban the political speech of millions of associations of citizens."[91] This result was unacceptable to the Court, and the Court thus accepted a speaker-blind approach to judging speech protections.

By eviscerating its earlier jurisprudence distinguishing between association and individual speakers, the Court destroyed any proverbial "leg" on which §8(b)(4)(ii)(B) could stand. In its discussion of *Austin*, the Court ignored *Austin*'s language regarding the "crucial differences" between corporations and unions.[92] In doing so, the Court opened the door for unions to take advantage of the new First Amendment regime. In an earlier opinion, the Court had held a non-picketing ordinance which only allowed labor picketing to be unconstitutional.[93] In doing so, the Court saw the ordinance as an "impermissible distinction between labor picketing and other peaceful picketing."[94] Following *Citizens United*, this distinction cuts both ways. Just as the government could not privilege labor activity above all others, the rules motivating *Citizens United* mandate that labor activity cannot be singled out for punishment or ban. Section 8(b)(4)(ii)(B) of the NLRA does this explicitly. A political secondary boycott legal when not organized by a union, as in the *Claiborne Hardware* context, becomes illegal merely

[89] *Citizens United*, *supra* note 82, at 349.
[90] *See* U.S. v. United Auto Workers, 352 U.S. 567 (1957) (reversing a lower court holding that union campaign expenditures violated the Corrupt Practices Act); U.S. v. Cong. of Indust. Orgs., 335 U.S. 106 (1948) (affirming the dismissal of an indictment against union officers who engaged in electioneering activities).
[91] *Citizens United*, *supra* note 82, at 354.
[92] Charlotte Garden, Citizens, United and Citizens United: The Future of Labor Speech Rights?, 53 Wm. & Mary L. Rev. 1, 12 (2011).
[93] *Police Dept. of Chicago v. Mosely*, 408 U.S. 92 (1972).
[94] *Id*. at 94. This finding is rooted in the language of Justice Black's *Tree Fruits* concurrence.

by virtue of its speaker's union identity.[95] Merely implementing time-place-and-manner restrictions of general applicability would do as good (if not better) of a job at avoiding industrial strife and maintaining labor peace, and would do so without implicating any of these First Amendment concerns.[96] These restrictions would necessarily have to comply with established legal precepts of speech protection; broad latitude would need to be granted to boycott organizers so as to avoid the general chilling of speech, but restrictions on boycotts that already raise concerns of coercion under the existing doctrines discussed earlier could be restricted without regard to their speaker. Those restrictions would do well as, if not better than, §8(b)(4)(ii)(B) at accomplishing the goal of preventing overly coercive political boycotts, and would do so without discriminating against labor unions on account of their organizational identity. As a result, §8(b)(4)(ii)(B) cannot survive the strict scrutiny standard which *Citizens United* would apply to such speaker-based discrimination and must be struck down accordingly.

Citizens United also brought the political-economic speech distinctions formerly applied in the secondary boycott context into question in fundamental ways. Where the hierarchal ladder of First Amendment protection formerly placed commercial speech "on a rung below [political speech with] labor speech relegated to a 'black hole' beneath the ladder,"[97] *Citizens United* applied a more categorical, speaker-neutral approach.[98] Prior to *Citizens United*, commercial speech could be regulated only if it failed the *Central Hudson Gas & Electric* test; that is to say, truthful commercial speech about a legal activity could be regulated via legislation which

[95] Guza, *Cure for Laryngitis, supra* note 74, at 1302.
[96] *Id*. at 1304
[97] Garden, *Citizens, United and Citizens United*, *supra* note 92, at 17.
[98] Zoran Tasic, The Speaker the Court Forgot: Re-Evaluating NLRA Section 8(b)(4)'s Secondary Boycott Restrictions in Light of Citizens United and Sorrell, 90 Wash. U. L. Rev.237, 237-238 (2012).

directly furthered a "substantial interest."[99] In other words, commercial speech regulation was subject only to intermediate scrutiny. Any speech with an economic or commercial goal, then, could be regulated more easily than purely political speech, even if the commercial speech had political elements. That was particularly true of corporations, whose very existence was for the purpose of producing commercial profit. Any speech, political or otherwise, made by corporations was inherently commercial at least in part, which made the speech commercial for purposes of regulation. *Citizens United*, however, explicitly ruled that economic motivations do not render political speech non-political, and that speech with both commercial *and* political motivations was still political and thus worthy of greater protection.[100] Only the speech itself is subject to scrutiny in *Citizens United*, and the Court outlawed considerations of who the speaker was and why the speaker was speaking. By categorically barring future Courts from considering the speaker's identity and motivations for speaking, *Citizens United* requires that strict scrutiny be applied even when the speech being regulated is made by a commercial actor. While *Citizens United* focuses on the subject of donations to political campaigns, its internal logic blurs the lines of distinction between political and commercial speech, and at the very least it calls the old categorical distinctions into question.

It is certainly true that proponents of labor speech restrictions could reasonably argue that such a broad, categorical reading of the holdings of *Citizens United* is misplaced. The case, they would argue, dealt only with issues of corporate campaign expenditures, and any language in broader terms is mere dicta. While that may be true, the method by which the Court comes to its conclusions is just as important as those conclusions themselves. Justice Kennedy could have couched his opinion in much narrower terms. He could merely have written that political

[99] *Id*. at 268 (*quoting* Central Hudson Gas & Elec. Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 563-564 (1980).)
[100] Garden, *Citizens, United and Citizens United*, *supra* note 92, at 26.

contributions are political speech, that corporations are legal persons, and thus that corporate contributions could not be regulated differently from individual contributions. While he *could* have written his opinion that way, he did not. It was Justice Kennedy, not advocates of the broad reading of the case, who raised labor unions as the legal equivalent of corporations, and it was Justice Kennedy who phrased his opinion in such broad terms. While the case does have narrow holdings, it is important to understand the rules that the Court used to reach those holdings. In this case, though the rules lead to certain specific results in the instant case, the rules themselves are expressed in terms which are applicable to a greater array of situations. Thus far, advocates of the narrow reading of *Citizens United* have not cogently expressed a compelling argument for ignoring the broad terms of the opinion.

Where *Citizens United* merely questioned the regulatory distinctions between commercial and political speech, the Court further eroded the distinction and protected commercial speech in *Sorrell v. IMS Health, Inc.*[101] Vermont had a medical privacy law restricting the sale, disclosure, and use of pharmacies' records to reveal the prescribing practices of individual doctors, which the Court held unconstitutional.[102] The Court could have merely applied the traditional *Central Hudson* test to the regulation, which likely would not have survived *Central Hudson*'s intermediate scrutiny, and arrived at the same result.[103] Instead, the Court applied heightened scrutiny, more in line with its *Citizens Untied* rationale.[104] This analysis provides a more nuanced understanding of the interconnectedness of political and economic speech. Political and economic issues overlap. By ignoring the speaker's identity and motivations, be they economic

[101] 131 S.Ct. 2653 (2011)
[102] *Id*. at 2661.
[103] Tasic, *Speaker the Court Forgot*, *supra* note 98, at 269.
[104] *Sorrell*, 131 S.Ct. at 2663. It is worth noting that this opinion, released just one year after *Citizens United*, is written by Justice Anthony Kennedy – the same author as *Citizens United*.

or political, speech becomes the focus of the inquiry and can be scrutinized without discrimination.

Under this framework, even if the economic-political dichotomy discussed earlier in this paper were a practicable justification for sustaining §8(b)(4)(ii)(B), it is now inconsistent with and overruled by *Citizens United* and *Sorrell*. Commercial speech and political speech are in the same protected category under this new framework: namely, speech in general, regardless of motivation. That the organizer behind an otherwise-protected secondary boycott is a labor organization or that such a boycott is motivated by the economics central to labor relations is now irrelevant to the analysis. Rather, *Citizens United* and *Sorrell* mandate that we look only at the speech and apply strict scrutiny in analyzing any restriction of that speech. For §8(b)(4)(ii)(B) to survive such an inquiry, there must be some meaningful difference between labor secondary boycotts and other secondary boycotts. The only plausible differences, as this paper has discussed at some length, are the speaker's identity or the categorization of labor boycotts as commercial speech rather than political speech. The *Citizens United* doctrine rejects both of these distinctions out of hand. The businesses harmed by labor's boycotts could argue that the harm to their business precludes First Amendment protection for those boycotts. The same Court that decided *Citizens United*, however, has already held that the public harm done by restricting speech must be offset by some greater public harm if the speech were permitted to continue; private harm alone cannot per se offset the public harm of chilling speech.[105] Even if the Court's earlier jurisprudence were wrongfully deemed consistent and practicable, the rules

[105] *See, e.g.,* Snyder v. Phelps, 131 S.Ct. 1207 (2011) (finding that the Westboro Baptist Church could not be banned from picketing at funerals, despite the fact that the families of the deceased were placed under severe emotional distress). Decided under one year after *Citizens United*, *Snyder* was incorporated into the NLRB's §8(b)(4)(ii)(B) reasoning within two months of *Snyder*'s publication. *See* Sheet Metal Workers Local 15, 356 NLRB No. 162 (2011).

developed in *Citizens United* and its progeny mandate that §8(b)(4)(ii)(B) be struck down as unconstitutional identity-based censorship.

V. Conclusion: A Long Road Ahead

The Supreme Court's jurisprudence on secondary pickets and boycotts as First Amendment speech outside the labor context is quite straightforward. As best exemplified in the *Claiborne Hardware* case, the Court has found that boycotts are critical vehicles for political speech and has afforded them the full extent of the First Amendment's protections, even where they target purportedly neutral secondary businesses. Those protections, under the Court's doctrines, cannot be permissibly withheld based only on the speaker's identity or the speech's content. The Court has recognized that categorical bans on certain types of speech – whether based on content or speaker – serves to censor particular viewpoints and chill speech generally. This violates the fundamental principles underlying the First Amendment.

Thus far, when the Court has had the opportunity to rule on these issues relating to labor speakers engaged in secondary boycotts, it has ignored those principles. The Court has tied itself in knots to justify §8(b)(4)(ii)(B), finding that labor speech is commercial and not political and stripping it of First Amendment protections. This distinction rests solely on the speaker's identity and speech's content. If an identical boycott were organized by any actor besides unions, or if the boycott arose in a context other than a labor dispute, the speech would be given the utmost protection under the First Amendment as political speech. Because the speech concerns a labor dispute, and because the speech is made by a labor organization, §8(b)(4)(ii)(B) strips it of its First Amendment protected status, and the Court has thus far acquiesced.

As the Court's holdings on First Amendment issues have progressed, the shaky foundations of §8(b)(4)(ii)(B)'s constitutionality have only eroded farther, and the current Court is perfectly situated to finally strike it down. The Roberts Court has routinely emphasized the importance of extending First Amendment protections to as much speech as possible. In *Citizens United*, the Court explicitly repudiated the old idea that associational (specifically union and corporate) speech could be regulated differently from individual speech. In *Sorrell*, the Court eliminated the old distinctions between commercial and political speech, holding that even commercial speech could have a political element deserving of protection. In *Snyder*, the Roberts Court affirmed that these protections even extend to some speech that causes immense private harm in order to avoid the public harm of chilling speech. Even against the backdrop of the old commercial-political dichotomy, the Roberts Court has made clear that First Amendment rights should be given the greatest protection. Given the opportunity, if this Court were to be presented with a §8(b)(4)(ii)(B) case, a consistent application of its own jurisprudence would force the Roberts Court to strike down §8(b)(4).

Of course, one must remain cognizant of the Court's political realities. The Roberts Court has, like many Courts before it, routinely proven hostile to labor interests, and that tendency is not out of line with the Court's historical position. Historically, Supreme Court decisions on labor issues have been based "not on statutory language or legislative history, but instead on frequently unstated assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees."[106] The Court typically privileges continuity of production and economic activity over workers' NLRA rights. Rather than defer to free speech rights except in the face of explicit language restricting them, as the Court typically does, the Court typically does the opposite in the labor context; economic

[106] Tasic, *Speaker the Court Forgot*, *supra* note 98, at 276.

productivity and continuity are to be maintained from interference, even at the cost of employee speech rights, unless Congress explicitly codifies the right to interfere.[107]

It is not difficult to imagine how the Roberts Court would decide a case calling §8(b)(4)(ii)(B) into question. The majority opinion would likely be authored by Chief Justice Roberts or Justice Scalia, Kennedy, Alito, or Thomas. The opinion would reiterate that the labor relations field has traditionally been viewed as purely economic and totally apolitical. Confronted with the language of *Citizens United* and its progeny, the Court would distinguish the context of one-on-one bargaining in the labor relations field from the implications of electioneering activities for the public at large. A campaign expenditure or ad buy, which were the focus of *Citizens United*, necessarily implicates sociopolitical issues by virtue of its role in the electoral and political process. The contract between one union local and its employer, the Court would argue, has no implications beyond the relationship between the employer and the union. In fact, the Court would likely note that the "union" is a legal fiction, existing only to collectively bargain for employment contracts on behalf of the individual members; in that framework, a collective bargaining agreement is nothing but an aggregation of many individual employment agreements. Finally, the Court would likely articulate once again that the state has a compelling interest in preserving continuity of industrial productivity. In so doing, it would likely enumerate the proverbial "parade of horribles" that would follow from allowing unions to disrupt productivity not just of their employers but of anyone who does business with them. While the validity of using "economic weapons" in collective bargaining has long been established,[108] the Roberts Court would likely articulate that their validity is confined to the direct labor dispute. To open up any and all business partners of a given employer up to

[107] *Id*. at 277.
[108] *See* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960).

vulnerability to those economic weapons would risk vast economic shutdown over what should have been a very limited labor dispute. With those arguments laid out, the Court would hold that §8(b)(4)(ii)(B) is a necessary restraint on the inherently coercive, purely commercial power of union activity and thus justified.

These arguments are not only specious and impracticable, but also internally inconsistent. In order to categorize labor disputes as purely commercial and totally apolitical, the Court must hold that labor disputes are isolated to a single employer-employee relationship. However, the Court must simultaneously hold that the dispute's ramifications are potentially far-reaching in order to justify §8(b)(4)'s speech restrictions under strict scrutiny's requirement that the state interest be compelling. If the labor dispute is so isolated, surely there is no concern that it would reach so far as to mandate a blanket prohibition on secondary activity. These arguments also totally ignore the Court's general boycott jurisprudence outside the labor context. Confronted with similarly situated economic boycotts for political reasons like that in *Clairborne Hardware*), producing a parade of horribles identical to the parade that would flow from secondary labor activity, the Court has already held that the necessity for speech protection vastly outweighs the state's interest in economic continuity. As discussed above, even though the activism happens in the context of union bargaining, secondary boycott activity has the same broad-reaching political aims when conducted by a union as it does in the civil rights context: to improve working conditions and open up new opportunities for historically oppressed classes in society. Union boycotts certainly do have some economic and commercial bases, but they also have crucial political ramifications. The Roberts Court has consistently held that political motivation extends First Amendment protection to associational speech, even if there are also economic motivations. The *Citizens United* and *Sorrell* decisions explicitly require that these

protections be extended to all speakers – be they unions, corporations, or otherwise. Finally, the Roberts Court cannot logically overcome its holding in *Snyder*, which mandates that speech can only be deliberately restricted when the private harm done by the speech exceeds the public harm done by restricting the speech. In order to restrict union speech in this context, the Court must ignore decades of jurisprudence on political boycotts and the First Amendment speech rights associated with them. Undermining long-established speech protection is surely a tremendous public harm which could not outweigh the slight extension of some labor disputes. It is doubtful that the logical inconsistencies in its own arguments would dissuade this Court from holding by them, but the inconsistencies are none-the-less fatal to a consistent application of the Court's doctrines.

The Court's jurisprudence on this issue has long been a tightrope walk between that mentality and the rest of its First Amendment rulings. The Court in general, and the Roberts Court specifically, has long viewed labor speakers as a class unto themselves, inherently economic actors without political aims and inherently coercive by their mere existence and activity. A thorough understanding of the Court's treatment of labor speech, particularly of secondary boycott and picket activity, reveals inconsistencies between the way labor speakers are treated relative to other speakers, as well as in the arguments used to drive those distinctions. Those inconsistencies have only been deepened by the Roberts Court's drastic expansion of First Amendment protections for associational speakers like unions and corporations. If the rules driving those decisions were applied uniformly to unions as they are to corporations, the Court would be forced to recognize that its legitimizations of §8(b)(4)(ii)(B) are an anomaly within its First Amendment jurisprudence, particularly as regards boycotts in general. However, there is still a deep gulf between that logical consistency and the way the Court treats labor speakers.

Only time will tell which side of that gulf the Roberts Court – and the Courts to follow – will end up on.